



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

SECOND SECTION

CASE OF AKGÜL v. TURKEY

(Application no. 65897/01)

JUDGMENT

STRASBOURG

16 January 2007

FINAL

16/04/2007

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 Akgül 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 I. CABRAL BARRETO,

Mr R. TÜRMEŒ,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Ms D. JOČIENĚ, *judges*,

and Mrs S. DOLLĚ, *Section Registrar*,

Having deliberated in private on 12 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 65897/01) 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 a Turkish national, Mr Orhan Akgül.

2. The applicant was represented by Ms T. Aslan, a lawyer practising in Izmir. The Turkish Government (“the Government”) did not designate a specific Agent for the purposes of the proceedings before the Court.

3. On 4 October 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**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1980 and lives in Izmir.

5. The facts of the case, as submitted by the applicant, may be summarised as follows.

6. On 23 February 1999 the applicant was taken into custody by police officers from the Anti-Terror branch of the Izmir Security Directorate (*Terörle Mücadele Şubesi*) on suspicion of aiding and abetting an illegal organisation, namely the PKK (the Kurdistan Workers’ Party), contrary to Article 169 of the Criminal Code.

7. On 26 February 1999 the applicant was brought before a single judge of the Izmir State Security Court. The applicant denied the veracity of his signed statements taken in detention, alleging that they had been obtained under duress. On the same day, the judge ordered his detention on remand.

8. On 3 March 1999 the public prosecutor at the Izmir State Security Court filed a bill of indictment, charging the applicant under Article 169 of the Criminal Code with aiding and abetting the PKK by engaging in propaganda for it.

9. On 7 April 1999 the State Security Court held its first hearing in the absence of the applicant. The court ordered that the applicant's detention on remand be continued as he could not be heard.

10. On 11 May 1999 the State Security Court held its second hearing in the presence of a military judge. The applicant was heard by the court. He denied having engaged in propaganda and stated that he had been merely watching the crowd shouting slogans. He further denied the statements taken in police custody and before the public prosecutor. He alleged that he had been forced to sign the impugned statements under duress. He asked the court to dismiss the charges and release him. Assessing the evidence against the applicant, the court dismissed his request and ordered his continued detention on remand.

11. On 18 June 1999 the Grand National Assembly amended Article 143 of the Constitution and excluded military members from State Security Courts. Following similar amendments made on 22 June 1999 to the Law on the State Security Courts, the military judge hearing the applicant's case was replaced by a civilian judge.

12. On 19 August 1999 the State Security Court held a hearing. The applicant's representative requested his release. He further asked the court to hear evidence from four witnesses. The court dismissed his requests. Considering the state of the proceedings, the court reasoned that the evidence to be given by the four witnesses would not help to elucidate the facts.

13. On 22 September 1999 the State Security Court held another hearing. The applicant's representative submitted the applicant's written defence submissions and read them at the hearing. The court ordered that the applicant's detention on remand be continued.

14. On 13 October 1999 the State Security Court composed of three civilian judges convicted the applicant as charged and sentenced him to three years' imprisonment under Article 169 of the Criminal Code.

15. On 9 October 2000 the Court of Cassation upheld the judgment. Two days later, this decision was pronounced in the absence of the applicant's representative.

16. As required by law, the decision was deposited with the registry of the Izmir State Security Court for the applicant's review.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

17. 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 Izmir State Security Court. He further complained that he had been denied the assistance of a lawyer during police custody and when he had first appeared before the prosecutor and the judge. In addition, he submitted that the written opinion of the public prosecutor at the Court of Cassation had never been served on him, thus depriving him of the opportunity to put forward his counter-arguments. He finally argued that the ruling of the Court of Cassation was not sufficiently reasoned.

18. 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.”

A. Admissibility

19. The Government contested these arguments. As regards the question of the Izmir State Security Court’s independence and impartiality, the Government maintained that the military judge had been removed from the bench on 18 June 1999 and that the applicant had been sentenced much later by a court entirely composed of civilian judges. Relying on the *Imrek* decision (*Imrek v. Turkey* (dec.), no. 57175/00, 28 January 2003), the Government argued that there was no situation which could lead to a legitimate doubt, from the standpoint of the applicant, on the independence and impartiality of the court.

20. With respect to the remainder of the applicant’s allegations under Article 6, the Government asked the Court to declare them inadmissible, either as being manifestly ill-founded or for failure to exhaust domestic remedies.

21. 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, 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 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

22. The Court notes that the applicant's trial before the Izmir State Security Court commenced on 3 March 1999. On 11 May 1999 the court held a hearing on the merits and asked the applicant to give his defence and submit evidence. In the presence of the military judge, the applicant denied his statements in police custody and before the public prosecutor. He stated that he had been forced to sign the impugned statements under duress. He therefore asked the court to dismiss the charges and release him. Nonetheless, finding that the evidence against the applicant was considerable, the court ordered his detention on remand to be continued.

23. The Court recalls that in the case of *Öcalan v. Turkey* ([GC], no. 46221/99, § 115, ECHR 2005-...) the Grand Chamber held that when a military judge has participated in one or more interlocutory decisions that continue to remain in effect in the criminal proceedings concerned, the accused has reasonable cause for concern about the validity of the entire proceedings, unless it is established that the procedure subsequently followed in the State Security Court sufficiently disposed of that concern. More specifically, where a military judge has participated in an interlocutory decision that forms an integral part of the proceedings against a civilian, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.

24. In the present case, the Court observes that, following the hearing of 11 May 1999, at which the military judge was present, the State Security Court did not take any detailed defence submissions from the applicant. Therefore, the hearing and the ensuing ruling of the State Security Court formed an integral part of the proceedings. In this respect, the present case differs from that of *Ceylan v. Turkey* ((dec.), no. 68953/01, ECHR 2005-...), which was declared inadmissible on 30 August 2005, where the Court rejected a similar complaint since the military judge in question had not participated in any decision relating to the merits of the case or to the defence rights of the applicant.

25. In light of the foregoing considerations, the Court finds that the State Security Court which tried and convicted the applicant was not an

independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. Accordingly, there has been a violation of this provision.

2. Fairness of the proceedings

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

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

27. The applicant alleged that he was convicted of an act which did not constitute a criminal offence at the relevant time. He relied on Article 7 of the Convention, which reads:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

28. The Court observes that the State Security Court convicted the applicant of aiding and abetting an illegal organisation by engaging in propaganda for it. That act was clearly defined as a criminal offence in domestic law - Article 169 of the Criminal Code - at the relevant time (paragraphs 6 and 14 above). This complaint should therefore be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

29. The applicant further complained that his conviction and sentence constituted discrimination on account of his political opinions. He relied on Article 14 of the Convention, which reads:

“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.”

30. The Court observes that the applicant has not submitted any evidence in support of this allegation. He has therefore failed to lay the basis of an arguable claim of a breach of Article 14. Therefore, this complaint

should also be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

31. Finally, the applicant contended that he had not been notified that the Court of Cassation had delivered its judgment on his appeal until a much later date. In the applicant's submission, this amounted to an interference with the exercise of his right of individual petition guaranteed by Article 34 of the Convention, which reads as follows:

"The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

32. The Court notes that, at the time of the present application, the practice of the Turkish judiciary was to deposit a Court of Cassation ruling with the court of first instance from which the appeal had originated. Then the ruling would be fully available to the parties in that court's registry.

33. The Court does not find that practice to be *per se* incompatible with the requirements of Article 34 as nothing would hinder an applicant from obtaining an official copy of a Court of Cassation ruling to be used in an application before the Court.

34. Furthermore, the current application was lodged within six months of the date of the Court of Cassation's decision, which constituted the final decision for the purposes of Article 35 § 1 of the Convention. The applicant has in no way substantiated that the alleged delay in notifying him of the Court of Cassation's decision was designed either directly or indirectly to frustrate his application under the Convention. It is also to be noted that it was open to the applicant and his lawyer to keep themselves informed of the outcome of the appeal by contacting the registry of either the State Security Court or the Court of Cassation.

35. In these circumstances, the Court considers that no issue arises under Article 34 of the Convention. This complaint should therefore be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant claimed 5,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage.

38. The Government contested these amounts.

39. On the question of pecuniary damage, the Court considers 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.

40. The Court also 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 *Incal*, cited above, p. 1575, § 82).

41. However, the Court observes 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*, cited above, § 210 *in fine*).

B. Costs and expenses

42. The applicant also claimed EUR 4,500 for the costs and expenses incurred before both the domestic courts and the Court. He did not submit any receipt or documents in support of his claim.

43. The Government contested this amount.

44. 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

45. 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 under Article 6 of the Convention 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 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 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 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 claims for just satisfaction.

Done in English, and notified in writing on 16 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President