



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

SECOND SECTION

CASE OF HIDIR KAYA v. TURKEY

(Application no. 2624/02)

JUDGMENT

STRASBOURG

9 January 2007

FINAL

09/04/2007

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 Hıdır Kaya v. Turkey,

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

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

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŒ,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM,

Mr D. POPOVIĆ, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 5 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 2624/02) 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 Hıdır Kaya (“the applicant”), on 10 December 2001.

2. The applicant was represented by Ms Y.I. Koluacı, a lawyer practising in Malatya. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 21 April 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 1971 and lives in İstanbul.

5. On 14 April 1998 the applicant was taken into police custody by police officers from the Prevention of Terrorism Department of the İstanbul

Security Directorate, on suspicion of membership of an illegal organisation, namely the TKP/ (ML) TIKKO¹.

6. On 15 April 1998 the applicant was interrogated at the Istanbul Security Directorate, where he confessed to being a member of the illegal organisation and taking part in several terrorist incidents. He also maintained that he had left the organisation in 1994.

7. On 17 April 1998 the applicant was taken before the public prosecutor, where he confirmed his previous statements. On the same day the applicant was seen by a doctor at the Forensic Institute who noted in his report that there were no signs of blows on his body.

8. After having been taken to the public prosecutor's office, the applicant was brought before a judge at the Istanbul State Security Court. He expressed regret that he had been a member of the illegal organisation in the past. He noted, however, that he did not wish to become a "confessor" (*itirafçı*)². The judge ordered his remand in custody.

9. Following the non-jurisdiction decision of the public prosecutor at the Istanbul State Security Court, the case file was transferred to the Malatya State Security Court.

10. On 28 April 1998, relying on the statements of four witnesses who had also been detained on suspicion of membership of the same organisation, the public prosecutor at the Malatya State Security Court filed an indictment with the court, charging the applicant under Article 146 of the Criminal Code with attempting to undermine the constitutional order. The applicant was accused of participating in four different armed attacks.

11. On 28 May 1998 the first hearing was held before the Malatya State Security Court. The court issued rogatory letters, requesting the Çemişgezek and Elbistan Criminal Courts to take the statements of three witnesses.

12. At the hearing of 23 June 1998, the court evaluated the witness statements as well as the autopsy and incident reports sent by the Malatya public prosecutor.

13. At the hearings of 21 July 1998 and 25 December 1998, the court took the statements of two witnesses who confirmed the applicant's involvement with the terrorist activities of the illegal organisation. The court also included in the case file the witness statements taken by way of rogatory letters.

14. On 18 June 1999 the Constitution was amended and the military judges sitting on the bench of State Security Courts were replaced by civilian judges. By that time, eighteen hearings had been held by the Malatya State Security Court.

¹ The Turkish Communist Party/ (Marxist Leninist) Turkish Workers' and Villagers' Salvation Army

² The Turkish word "*itirafçı*" indicates a member of an illegal organisation who has defected and provides the authorities with information about that organisation.

15. On 24 February 2000 the applicant, who was brought before the Malatya State Security Court to give his statement for the first time, claimed that, although he had been a member of the organisation for a while, he had not participated in any of the terrorist activities. He maintained that he had merely purchased and transported goods for the organisation. He denied his statements given in police custody, alleging that they had been taken under duress. Moreover, he denied his statements taken by the public prosecutor. He accepted that, at the public prosecutor's office, he had confessed to being a member of the organisation. However, he argued that the public prosecutor had not asked him about the acts in which he had taken part. The applicant further denied the statements of the witnesses. He claimed that he did not even know two of the witnesses.

16. At the following six hearings, the prison authorities again failed to bring the applicant before the court. The court rescheduled the hearings for later dates without taking any interlocutory decisions.

17. At the hearing of 16 May 2000, the applicant's lawyer requested the court to confront the applicant with the witnesses. Although the court agreed to his request, the confrontation never occurred.

18. On 29 August 2000 the prosecution made their final submissions. Relying on the statements of the witnesses, the evidence collected during the proceedings and the incident reports, they sought the applicant's life imprisonment, pursuant to Article 146 of the Criminal Code.

19. On 21 November 2000 the applicant was present in court. He contended that, although he had been a member for a year, he had left the organisation five years ago. He further maintained that he had never participated in any of the terrorist activities.

20. In a letter dated 19 December 2000, the applicant's lawyer requested the court to disregard his statements given during the preliminary stage of the proceedings as he had been under pressure during that period. Furthermore he maintained that the statements of the witnesses should be disregarded as these were either unsubstantiated or given in order to benefit from the law that protected "*confessors*". On the same day, relying on the applicant's statements given at the preliminary stage of the proceedings as well as before the court, the statements of the witnesses and the incident reports, the Malatya State Security Court found the applicant guilty as charged, sentenced him to life imprisonment for offences under Article 146 § 1 of the Criminal Code, and permanently debarred him from employment in the civil service.

21. On 26 January 2001 the applicant lodged an appeal with the Court of Cassation, arguing that the lower court should have considered his acts under Article 168 of the Criminal Code which penalised forming an armed gang to undermine the State's independence. He also argued that, if the court insisted on convicting him under Article 146 of the Criminal Code, than his sentence should have been reduced, as he had repented.

22. On 28 May 2001 the Court of Cassation upheld the applicant's conviction. On 2 July 2001 the decision of the Court of Cassation was submitted to the registry of the first instance court.

23. On 13 August 2003 the applicant filed a request with the Malatya State Security Court in order to benefit from Law no 4959 on the reintegration of offenders into society, which came into force in 6 August 2003.

24. On 29 April 2004, at the end of the hearing, which was held in the presence of three civilian judges, the Malatya State Security Court reduced the applicant's sentence to nine years' imprisonment.

II. THE RELEVANT DOMESTIC LAW

25. 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).

26. 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

27. The applicant complained that he was denied a fair trial by the Malatya State Security Court which had lacked independence and impartiality. He also alleged that he had been convicted on the basis of statements he had made to the police under duress. He argued that he was deprived of his right to defend himself as he had not been brought before the court until almost two years after the trial had begun.

Furthermore, the applicant complained that the courts had erroneously interpreted domestic law as they had not considered his acts under Article 168 of the Criminal Code. He relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

“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...

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.”

28. The Government argued that the applicant was re-tried by a court made up of civilian judges and his prison sentence was considerably reduced, in accordance with Law no. 4959.

A. Admissibility

29. The Court notes that 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

30. 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 Malatya State Security Court.

31. The Government referred to the constitutional amendment of 1999 whereby military judges could no longer sit on such courts, and contended that the applicant cannot therefore claim to be a victim of a violation of the Convention in this respect. They further informed the Court that by Law no. 5190 of 16 June 2004 the State Security Courts had been abolished.

32. The Court has consistently held in earlier cases that certain aspects of the status of military judges sitting as members of the State Security Courts made their independence from the Executive questionable (see, *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 68; *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, § 39).

33. In the present case, the Court notes that, following the constitutional amendment (see paragraph 14 above), the military judge was replaced by a civilian judge, and the applicant was convicted by the newly composed State Security Court. It observes, however, that although the applicant’s trial continued before the Malatya State Security Court which was composed of three civilian judges for more than a year, the replacement of the military judge was not capable of curing the defect in the composition of the court.

34. In particular, 18 hearings had already taken place prior to the replacement of the military judge. At these hearings the court heard the witnesses whose testimony played a key role in the applicant’s conviction (paragraphs 10-13 above; see, *a contrario*, *Kabasakal and Atar v. Turkey*,

no. 70084/01 and 70085/01, § 34, 19 September 2006). The entire prosecution case against the applicant was based on the information already obtained by that stage (paragraph 18 above). In short, most of the trial had already taken place before the military judge ceased to be a member of the court.

35. The Court further observes that the Malatya State Security Court, when composed of three civilian judges, did not take any decision concerning the merits of the case. Except the applicant's own statements dated 24 February and 21 November 2000, no other statements or evidence were admitted to the case file after the military judge was replaced by the civilian judge. Despite the objections of both the applicant and his lawyer, the witness statements obtained while the military judge was still a member of the court were not excluded from the case file (paragraphs 15 and 20 above). In its final decision of 24 February 2000, the State Security Court convicted the applicant relying on his statements given at the preliminary stage and before the court, as well as on the documents and witness statements previously admitted to the case file.

36. Additionally, the Court notes that, upon the applicant's request of 13 August 2003, the State Security Court did not re-examine the merits of the case, but merely reviewed the sentence, in accordance with the Law no. 4959 (paragraphs 23-24 above).

37. Consequently, taking into account the importance of the procedural acts taken before the replacement of the military judge, in particular the taking of key witness statements, the Court considers that the replacement of the military judge before the end of the proceedings did not dispose of the applicant's reasonably held concern about the trial court's independence and impartiality.

38. In the light of above, the Court concludes that the Malatya State Security Court, which convicted the applicant, was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. Consequently, there has been a violation of this provision.

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 his other complaints 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 *Işık v. Turkey*, no. 50102/99, §§ 38-39, 5 July 2003).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 10,000 euros (EUR) in respect of pecuniary and non-pecuniary damages.

42. The Government maintained that the amount requested by the applicant was excessive.

43. The Court considers that the finding of a violation of Article 6 § 1 constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant (see *İncal*, cited above, p. 1575, § 82, and *Çıraklar*, cited above, § 45).

44. The Court 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

45. The applicant also claimed EUR 2,000 for the costs and expenses incurred both before the domestic courts and before the Court. The applicant did not submit any receipt or documents in support of his claim.

46. The Government contended that the applicant's claim was unsubstantiated.

47. 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 finds it reasonable to award the sum of EUR 1,000 for the proceedings before the Court.

C. Default interest

48. 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 application admissible;
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 Malatya State Security Court;
3. *Holds* that it is not necessary to examine separately the applicant's other complaints under Article 6 of the Convention;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained 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) 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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President