



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

FORMER SECOND SECTION

**CASE OF KEMAL KAHRAMAN AND ALİ KAHRAMAN
v. TURKEY**

(Application no. 42104/02)

JUDGMENT

STRASBOURG

26 April 2007

FINAL

26/07/2007

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 Kemal Kahraman and Ali Kahraman v. Turkey,

The European Court of Human Rights (Former 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 Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 5 December 2006 and 27 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 42104/02) 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 Turkish nationals, Mr Kemal Kahraman and Mr Ali Kahraman, on 21 October 2002.

2. The applicants were represented by Mr H. Tuna, Mr S. Kar, and Mr M.E. Kaya, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 8 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

THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1967 and 1972 respectively. They are serving sentences in Eskişehir Prison, Turkey.

5. On 17 November 1999 the applicants, who were detained in Niğde Prison for being members of the IBDA-C (*Great East Islamic Raiders-Front*), allegedly incited an insurrection against the prison administration. The prison officers together with soldiers intervened in the uprising in order to bring it to an end. During the incident the applicants and the security

forces both sustained injuries which were recorded in medical reports. The security forces drew up an incident report after the operation.

6. On 18 November 1999 the public prosecutor, prison director and prison officers drew up a damage-assessment report concerning the incident.

7. On 22 November 1999 the public prosecutor asked the applicants for their statements. The applicants declared that they wished to make their statements in the presence of their lawyers.

8. On 18 and 23 November 1999, the public prosecutor took statements from ten complainants who were prison officers and one complainant who was a soldier.

9. On 7 December 1999 the applicants gave their statements to the public prosecutor with their lawyer present. The prosecutor asked the applicants whether they had any arguments against the damage-assessment report. The same day, an on-site investigation was conducted inside the prison.

10. On 28 December 1999 the public prosecutor filed an indictment with the Niğde Criminal Court, accusing the applicants of insulting an officer and of insurrection against the prison administration.

11. On 3 January 2000 the Niğde Criminal Court held the first hearing and demanded the presence of the complainants and the four accused, including the applicants, at the following hearing.

12. At the second hearing on 21 March 2000, the Niğde Criminal Court ascertained the applicants' identities and asked them to submit their defence. The applicants maintained that they wished to make their statements in the presence of their lawyers. Accordingly, the court sent a letter to the public prosecutor's office requesting that lawyers from the Niğde Bar Association be assigned to the applicants. At the same hearing, the court took statements from the prison officers who were involved in the incident.

13. On 29 May 2000, two lawyers who were members of the Niğde Bar were assigned to represent the applicants. However, they did not attend any of the ensuing hearings.

14. On 30 May 2000 the court noted that the applicants had been sent to Bandırma Prison for administrative reasons. The court issued a rogatory letter to the Bandırma Criminal Court, requesting that the latter obtain the applicants' statements.

15. On 2 November 2000 the Bandırma Criminal Court, acting under powers delegated to it by the Niğde Criminal Court, pursuant to Article 226 § 4 of the Code of Criminal Procedure, took statements from the applicants. According to the minutes of the Bandırma Criminal Court, the applicants were reminded of their rights in accordance with Article 135 of the Code of Criminal Procedure, which also included the right to a lawyer. The applicants stated that they were aware of their rights and would defend themselves.

16. The Niğde Criminal Court held six further hearings in the absence of the applicants.

17. On 24 October 2000 the Niğde Criminal Court noted that the applicants' statements had been sent to it by the Bandırma Criminal Court.

18. On 22 November 2001 the Niğde Criminal Court, *in absentia*, acquitted the applicants of insulting the prison officer, but convicted them of insurrection against the prison administration. The court relied on the applicants' statements, the statements of the complainants, the on-site investigation report, the witness statements and the experts' opinions. The applicants were each sentenced to four years' imprisonment.

19. On 14 March 2002 the applicants appealed against the judgment to the Court of Cassation. In their appeal petitions, they stated that they were only brought before the Niğde Criminal Court once, at the beginning of the proceedings, when the court had only ascertained their identities. They further maintained that the public prosecutor's indictment had not been previously served on them, thus preventing them from submitting their defence, and that they had requested legal representation, which had not been forthcoming. They finally submitted that they were not asked to submit their final statements and the judgment was pronounced in their absence.

20. On 25 June 2002 the Court of Cassation upheld the judgment of the Niğde Criminal Court.

21. On 1 June 2005 the new Criminal Code came into force. Consequently, the Niğde Assize Court has scheduled a hearing for 20 March 2007 with a view to adjusting the applicants' sentences, pursuant to the provisions of the new Criminal Code.

THE LAW

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

22. The applicants complained under Article 6 §§ 1 and 3(c) of the Convention of a breach of the principle of a fair trial as they had been unable to appear at the hearings before the Niğde Criminal Court, and that they had not had legal representation. Article 6 reads, in so far as relevant, 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

23. The Government asked the Court to reject these complaints for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They maintained that the applicants had not raised the substance of their complaints before the domestic courts at any stage. They further alleged that, in any case, the applicants should have applied to the Court within six months from the date on which the Bandırma Criminal Court took their statements on behalf of the Niğde Criminal Court.

24. The applicants stated that it was unrealistic to expect them to raise their complaints before the Niğde Criminal Court as they had never been presented before that court. They further maintained that they had put the substance of their complaints in their petitions to the Court of Cassation.

25. The Court observes that the applicants had indeed raised the substance of their complaints in their appeal petition to the Court of Cassation (paragraph 19 above), and had lodged their application with the Court within six months of the Court of Cassation's decision on 25 June 2002. It therefore rejects the Government's preliminary objections.

26. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

a) Failure to bring the applicants before the trial court

27. The Government observed that the applicants had given their statements to the public prosecutor in the presence of a lawyer. Furthermore, they were reminded of their rights under Article 135 of the Code of Criminal Code by the Bandırma Criminal Court. However, the applicants had opted to defend themselves and had not requested a lawyer before the Bandırma Criminal Court, which had taken their statements under delegated powers, pursuant to Article 226 of the Code of Criminal Procedure. They submitted that the applicants had thus enjoyed their rights of defence. They further alleged that the applicants' statements were not the only evidence on which the Niğde Criminal Court had based its finding.

28. The applicants disputed this argument.

29. The Court reiterates that the object and purpose of Article 6 of the Convention, taken as a whole, implies that a person charged with a criminal offence is entitled to take part in the hearing. Moreover, sub-paragraph (c) of paragraph 3 guarantees to "everyone charged with a criminal offence" the right "to defend himself in person" and it is difficult to see how these rights could be exercised without the person concerned being present at the actual trial (see the *Colozza v. Italy* judgment of 12 February 1985, Series A

no. 89, p. 14, § 27; *Monnell and Morris v. the United Kingdom* judgment of 2 March 1987, Series A no. 115, p. 22, § 58).

30. The Court observes that in the instant case the applicants were not invited to attend the hearings before the Niğde Criminal Court which sentenced them to four years' imprisonment. In accordance with Article 226 § 4 of the Code of Criminal Procedure, the Bandırma Criminal Court had been asked to take evidence from them in their defence, under the powers delegated to it by the former (paragraph 15 above).

31. The Court finds that, contrary to the Government's contention, the fact that the applicants raised no objections when the Bandırma Criminal Court took their statements does not signify that they implicitly waived their right to defend themselves or to appear before the Niğde Criminal Court, since the waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner (see the *Colozza* judgment cited above, p. 14, § 28, and *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, § 70).

32. Consequently, the Court considers that such an interference with the rights of the defence cannot be justified, regard being had to the prominent place held in a democratic society by the right to a fair hearing within the meaning of the Article 6 § 1 of the Convention.

b) Lack of legal assistance during the trial

33. The Government noted that the applicants had requested legal assistance during the proceedings before the Niğde Criminal Court at the hearing on 21 March 2000. In compliance with this request, that court had sent a letter to the public prosecutor's office requesting that lawyers from the Niğde Bar Association be assigned to the applicants. On 29 May 2000, two lawyers who were members of the Niğde Bar were assigned to represent the applicants. Thus the applicants were provided with legal assistance in accordance with the case-law of the Court and the national law. They alleged that, from then on, it was the duty of the representatives, who had powers of attorney, to fulfil their obligations and responsibilities. Therefore the applicants' allegation that they were not in receipt of legal assistance during the criminal proceedings was unfounded.

34. The applicants maintained their allegation.

35. The Court reiterates that the appointment of defence counsel in itself does not necessarily settle the issue of compliance with the requirements of Article 6 § 3 (c). The Convention is intended to guarantee not rights which are theoretical or illusory, but rights which are practical and effective. Thus, mere nomination does not ensure effective assistance since a lawyer appointed for legal aid purposes may be prevented from performing, or shirk his or her duties. If they are notified of the situation, the authorities must either replace or oblige the lawyer to fulfil those duties (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, pp. 12-13,

§ 24; *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33).

Nevertheless, a State cannot be held responsible for every shortcoming of a lawyer appointed for legal aid purposes. It follows from the independence of the legal profession that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court considers that the competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (*Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, § 67).

36. Turning to the circumstances of the present case, the Court notes that, upon the request of the Niğde Criminal Court, the Niğde Bar Association appointed two lawyers on 29 May 2000 to assist the applicants with their case (paragraph 13 above). The Court observes from the minutes of the six hearings held by the Niğde Criminal Court that the lawyers did not attend any of them. It therefore considers that the Niğde Criminal Court must have been aware of the lawyers' failure to fulfil their obligations. The Court further notes that the domestic court did not take any measures to ensure that the lawyers comply with their duties.

37. The foregoing considerations are sufficient to enable the Court to conclude that the proceedings before the Niğde Criminal Court did not comply with the requirement of fairness.

There has consequently been a breach of Article 6 §§ 1 and 3(c) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

38. The applicants further alleged violations of Articles 10 and 14 of the Convention without specifying any reasons.

39. An examination by the Court of the material as it has been submitted does not disclose any appearance of a violation of these provisions. It follows that this part of the application is manifestly-ill founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. 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 applicants claimed a total of 11,256 new Turkish liras (YTL), equivalent to 6,082 euros (EUR), in respect of pecuniary damage. They also claimed non-pecuniary damage, but left the assessment of the amount to the discretion of the Court.

42. The Government contested these claims as excessive.

43. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it accepts that the applicants must have suffered some non-pecuniary damage as a consequence of their absence from the trial and the lack of effective legal representation, which cannot be sufficiently compensated by the finding of a violation. Ruling on equitable basis, it awards each of the applicants EUR 2,000 in respect of non-pecuniary damage.

44. Furthermore, the Court considers that, where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, 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 - IV). In this connection, it notes that the domestic court has scheduled a hearing for 20 March 2007 only with a view to readjusting the applicants' sentences in accordance with the provisions of the new Criminal Code.

B. Costs and expenses

45. The applicants also claimed EUR 5,000 for their costs and expenses.

46. The Government contested the claim.

47. On the basis of the material in its possession and ruling on an equitable basis, the Court awards the applicants, jointly, EUR 1,000 in respect of cost and expenses, less the EUR 850 received in legal aid from the Council of Europe.

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 complaint concerning Article 6 §§ 1 and 3 (c) admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), each, in respect of non-pecuniary damage and EUR 1,000 (one thousand euros), jointly, in respect of costs and expenses, less the EUR 850 (eight hundred and fifty euros) received in legal aid from the Council of Europe, plus any tax that may be chargeable, to be converted into new Turkish liras at the rate applicable of the date of settlement;
 - (b) that from the expiry of the abovementioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' 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

J.-P. COSTA
President