



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

FOURTH SECTION

CASE OF HIDIR DURMAZ v. TURKEY

(Application no. 55913/00)

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 Hidir Durmaz v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr R. TÜRMEŒ,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *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. 55913/00) 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 Hidir Durmaz (“the applicant”), on 18 October 1999.

2. The applicant was represented by Mr E. L. Yavuzer, a lawyer practising in Konya. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 22 March 2005 the Court decided to give notice of 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 1954 and was serving his prison sentence in Ceyhan prison at the time of his application to the Court.

5. On 11 August 1995 the applicant was arrested and taken into custody in Mersin on suspicion of membership of an illegal organisation, namely the

TKP/ML-TIKKO¹. On the same day the applicant was examined by a doctor at the Mersin State Hospital who did not find any signs of ill-treatment on the applicant's body.

6. On 23 August 1995 the applicant was examined by a doctor at the Mersin State Hospital who did not find any signs of ill-treatment on the applicant's body.

7. On 24 August 1995 the applicant was brought before a judge at the State Security Court who ordered his detention on remand.

8. The public prosecutor at the Konya State Security Court in his indictment, dated 20 September 1995, accused the applicant of membership of an illegal organisation. The charges were brought under Article 168 § 1 of the Criminal Code and Article 5 of Law no. 3713.

9. In the meantime, on 12 October 1995, the applicant filed a petition with the Mersin public prosecutor (hereinafter: "the prosecutor") and claimed that he had been subjected to ill-treatment while he was held in police custody. On an unspecified date, the prosecutor instigated an investigation into the applicant's allegations.

10. On 16 October 1995 the criminal proceedings against the applicant and two other accused commenced before the Konya State Security Court.

11. On 13 November 1995 the prosecutor took the statement of the applicant. In his deposition, the applicant submitted, in particular, that he had been hung up, subjected to electric shocks and hosed with pressurised water. He further stated that, during interrogation, his hands and feet had been beaten with a hard object. Finally, he gave the names of four detainees who witnessed the incident.

12. On 15 November 1995, upon the request of the prosecutor, the applicant was examined by a doctor at the Konya Forensic Medicine Department who noted healed superficial grazes under the armpits and a healed wound of about 1 mm on one of the fingers of the applicant's right hand. She further found a loss of pigment of 1x2 mm on the applicant's penis.

13. The prosecutor took the statements of two police officers who had interrogated the applicant on 17 November 1995 and 3 December 1997. They both denied the allegations of the applicant. The prosecutor also took the witness statements of three detainees (Mr D.B., Mr Y.A. and Mr M.U.). They all affirmed, in particular, that they saw the applicant bleeding from under his armpits during his stay in custody.

14. In the meantime, at the hearing held on 28 November 1995 the first-instance court heard witnesses on behalf of the applicant. Four witnesses (Mr D.B., Mr Y.A., Mr M.U. and Mr A.Ö) maintained that they had seen the applicant during his detention in the Security Directorate and

1. Turkish Communist Party/Marxist and Leninist-Turkish Workers and Peasants' Liberation Army.

that he had bruises on his face and armpits. In the course of the criminal proceedings, the Konya State Security Court decided to join the proceedings against the applicant to several other cases brought against other persons who were also accused of membership of the same organisation.

15. On 12 June 1997, the Adana State Security Court acquired jurisdiction over the case since the Konya State Security Court had been abolished by Law no. 4210 on 19 May 1997.

16. On 4 December 1997 the prosecutor, taking into account the contents of the medical reports dated 11 and 23 August 1995 and the fact that it was not possible to determine whether the physical findings noted in the medical report of 15 November 1995 - three months after the applicant's stay in custody - were the result of ill-treatment, decided that no prosecution should be brought against the two police officers who had interrogated the applicant. The prosecutor found in this connection that there was insufficient evidence in support of the allegations. This decision was not served on the applicant.

17. Between 12 June 1997 and 14 July 1998 the Adana State Security Court held sixteen hearings at regular intervals.

18. On 14 July 1998 the Adana State Security Court convicted the applicant as charged and sentenced him to fourteen years and seven months' imprisonment.

19. On 20 April 1999 the Court of Cassation held a hearing and upheld the judgment of the first-instance court. The applicant's representative failed to attend the hearing.

20. On 24 December 2004 the Adana Assize Court suspended the execution of the applicant's sentence and ordered his release from prison in light of the provisions of the new Criminal Code.

II. THE RELEVANT DOMESTIC LAW

21. The relevant domestic law and practice in force at the material time are outlined in the following judgments and decision: *Batı and others v. Turkey* (nos. 33097/96 and 57834/00, §§ 96-100, ECHR 2004-IV (extracts)), *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002), *Gençel v. Turkey* (no. 53431/99, §§ 11-12, 23 October 2003) and *Nuray Şen v. Turkey* ((dec.), no. 41478/98, 30 April 2002).

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

23. According to Article 165 of the Criminal Procedure Code a complainant may file an appeal against the decision of a public prosecutor not to institute criminal proceedings. This appeal must be lodged, within fifteen days from the day of notification of the decision to the complainant, with the president of the assize court in whose jurisdiction the public prosecutor works.

24. Under Article 102 of the Criminal Code, taken in conjunction with Articles 243 and 245, a prosecution for an offence of ill-treatment or torture by a public official must be brought within five years.

25. According to Article 32 of Law no. 7201 concerning notification, a notification which was not served in accordance with law is valid if the person concerned learns of its existence. The date of notification is the date relied on by the concerned person.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

26. 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.”

27. The Government asked the Court to dismiss this part of the application as being inadmissible for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. They argued that the applicant failed to object to the decision of non-prosecution of the public prosecutor and that he could have also sought reparation for the harm he allegedly suffered by instituting an action in the civil or administrative courts.

28. The applicant claimed that he was never served with the public prosecutor’s decision. He maintained that, in any event, lodging an objection against it would have been unsuccessful since perpetrators of torture were never prosecuted in Turkey.

29. The Court reiterates that an appeal against decisions of public prosecutors not to prosecute constitutes, in principle, an effective and accessible remedy within the meaning of Article 35 § 1 of the Convention (see, in particular, *Saraç v. Turkey* (dec.), no. 35841/97, 2 September 2004; and *Nuray Şen v. Turkey* (dec.), no. 41478/98, 30 April 2002).

30. In the present case, the applicant did not contest the prosecutor’s decision. Even though the decision not to prosecute was not formally served on the applicant, the Court considers that the applicant and/or his representative, had they behaved more diligently, could have apprised themselves of the decision much sooner. It notes in this connection that, under the relevant domestic law (see paragraph 24 above), the applicant had a period of five years in which to contest the prosecutor’s decision. In the particular circumstances of the case, the Court does not find any special

circumstances which would dispense the applicant from the obligation to object to the public prosecutor's decision of non-prosecution in order to exhaust domestic remedies.

31. 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.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

32. The applicant complained that his detention on remand exceeded the "reasonable time" requirement as provided in Article 5 § 3 of the Convention, which reads insofar as relevant as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

33. The Government argued that the applicant was no longer a victim within the meaning of Article 34 of the Convention since the period he had spent in remand had been deducted from the sentence eventually imposed by the domestic court.

34. The Court reiterates that the taking into account of detention on remand as part of a later sentence cannot eliminate a violation of Article 5 § 3, but may have repercussions only under Article 41 on the basis that it limits the loss occasioned (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, § 69; and *Kimran v. Turkey*, no. 61440/00, § 41, 5 April 2005). Accordingly, the Government's objection that the applicant could not be considered a "victim" should be rejected.

35. However, the Court observes that the applicant's remand in custody ended when he was convicted by the State Security Court on 14 July 1998, whereas this complaint was lodged with the Court on 18 October 1999, i.e. more than six months later (see, in particular, *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, p. 23, § 9; and *Turan v. Turkey* (dec.), no. 879/02, 27 January 2005). It follows that this part of the application must be rejected for non-compliance with the six-month rule in accordance with Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

36. 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 State Security Courts which tried and convicted him. He further complained that he had not been informed of the nature and cause of the accusations against him and that he did not have

adequate time and facilities for the preparation of his defence. Finally, he claimed that the length of the criminal proceedings brought against him was excessive. The applicant relied on Article 6 §§ 1 and 3 (a) and (b) of the Convention, which, in so far as relevant, read 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:

(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.”

A. Admissibility

37. The Court, in the light of its established case-law (see, among many other 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, considers 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

38. 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).

39. 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 under this head.

2. Fairness of the proceedings

40. 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, *İncal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, § 74).

3. *Length of the proceedings*

41. The Court observes that the period to be taken into consideration began on 11 August 1995, when the applicant was arrested and taken into police custody and ended on 20 April 1999, when the Court of Cassation upheld the judgment of the Adana State Security Court. The period under consideration thus lasted three years and eight months before two instances.

42. After examining the overall duration of the proceedings, and taking into account that the case was of some complexity, the number of the accused and the fact that the case was dealt with at two levels of jurisdiction, the Court does not consider that the length of the proceedings in the present case was excessive even if it had been somewhat prolonged by the decisions of the first-instance court to join the applicant's case to other related criminal proceedings. The Court further finds that no significant delay resulted from the transfer of the case to the Adana State Security Court.

43. Having regard to the particular circumstances of the case, the Court finds that the "reasonable time" requirement laid down in Article 6 § 1 of the Convention was complied with in the present case. Consequently, the Court concludes that there has been no violation of Article 6 § 1 as regards the length of the proceedings.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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**

45. The applicant claimed 7,500 euros (EUR) in respect of non-pecuniary damage.

46. The Government contested the amount.

47. 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 in this respect (see *İncal*, cited above, p. 1575, § 82; and *Çıraklar*, cited above, § 45).

B. Costs and expenses

48. The applicant also claimed, in total, EUR 7,863 for costs and expenses incurred both before the domestic courts and before the Court. The applicant submitted a schedule of costs prepared by his representative and relied on the Konya Bar Association's recommended minimum fees list. However, he did not submit any receipt or invoice in support of his claims.

49. The Government contested the amount.

50. 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

51. 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 applicant's right to a fair trial within a reasonable time and 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 complaint relating to the independence and impartiality of the Adana State Security Court;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards the length of the criminal proceedings;
4. *Holds* that it is not necessary to consider the applicant's complaints under Article 6 of the Convention relating to fairness of the proceedings;
5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant;

6. *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) in respect of costs and expenses, to be converted into New Turkish liras at the rate applicable at the day 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;

7. *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