



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

SECOND SECTION

CASE OF SALDUZ v. TURKEY

(Application no. 36391/02)

JUDGMENT

STRASBOURG

26 April 2007

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
27/11/2008**

This judgment may be subject to editorial revision.

In the case of Salduz v. Turkey,

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

Mrs F. TULKENS, *President*,

Mr A.B. BAKA,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŒ,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Ms D. JOČIENĖ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 27 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 36391/02) 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 Yusuf Salduz (“the applicant”), on 8 August 2002.

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

3. On 28 March 2006 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the lack of legal assistance in police custody and the non-communication of the submissions of the Principal Public Prosecutor, 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 1984 and lives in Izmir.

5. On 29 May 2001, the applicant was arrested by police officers from the anti-terrorism branch of the Izmir Security Directorate on suspicion of having participated in an illegal demonstration in support of the imprisoned leader of the PKK (the Kurdistan Workers’ Party, an illegal organisation).

The applicant was also accused of hanging an illegal placard on a bridge in Bornova on 26 April 2001.

6. On 30 May 2001 the police officers took a statement from the applicant in which he admitted the charges.

7. On 1 June 2001 the applicant was brought before the public prosecutor and then the investigating judge. Before both officials, the applicant denied the content of his police statement, alleging that it had been extracted from him under duress. The same day, the investigating judge remanded the applicant in custody.

8. On 11 July 2001 the public prosecutor at the Izmir State Security Court filed an indictment with the same court, accusing the applicant of aiding and abetting the PKK, an offence under Article 169 of the Criminal Code and Section 5 of Law no. 3713 (the anti-terrorism law).

9. On 5 December 2001 the Izmir State Security Court convicted the applicant as charged and sentenced him to four years and six months' imprisonment. This sentence was then reduced to two and a half years' imprisonment as the applicant had been less than eighteen years of age at the time of the offence.

10. When delivering its judgment, the Izmir State Security Court had taken into consideration the statements which the applicant had made to the police, the public prosecutor and the investigating judge, as well as his co-defendants' testimony before the public prosecutor. The court noted that the latter had given evidence that the applicant had organised them to participate in the demonstration. The court further took note of the expert report which suggested that the applicant's handwriting was identical to that on the placard. The court also noted that, according to the arrest report drawn up by the police, the applicant had been among the people who dispersed after the demonstration.

11. On 27 March 2002, the Principal Public Prosecutor at the Court of Cassation submitted his written opinion to the 9th Chamber of the Court of Cassation, in which he had argued that the Chamber should uphold the judgment of the Izmir State Security Court.

12. On 10 June 2002 the 9th Chamber of the Court of Cassation confirmed that judgment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (c) OF THE CONVENTION

13. The applicant complained under Article 6 §§ 1 and 3 (c) of the Convention that the submissions of the Principal Public Prosecutor of the

Court of Cassation had not been communicated to him, and that he had been denied the assistance of a lawyer while in police custody. Article 6 §§ 1 and 3 (c) of the Convention, in so far as relevant, read as follows:

“1. 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; ...”

A. Admissibility

14. 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. Non-communication of the public prosecutor's written opinions submitted to the Court of Cassation

15. The Government submitted that the written opinion of the Principal Public Prosecutor was not binding on the Court of Cassation, as it was free to decide on appeals regardless of the Prosecutor's opinion. They further maintained that the applicant's representative had had the right to consult the case file and examine the documents. Finally, the Government pointed out that on account of the recent amendment of 27 March 2003 Article 316 of the Code of Criminal Procedure now provides that the written opinion of the Principal Public Prosecutor of the Court of Cassation must be sent to the parties.

16. The applicant maintained his allegations.

17. The Court notes that it has already examined the same grievance in the case of *Göç v. Turkey* and found a violation of Article 6 § 1 of the Convention ([GC], no. 36590/97, § 14, ECHR 2002-V). In that judgment, the Court held that, having regard to the nature of the principal public prosecutor's submissions and to the fact that the applicant had not been given an opportunity to make written observations in reply, there had been an infringement of the applicant's right to adversarial proceedings (*loc. cit.* § 55).

18. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned case.

19. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

2. Lack of legal assistance during police custody

20. The Government maintained that the restriction imposed on the applicant concerning access to a lawyer while in police custody had not infringed his rights of defence. They submitted that, according to the Court's case-law, the assessment of whether a trial was fair should be made in the light of the entire case. In this connection, they contended that the applicant had been assisted by a lawyer before both the Izmir State Security Court and the Court of Cassation.

21. The applicant maintained his allegations.

22. The Court reiterates that Article 6 § 3 (c) may be relevant at the stage of the preliminary investigation in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996-I, § 62). Although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (see *Brennan v. the United Kingdom*, no. 39846/98, § 45, ECHR 2001-X).

23. In the present case, the Court notes that the applicant was represented both at the trial before the Izmir State Security Court and on appeal by his lawyer. Moreover, the statement he made to the police during his pre-trial detention was not the sole basis for his conviction, and he had had the opportunity of challenging the prosecution's allegations under conditions which did not place him at a substantial disadvantage *vis-à-vis* his opponent. Before deciding the case, the Izmir State Security Court considered the factors surrounding the applicant's arrest and the expert report which confirmed that the applicant's handwriting had been identical to that on the illegal placard. The court also took note of witnesses' statements before the public prosecutor to the effect that the applicant had invited them to join the demonstration. The court then convicted the applicant on the basis of the facts and evidence before it as a whole (see *Yurtsever v. Turkey* (dec.), no. 42086/02, 1 August 2006, and *Uçma and Uçma v. Turkey* (dec.), no. 15071/03, 3 October 2006).

24. In these circumstances, the Court considers that, in the instant case, the fairness of the applicant's trial was not prejudiced on account of the fact that he did not have access to a lawyer during the period in police custody.

Accordingly, there has been no violation of Article 6 § 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. 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

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

27. The Government contended that the amounts claimed were excessive and unacceptable.

28. The Court finds that the applicant has failed to substantiate that he incurred any pecuniary damage as a result of the breach of his Convention rights. It therefore disallows this aspect of the claim. Moreover, it considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

29. The applicant also claimed EUR 3,500 for the costs and expenses incurred before the domestic courts and the Court.

30. The Government submitted that the applicant had failed to substantiate his claim.

31. Making its own estimate based on the information available, the Court considers it reasonable to award the sum of EUR 1,000 under this head.

C. Default interest

32. 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*, unanimously, the application admissible;
2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention on account of the non-communication of the public prosecutor’s written opinion;

3. *Holds* by 5 votes to 2 that there has been no violation of Article 6 § 3(c) of the Convention on account of the lack of legal assistance while the applicant was in police custody;
4. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction 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) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into new Turkish liras at the rate applicable at the date of settlement;
 - (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*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Tulkens and Mularoni is annexed to this judgment.

F.T.
S.D.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS AND MULARONI

We regret that we cannot agree with the majority that there has been, in this case, no violation of Article 6 § 3 (c) of the Convention, for the following reasons:

1. As the majority correctly points out at paragraph 22 of the present judgment, our Court has been very clear in reiterating, over many years, that Article 6 applies even at the stage of the preliminary investigation into an offence by the police, and that its paragraph 3 (c) may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its requirements (*Imbrioscia v. Switzerland*, judgment of 24 November 1993, § 36). As the Court emphasised in that judgment, the manner in which this provision is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case (§ 38).

In the *John Murray v. the United Kingdom* judgment of 8 February 1996, the Court observed: “national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions *for good cause*. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing” (§ 63).

In the *Brennan v. the United Kingdom* judgment of 16 October 2001, which is based on the same principles, the Court said that “[t]he manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case” (§ 45). It observed: “although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction *for good cause*. The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing” (*ibid*).

2. We can reasonably infer from the above-mentioned case-law the following elements:

Firstly, it is now clear from the Court’s case-law concerning Article 6 § 3 (c) that the assistance of a lawyer already at the initial stages of police interrogation is the rule and the lack of assistance is the exception.

Secondly, both in the *John Murray* and *Brennan* judgments, the Court made it equally clear that, if there is a restriction on the right to the assistance of a lawyer already at the initial stages of the proceedings, there must be a “good cause” (*des raisons valables*) for such a restriction.

Thirdly, we observe that in the *Murray* case the Court found a violation of Article 6 § 3 (c) of the Convention and refused to accept the respondent Government’s submission that no problem arose under this Article since the inferences drawn during the first 48 hours of police detention were not the only evidence against the applicant (§ 60, third sub-paragraph).

Fourthly, although in the *Brennan* case the Court did not find a violation of Article 6 § 3 (c) of the Convention as far as the deferral of access to the applicant’s solicitor was concerned, the reason was that the applicant had made no incriminating admissions during the 24-hour deferral period, when he was denied access to a solicitor.

3. Against this background, in the present case, we cannot accept that the exception has become the rule and that the argument put forward by the Government and rejected by the Court in the *Murray* case is now the ordinary justification for dismissing complaints under Article 6 § 3 (c) concerning deferral of access to lawyer, i.e. that “the statement the applicant made to the police during his pre-trial detention was not the sole basis for his conviction” (paragraph 23 above). As to the argument that the applicant had had the opportunity to challenge the prosecution’s allegations under conditions which did not place him at a disadvantage *vis-à-vis* his opponent, it does not seem to us to be grounded on any factual evidence in the file.

Furthermore, no examination of the specific circumstances of the case was made, although incriminating admissions made during police custody were part of the evidence used for the conviction. As to this last aspect, we would observe that the applicant was a minor suspected of having participated in an illegal demonstration in support of the imprisoned leader of the PKK, and accused of hanging an illegal placard on a bridge. He was facing a very serious penalty and was eventually sentenced to four years and six months’ imprisonment, which was then reduced to two and a half years’ imprisonment on account of the fact that he was a minor at the time of the offence. In addition to that, before the public prosecutor and the investigating judge, the applicant denied the content of his police statement, alleging that it had been extracted under duress (paragraph 7 above).

Moreover, the majority does not examine at all the specific circumstances of the case, as the Court did for example in the *Kolu v. Turkey* judgment of 2 August 2005, in which it held that there had been a violation of Article 6 § 3 (c) of the Convention on the ground that “depriving the applicant of legal assistance while he was being questioned – whatever the justification might be – caused an infringement of his right to due process which could not be made good subsequently” (§ 62).

Finally, the Government have not advanced any “good cause” (*des raisons valables*) for the restriction at issue. The only “good cause” was probably that the legislation in force at the material time in the respondent State concerning such crimes did not provide for access to a lawyer during police custody.

4. On a more general level, we would also observe that in the last few years a number of State Parties to the Convention, including the respondent, have changed the relevant legislation concerning access to a lawyer during police custody. Some of them expressly invoked the Court’s case-law as the main reason for such a change. In this respect, we should not send out the wrong message by saying that the mere fact that a statement made to the police during pre-trial detention is not the sole basis for an applicant’s conviction retrospectively justifies any restrictions on access to a lawyer during police custody, which is simply not true.

5. Last but not least, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) has frequently recommended that the right of access to a lawyer be guaranteed from the very outset of custody (see as a recent reference CPT/Inf/E (2002) 1 – Rev. 2006, page 12, § 41). The CPT has stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. It is difficult for us to accept that our Court, while being more and more careful about any situation that could possibly be problematic under Article 3 of the Convention, is at the same time moving backward as to the protection afforded under Article 6 § 3 (c) of the Convention.

6. The aim of the Convention is to protect rights that are not theoretical or illusory but practical and effective. That rule is true also of the right to legal assistance. As we all know, the crucial moments in criminal proceedings come right at the beginning, with the first stages of police intervention, which may determine the outcome of the proceedings definitively and irremediably.

That is the main reason why the right to legal assistance as soon as possible and throughout criminal proceedings is set forth as a guaranteed fundamental right in the proposal of 28 April 2004 for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, with the aim of setting common minimum standards.