



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

THIRD SECTION

CASE OF EVRENOS ÖNEN v. TURKEY

(Application no. 29782/02)

JUDGMENT

STRASBOURG

15 February 2007

FINAL

15/05/2007

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 Evrenos Önen v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr R. TÜRMEŖ,

Mrs E. FURA-SANDSTRÖM,

Mrs A. GYULUMYAN,

Mr E. MYJER,

Mrs I. ZIEMELE, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 25 January 2007,

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

PROCEDURE

1. The case originated in an application (no. 29782/02) 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 Evrenos Önen (“the applicant”), on 5 July 2002.

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

3. On 31 May 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 1937 and lives in İzmir.

5. The applicant is the owner of a potable and industrial water station in İzmir. By a letter dated 9 July 2001 the authorities from the İzmir Health Directorate informed the Karşıyaka Public Prosecutor about the fact that the applicant's company was not complying with the requirements of the relevant regulation concerning the packaging and marketing of spring and mineral waters.

6. On 24 August 2001, in his statements taken by the Karşıyaka Public Prosecutor, the applicant maintained that he had been already told by the authorities that the way he was selling water was in breach of the relevant regulation and that he had consequently closed his business earlier that year.

7. On 28 November 2001 the Karşıyaka Public Prosecutor issued an advance payment order of 1,898,208,000 Turkish Liras (TRL) for the applicant, for failure to respect the rule concerning the packaging and marketing of spring and mineral waters, provided in decree law no. 560. The applicant did not pay the fine within ten days as required by the order.

8. On 14 December 2001 the applicant filed a petition with the Karşıyaka Magistrate's Court, challenging the decision of the Public Prosecutor. He claimed that he had already made a payment. In his submissions to the court, the Public Prosecutor explained that the payment made by the applicant was for a previous offence, which took place on 26 May 1999.

9. On 22 January 2002 the Karşıyaka Magistrate's Court dismissed the objection and issued a penal order, by which it increased the fine to TRL 2,847.312.000, due to the applicant's failure to comply with the advance payment order.

10. On 19 February 2002 the applicant filed an objection with the Karşıyaka Criminal Court of First Instance, against the penal order of 22 January 2002, alleging, in particular, a breach of Article 6 § 3 (c) of the Convention.

11. On 4 March 2002 the Karşıyaka Criminal Court of First Instance upheld the decision of the Magistrate's Court, holding that it was in accordance with the law.

12. The applicant paid the fine on 3 May 2002, 28 May 2002 and 2 July 2002, in three equal instalments.

II. THE RELEVANT DOMESTIC LAW

13. Article 17 Decree law no. 560 (amended by law no. 4128) on the packaging and marketing of spring and mineral waters, provides that the manufacturing, packaging and selling of the spring and mineral waters are under the authorisation of the Ministry of Health. The principles and procedural requirements concerning these subject matters are regulated by the Ministry of Health. Article 18 A (I) of the same law provides that a company who acts in breach of Article 17 of the decree law no. 560 would be closed, affixed with a seal and be subject to a fine. Should the company commit the same offence again, the fine would be doubled.

14. Article 465 § 4 of the former Criminal Code provide as follows:

“If the action does not cause any sickness or prevent the victim from attending his/her usual occupation (...) the offender shall be sentenced to 2 to 6 months' imprisonment or to a fine of TRL 200 to 2,500. However, the legal proceedings may be initiated only upon the victim's complaint.”

15. The relevant Articles of the Code of Criminal Procedure which was in force at the time of the events, read as follows:

Article 302

“Save the exceptional circumstances described by law, the courts shall decide on objections filed against the penal orders without holding a hearing.

If the objection is upheld, the same court shall decide on the merits of the case.”

Article 386

“The judge at the Magistrates' Court may, without holding a hearing, rule on the offences which are within the jurisdiction of the Magistrates' Court and it may subsequently issue a penal order.

Only the sentencing to a fine, an imprisonment up to three months, a suspension of a certain profession and a seizure (...) may be adjudicated by a penal order. (...)”

Article 387

“If the judge at the Magistrates' Court considers that the lack of a hearing may put the offender in an unfavourable situation, then it could be decided to hold a hearing. “

Article 388

“In addition to the conviction, it should be noted in the penal order, the designation of the offence, the applicable provisions of law, the relevant evidence, and the possibility of raising an objection within eight days after its notification (...). The petition which raises an objection to the penal order shall be approved by the trial judge. (...)”

Article 390

“A hearing shall be held if the objection is raised against an imprisonment sentence given by a penal order. (...)

The suspect can be represented by a defence counsel during the hearing. (...)

The objections against the penal orders (...) are examined by a judge at the criminal court of first instance, in line with the procedure described under Articles 301, 302 and 303. The objection would suspend the execution of the penal order.”

16. In a judgment given on 30 June 2004 the Constitutional Court declared Article 390 § 3 of the Code of Criminal Procedure unconstitutional and a nullity. It held that lack of a public hearing before the Criminal Court of First Instance that examines the objections against the penal orders, would be in breach of the right guaranteed under Article 6 of the Convention, as well as Article 36 of the Constitution.

17. Additionally, the new Criminal Code and the Code of Criminal Procedure which came into force on 1 June 2005, contain no provision concerning penal orders.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

18. The applicant complained that he did not have adequate time and facilities for the preparation of his defence and that he was not allowed to defend himself in person or through a lawyer as there were no public hearings. Moreover, he complained that he did not have the possibility of an effective appeal to the Court of Cassation. He claimed that if he had a regular trial with a public hearing, rather than a penal order, he would have also had the chance to appeal before the Court of Cassation. He invoked Article 6 §§ 1 and 3 (c) of the Convention:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

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

(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;”

19. The Government argued that imposition of a fine under decree Law no. 560 were distinguishable from criminal offences not only by their procedure but also by their juridical characteristics and consequences. They maintained that according to Turkish law, the fine in question was an administrative measure. They therefore claimed that proceedings in the instant case did not fall within the scope of Article 6, under its criminal head.

20. Furthermore, they contended that the procedure followed by the judicial authorities was in compliance with the relevant provisions of the Code of Criminal Procedure. It was a simplified procedure for minor crimes, aimed at diminishing the work load of the courts. They argued that the right to an effective remedy does not necessarily mean the right to an appeal in every circumstance. In the instant case the applicant had the opportunity to object to the penal order, before the nearest Criminal Court of First Instance.

21. Additionally, they noted that the Magistrates' Court did not consider it necessary to hold a hearing as it regarded the applicant's statements taken by the Public Prosecutor and the documents found in the case file sufficient to decide on the case.

A. Admissibility

22. The Court recalls at the outset that in order to determine whether an offence qualifies as “criminal” for the purposes of the Convention, the first matter to be ascertained is whether or not the text defining the offence belongs, in the legal system of the respondent State, to the criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6, to the ordinary meaning of the terms of that Article and to the laws of the Contracting States (see, among other authorities, *Garyfallou AEBE v. Greece*, 24 September 1997, *Reports of Judgments and Decisions* 1997-V, p. 1830, § 32).

23. The Court notes that it is apparent from Article 18 A (1) of the Law no. 560 that the offence of which the applicant was convicted is not characterised under domestic law as “criminal”. However, the indications furnished by the domestic law of the respondent State have only a relative value (see, *Öztürk v. Germany* judgment of 21 February 1984, Series A no. 73, p. 19, § 52). It is therefore necessary to examine the minor offence in the light of the second and third criteria mentioned above (see paragraph 22). In this respect, the Court recalls that these criteria are alternative and not cumulative: for Article 6 to apply by virtue of the words “criminal charge”, it suffices that the offence in question should by its nature be “criminal” from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere (see, inter alia, *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, p. 23, § 55). This does not exclude that a cumulative approach may be adopted where the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a “criminal charge” (see, among other authorities, *Garyfallou AEBE*, cited above, p. 1830, § 33; and *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, p. 20, § 47).

24. In view of the above, the Court considers that although the proceedings were not classified as “criminal” in domestic law, having regard to the nature of the offence, the nature and degree of severity of the penalty that the applicant was faced with, the fine imposed on the applicant was “criminal” within the meaning of the Convention (see, *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, § 50). It therefore considers that Article 6 § 1 is applicable in the instant case.

25. It 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. *The general principles*

26. The Court reiterates that it is a fundamental principle enshrined in Article 6 § 1 that court hearings should be held in public. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the principles of any democratic society (see, among others, *Stefanelli v. San-Marino*, no.35396/97, § 19, ECHR 2000-II).

27. It recalls that, read as a whole, Article 6 guarantees the right of an accused to participate effectively in a criminal trial. In general this includes not only the right to be present, but also the right to receive legal assistance, if necessary, and to follow the proceedings effectively. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c) and (e) of Article 6 § 3 (see, among others, *Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A no. 282-A, pp. 10–11, § 26).

28. Furthermore, Article 6 § 1 does not guarantee a right to appeal from a decision of first instance. Where, however, domestic law provides for a right of appeal, the appeal proceedings will be treated as an extension of the trial process and accordingly will be subject to Article 6 (*Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, § 25).

2. *Application of these principles to the present case*

29. The Court considers that, in the instant case, it is more appropriate to deal with the applicant's complaints under Article 6 § 1 globally due to the overlapping nature of the issues and since the sub-paragraphs of Article 6 § 3 may be regarded as specific aspects of the general fairness guarantee of the first paragraph.

30. At the outset, the Court notes that in a judgment given on 30 June 2004, the Constitutional Court unanimously declared Article 390 § 3 of the former Criminal Code unconstitutional and a nullity, holding that depriving individuals of a public hearing was in violation of the right to a fair trial. Furthermore, with the new Criminal Code and the Code of Criminal Procedure which came into force on 1 June 2005, the practice of issuing penal orders ceased to exist.

31. It notes, however, that in accordance with the relevant domestic law prevailing at the time of the events, no public hearing was held during the applicant's prosecution. Both the Karşıyaka Magistrate's Court that issued a penal order and sentenced the applicant to pay a fine and the Karşıyaka Criminal Court of First Instance that examined his objection, took a

decision on the basis of the documents found in the case file. The applicant's statement was taken only by the Karşıyaka Public Prosecutor. He was not given the opportunity to defend himself in person or through a lawyer before the courts that decided on his case. The Court, therefore, considers that the applicant was not able to follow the criminal proceedings effectively.

32. In view of the above, the Court concludes that the procedure followed by the judicial authorities prevented the applicant from exercising his defence rights properly and thus rendered the criminal proceedings unfair.

33. It holds that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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. Damages

35. Taking into consideration the fine that he had to pay and its subsequent effect on his business, the applicant claimed 14,647,712,000 Turkish liras (TRL) (approximately EUR 7,696), plus 48,042 New Turkish Lira (TRY) (approximately EUR 25,000) of interest. Moreover, the applicant claimed TRY 25,000 (approximately EUR 13,000) in respect of non-pecuniary damage.

36. The Government contended that the applicant's claims were unsubstantiated and excessive.

37. The Court recalls that it cannot speculate as to what the outcome of the proceedings at issue might have been if the violation of Article 6 § 1 of the Convention had not occurred (see, among others; *Janssen v. Germany*, no. 23959/94, § 56, 20 December 2001). It notes that the applicant closed down his business prior to the proceedings giving rise to the instant case (paragraphs 6 and 8).

38. The Court notes, however, that the applicant suffered pecuniary damage in that he had been ordered to pay TRL 2,847.312.000. On the basis of the average exchange rates applicable on the dates of payment, the Court awards the applicant EUR 2,160 for his pecuniary damage.

39. Moreover, the Court considers that the finding of a violation constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

40. The applicant claimed TRY 14,600 (approximately EUR 7,600) for his representation before the Court, by his lawyer, who had worked twenty three hours on the case. However, he did not submit any documents in support of this claim.

41. The Government contested his claim.

42. The Court, deciding on an equitable basis and considering its case-law, awards the applicant EUR 1,000 under this heading.

C. Default interest

43. 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;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
4. *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, the following sums, to be converted into new Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 2,160 (two thousand one hundred and sixty euros) for pecuniary damage,
 - (ii) EUR 1,000 (one thousand euros) for costs and expenses,
 - (iii) 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President