



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

FOURTH SECTION

CASE OF BÜLBÜL v. TURKEY

(Application no. 47297/99)

JUDGMENT

STRASBOURG

22 May 2007

FINAL

22/08/2007

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 Bülbül v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr R. TÜRMEK,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Ms L. MIJOVIĆ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 3 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 47297/99) 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 Kemal Bülbül ("the applicant"), on 22 December 1998.

2. The applicant was represented by Mr L. Kanat, a lawyer practising in Ankara. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. On 4 March 2006 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**

3. The applicant was born in 1963 and lives in Ankara. At the time of the events, he was the provincial leader of HADEP (*Halkın Demokrasi Partisi* - People's Democracy Party) in Ankara.

4. On 18 November 1998 the military judge sitting on the bench of the Ankara State Security Court ordered the applicant's detention *in absentia*. According to the detention order, the applicant was suspected of aiding and abetting an illegal organisation, the PKK (the Kurdistan Workers' Party).

5. On 19 November 1998 police officers conducted a search in the Ankara office of HADEP and the applicant was taken into police custody. In the search and arrest protocol, which was signed by the applicant, it was explained that the applicant was taken into custody pursuant to the detention order issued the day before by the Ankara State Security Court. Following his arrest, the applicant was brought before the military judge of the Ankara State Security Court and, on his order, was placed in detention on remand.

6. On 26 November 1998 the applicant filed an appeal against the detention order and requested his release.

7. On 27 November 1998, having regard to the nature of the offence and the state of the evidence, the Ankara State Security Court -composed of three judges including a military judge- dismissed the applicant's appeal.

8. On 8 December 1998 the public prosecutor at the Ankara State Security Court filed a bill of indictment against the applicant, charging him with aiding and abetting the PKK under Article 169 of the Criminal Code.

9. On 12 July 1999 the applicant was released pending trial.

10. On 24 February 2000 the Ankara State Security Court convicted the applicant of aiding and abetting the PKK and sentenced him to three years and nine months' imprisonment.

11. While the proceedings were pending before the Court of Cassation, on 21 December 2000 new legislation (Law No. 4616), which governed the conditional release, suspension of proceedings or execution of sentences in respect of offences committed before 23 April 1999, came into force. Accordingly, on 23 January 2001 the Court of Cassation quashed the judgment of the first-instance court.

12. On 2 May 2001 the Ankara State Security Court suspended the proceedings against the applicant. According to Law No. 4616, these proceedings would be resumed only if the applicant were to commit an offence of the same or more serious kind within five years of the court's decision to suspend the proceedings.

13. It appears from the documents in the file that no charges have been brought against the applicant during the period of suspension.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 3 and 4 OF THE CONVENTION

14. The applicant maintained that the military judge who ordered his detention on remand and the court which decided on his appeal against the detention order were not independent and impartial. In this connection, he

invoked Article 5 §§ 3 and 4 of the Convention, which in so far as relevant read as follows.

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

15. The Government referred to the constitutional amendment of 1999 whereby military judges could no longer sit on state security courts. They also stated that the state security courts had been abolished as of 2004.

A. Admissibility

16. The Government argued that this part of the application should be rejected for non-exhaustion of domestic remedies. In this respect, they referred to Article 112 § 3 of the Code of Criminal Procedure, now repealed, according to which the criminal court had to review the applicant's continued detention on its own motion at regular intervals. In the Government's view, as the applicant had lodged his application with the Court without awaiting the outcome of the criminal proceedings, he had failed to exhaust the domestic remedies in respect of his complaint.

17. The Court observes that, when the applicant was placed in detention on remand on 19 November 1998, he sought to have the decision ordering his detention on remand set aside by filing an appeal pursuant to Article 298 of the Code of Criminal Procedure. It further observes that the applicant's only complaints under Article 5 §§ 3 and 4 concern the alleged lack of independence and impartiality of the military judge who ordered his detention on remand and of the state security court which rejected his appeal against the detention order. The Court reiterates that Article 35 of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time provide effective and sufficient redress. An applicant does not need to exercise remedies which do not in reality offer any chance of redressing the alleged breach (*Şen v. Turkey* (dec.), no. 41478/98, 30 April 2002). In the present case, as the presence of a military judge on the bench of the state security courts was in accordance with the domestic law at the material time and as such a judge was empowered to make detention orders, the Court finds that the applicant did not have any domestic remedy whereby he could seek redress for his complaints.

18. In view of the above, the Court dismisses the Government's preliminary objection.

19. The Court further notes that this complaint 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

Article 5 § 3 of the Convention

20. The applicant alleged that the military judge, who ordered his detention on remand, could not be considered independent and impartial.

21. The Court recalls that one of the essential features embodied in Article 5 § 3 is judicial control, which is intended to minimise the risk of arbitrariness and to secure the rule of law. It is for the judicial authorities to develop forms of judicial control which are adapted to the circumstances but they have to be compatible with the Convention (*Estrikh v. Latvia*, no. 73819/01, § 115, 18 January 2007).

22. Judicial control has to be performed by, according to the wording of Article 5 § 3 of the Convention, a “judge” or “other officer authorised by law to exercise judicial power”. The judge referred to in Article 5 § 3 must satisfy certain conditions each of which constitutes a guarantee for the person arrested. One of the most important of such conditions is independence of the executive and the parties (*Schiesser v. Switzerland*, judgment of 4 December 1979, Series A no. 34, § 31).

23. In the instant case, the applicant was placed in detention on remand on the order of a military judge, who was a member of the Ankara State Security Court. At this point, the Court recalls that it has, in the past, already examined the status of the military judges sitting on the bench of the state security courts. In systematically finding a violation under Article 6 § 1 of the Convention, the Court had regard to the fact that the military member of the state security court was a serviceman who still belonged to the army, which in turn took orders from the executive. Secondly, he remained subject to military discipline and assessment reports were compiled on him by the army for that purpose. Furthermore, decisions pertaining to the military judge's appointment were to a great extent taken by the administrative authorities and the army (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 68). The Court considers that these findings which raise a problem under Article 6 § 1 are also applicable in respect of Article 5 § 3.

24. In sum, the Court finds that there has been a violation of Article 5 § 3 of the Convention since the military judge who ordered the applicant's detention on remand could not be regarded as independent of the executive.

Article 5 § 4 of the Convention

25. The applicant further maintained that the court, which decided on his appeal against the detention order, was not independent and impartial.

26. The Court reiterates at this point that Article 5 § 4 of the Convention, which enshrines the right “to take proceedings [in] a court”, does not stipulate the requirement of that court's independence and impartiality and thus differs from Article 6 § 1 which refers, *inter alia*, to an “independent and impartial tribunal”. However, the Court has held in several judgments that independence of the executive is one of the most important constitutive elements of the notion of a “court” (see *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, § 24 and *D.N. v. Switzerland* [GC], no. 27154/95, § 42, ECHR 2001-III). In the Court's opinion, it would be inconceivable that Article 5 § 4 of the Convention, relating, *inter alia*, to such a sensitive issue as the deprivation of liberty of a person, should not equally envisage, as a fundamental requisite, the impartiality of that court.

27. In the present case, the applicant's appeal against the detention order was examined and rejected by the Ankara State Security Court, which was composed of three members, including a military judge. The Court recalls that it has in the past examined the independence and impartiality of the state security courts from the standpoint of Article 6 § 1 of the Convention and has found that the presence of a military judge on the bench constituted a breach of that provision. (see *Incal*, cited above, §§ 65-73 and *Özel v. Turkey*, no. 42739/98, §§ 31-34, 7 November 2002). The Court's concerns about the status of the military judge have been summarised in paragraph 23 above. In the present case, this time the Court is called upon to examine this question under Article 5 § 4 of the Convention. However, in the Court's view, the concerns about the status of the military judges expressed in the *Incal* judgment in the context of Article 6 are equally valid in the context of Article 5 § 4, and the term “court” referred to in that provision must be construed as a body which enjoys the same qualities of independence and impartiality as are required of the “tribunal” mentioned in Article 6. It follows that, as with Mr Incal, the present applicant, charged with membership of an illegal organisation, could legitimately fear that because one of the judges of the Ankara State Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of his case. As a result, the Ankara State Security Court, which decided on the applicant's appeal against the detention order, lacked the necessary independence and impartiality for the purposes of Article 5 § 4 of the Convention.

28. In the light of the foregoing, the Court finds that there has also been a violation of Article 5 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

29. The applicant alleged under Article 5 § 2 of the Convention that he was not informed of the reasons for his arrest.

30. The Court observes that the search and arrest report, which was signed by the applicant, clearly indicated that the applicant had been taken into custody on the basis of a detention order delivered by the Ankara State Security Court on 18 November 1998. It concludes therefore that the applicant must be deemed to have been aware of the reasons of his arrest.

31. It follows that this part of the application should be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

32. The applicant complained under Article 6 § 1 of the Convention that he was not tried by an independent and impartial court on account of the presence of a military judge on the bench of the Ankara State Security Court. He further alleged that he had not been informed promptly of the accusations against him. In respect of his complaints, the applicant invoked Article 6 §§ 1 and 3 (a) and (c) of the Convention.

33. The Government contended that this part of the application was premature as the trial against the applicant was still pending before the Ankara State Security Court when the application was introduced.

34. The Court does not consider it necessary to decide whether the applicant may be considered to have complied with the requirements of Article 35 § 1 of the Convention since this complaint should in any case be declared inadmissible for the following reasons.

35. The Court reiterates that a person may not claim to be a victim of a violation of his right to a fair trial under Article 6 of the Convention which, according to him, took place in the course of proceedings in which he was acquitted or which were discontinued (see, in this respect, *I.I. v. Bulgaria* (dec.), no. 44082/98, 25 March 2004).

36. It observes that, in the instant case, the criminal proceedings against the applicant were suspended pursuant to Law No. 4616. As a result, he was not convicted by the State Security Court. Since the proceedings would only resume if the applicant were to commit another offence of the same or more serious kind within five years of the court's decision, the decision to suspend them may be regarded as bringing the case to a close (see *Withey v. the United Kingdom* (dec.), no. 59493/00, ECHR 2003-X, *Koç et Tambaş v. Turkey* (dec.), no. 46947/99, 24 February 2005 and *Güzel v. Turkey* (dec.), no. 65849/01, 18 October 2005). Further it does not appear from the file that the applicant has been the object of any other charges during the period of suspension.

37. In the light of the foregoing, the Court concludes that the applicant cannot claim to be a victim within the meaning of Article 34 of the Convention (see *F.A. v. Turkey* (dec.), no. 36094/97, 1 February 2005 and *Güneş v. Turkey* (dec.), no. 38413/02, 1 September 2005).

38. It follows that this part of the application should be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

39. The applicant complained under Article 14 of the Convention, in conjunction with Articles 5 and 6 of the Convention, that he had been discriminated against on the basis of his ethnic origin and political opinions.

40. The Government did not address this issue.

41. The Court notes that the applicant has not substantiated his complaints.

42. It follows that this part of the application should be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

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

45. The Government contested these claims.

46. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand it awards the applicant EUR 1,500 in respect of non-pecuniary damage.

B. Costs and expenses

47. The applicant claimed EUR 4,350 for the costs and expenses incurred before the Court.

48. The Government contested this claim.

49. 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, the Court notes that the applicant failed to submit any supporting documents in support of his claim. The Court therefore rejects this claim.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the independence and impartiality of the military judge who ordered the applicant's detention on remand and the court which decided on his appeal against the detention order admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
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, EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage, to be converted into New Turkish liras at the rate applicable at the date of 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President