



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

SECOND SECTION

CASE OF VEYİSOĞLU v. TURKEY

(Application no. 27341/02)

JUDGMENT

STRASBOURG

26 June 2007

FINAL

26/09/2007

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 Veyisoğlu 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 R. TÜRMESEN,

Mr M. UGREKHEDIDZE,

Mr V. ZAGREBELSKY,

Mrs D. JOČIENĖ,

Mr D. POPOVIĆ, *judges*,

and Mrs F. ELEN-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 5 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 27341/02) 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 Zülfikar Veyisoğlu ("the applicant"), on 1 July 2002.

2. The applicant was represented by Mr S. Doğruer, 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. The applicant complained under Article 6 of the Convention that he was not tried by an independent and impartial tribunal and that the disciplinary penalty which was imposed on him by the Military Disciplinary Courts contravened Article 5 § 1.

4. On 29 November 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

5. The applicant was born in 1978 and lives in Istanbul.

6. At the time of the events, the applicant was a corporal in the Hakkari Mountain Commando Brigade of the Turkish Land Forces.

7. On 29 January 2002 the brigadier general (*tuğgeneral*) filed an indictment against the applicant with the Hakkari Military Disciplinary Court which was attached to the Hakkari Mountain and Commando Brigade. He accused the applicant of insulting his subordinates, of deliberately hiding the truth from his superiors and of giving abusive commands to his subordinates which did not concern military service. In particular, the applicant was accused of forcing his subordinates to make his bed, or do his personal shopping and laundry. On 6 February 2002, the Hakkari Military Disciplinary Court, which was composed of a major (*binbaşı*), a captain (*yüzbaşı*) and a sergeant major (*başçavuş*), found the applicant guilty as charged and sentenced him to “room arrest” for 110 days.

8. On 19 February 2002 the applicant appealed.

9. On 5 March 2002 the Van Supreme Disciplinary Court attached to the General Command of the Gendarmerie gave a decision of non-jurisdiction regarding the first charge and sent the case file to the Military Court attached to the General Command of the Gendarmerie for reconsideration. It acquitted the applicant of the second charge. However, it established that he had given abusive orders to his subordinates. It therefore upheld the decision of 6 February 2002 in respect of the third charge. As a result, the applicant was ordered to serve 40 days' “room arrest”.

10. On 16 April 2002 the applicant petitioned the Minister of Defence for a referral of his case to the office of the public prosecutor at the Military Court of Cassation, by means of an appeal against the decision of the Van Supreme Disciplinary Court. He complained, in particular, of a breach of Articles 5 § 1 and 6 §1 of the Convention.

11. On 7 June 2002 the Chief Magistrate of Military Justice, acting on behalf of the Ministry of Defence, dismissed the applicant's petition.

II. RELEVANT DOMESTIC LAW

A. The Constitution

12. The relevant provisions in force at the material time provided as follows:

Article 9

“...The Administration shall not impose any sanction resulting in a restriction of personal liberty. Exceptions to this provision may be introduced by law regarding the internal order of the Armed Forces. ...”

Article 145

“Military justice shall be dispensed by military courts and military disciplinary organs. These courts and tribunals shall be responsible for conducting proceedings

concerning offences committed by military personnel in violation of military law or are committed against other military personnel, on military premises or in connection with military service and related duties.

Military courts shall also be responsible for dealing with offences committed by civilians where these are designated by special laws as breaches of military law, or have been committed against military personnel, either during their performance of duties designated by law or on military premises so designated.

The jurisdiction of the military courts as regards persons and offences in time of war or a state of emergency, the composition of such courts and the secondment of civilian judges and prosecutors to them where necessary, shall be regulated by law.

The organisation and functions of military judicial organs, the personal status of military judges and the relations between judges acting as military prosecutors and the commanders under whom they serve, shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of the judiciary, and with the requirements of military service. Relations between military judges and the commanders under whom they serve as regards their non-judicial duties shall also be regulated by law in accordance with the requirements of military service.”

B. Law no. 477 on the Establishment and Procedures of the Disciplinary Courts and Disciplinary Offences and Penalties

13. The pertinent provisions of Law no. 477, applicable at the material time, provided as follows:

Article 2

“The Disciplinary Courts shall be composed of three commissioned officers. When prosecuting a non-commissioned officer or a private soldier, one of the members of the court shall be selected amongst the non-commissioned officers.”

Article 3

“The members are appointed for one year by the commanding officer of the military unit. They cannot be removed from office during this period. Moreover, the members of the court cannot be subordinate to the accused.”

Article 4

“The president and the members are obliged to have served in the military sections or military institutions for at least one year, not to have been convicted of an offence except for crimes committed by imprudence, not to be of an inferior rank to the suspect and the president must be, at least, a captain in military rank.”

Article 6

“...there must be one officer who is a member of the military legal service or is a military prosecutor ...”

Article 23

“The members of the court are prevented from carrying out this duty in the following conditions:

- a) if he [or she] is a victim of the alleged crime;
- b) if he[or she] has any sort of hereditary or marital relation to the accused;
- c) if he [or she] is a relative of the accused;
- d) if he [or she] has defended the accused or carried out an executive duty in the course of the proceedings;
- e) if he [or she] has acted as an expert or a witness during the proceedings;
- f) if there are reasonable doubts regarding his [or her] impartiality.”

Article 30

“The commanding officer of the relevant military unit, the executive officer of the military institution, or the accused, has the right to appeal against the decision of the Military Disciplinary Court.”

Article 38

“Room arrest or surveillance sentences given by the Military Disciplinary Courts:

A) Concerning commissioned and non-commissioned officers, civilian staff members, gendarmerie, corporals and sergeants who are military specialists:

...

II. the sentence of room arrest:

- a) In case of availability, the sentence is served alone in a cell.
- b) The arrestees cannot give any orders.
- c) They cannot continue with their general duties.

...

C) Concerning privates, sergeants and corporals:

- a) They serve their room arrest, together with other convicts, in a cell.
- b) The cell is guarded.
- c) During their sentence, sergeants and corporals cannot continue with their general duties. Privates may be employed for austere military services.”

Article 62

“The room arrests ordered by the Military Disciplinary Courts, and served by reserve officers, sergeants and corporals (except those who are military specialists) are not considered to be part of military service. Therefore, these officers are discharged from military service after serving the additional time which they have spent in room arrest.”

THE LAW

I. ADMISSIBILITY

14. The applicant complained that the Military Disciplinary Court which tried him was not independent and impartial, as required by Article 6 § 1 of the Convention, which read insofar as relevant as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

A. Admissibility

15. The Government argued that the charges against the applicant were not “criminal” but “disciplinary”. Therefore, Article 6 § 1 was not applicable in the instant case and that this complaint must therefore be rejected as being incompatible *ratione materiae* with the provisions of the Convention.

16. The applicant contested the Government's submissions and argued that, as a corporal, he had served his sentence under the conditions described in paragraph (C) of Article 38 of Law no. 477. Accordingly, he was locked in a cell for 40 days, with a guard at the door. Furthermore, as this period was not part of his military service, he was discharged from the army 40 days later than originally foreseen.

17. The Court considers that the Government's preliminary objection concerning applicability of Article 6 § 1 is closely linked to an examination of the merits of this complaint. Consequently, the Court joins the preliminary objection to the merits. It further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Applicability of Article 6 § 1

18. The Court recalls that it is first necessary to establish whether the provisions defining the offence charged belong, according to the legal system of the respondent State, to the criminal law, disciplinary law, or both concurrently. However, this is no more than the starting point. The indication so afforded has only a formal, relative value, and must be examined in the light of the common denominator of comparable legislation in the various Contracting States. The very nature of the offence is a factor of greater importance. However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not

also take into consideration the degree of severity of the penalty which the person concerned risks incurring (*Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, §§ 82-83).

19. The Court observes in the present case that the relevant domestic law treated as a disciplinary matter the offences at issue (insulting subordinates, deliberately hiding the truth from superiors and giving abusive commands to subordinates). These offences were designed and pursued the objective of maintaining order within the military and there was no obvious criminal law equivalent for civilians. However, the aforementioned *Engel* criteria being alternative and not necessarily cumulative, the “criminal” nature of the “offence” could, in principle, be determined solely on the basis of the nature and severity of the sanction (see, *mutatis mutandis*, *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 86, ECHR 2003-X; *Young v. the United Kingdom*, no. 60682/00, § 36, 16 January 2007).

20. In the light of the above, the Court considers that the key issue in determining the applicability of Article 6 § 1 of the Convention in the instant case is the assessment of the severity of the applicant's sentence.

21. In this connection, the Court observes that, initially, the Military Disciplinary Court found the applicant guilty of three offences and sentenced him to “room arrest” for 110 days. Subsequently, the Van Supreme Disciplinary Court acquitted the applicant of two charges and the applicant was ordered to serve “room arrest” for 40 days for the remaining offence. The Court finds, however, that the final outcome of the appeal did not diminish the importance of what was at stake for the applicant.

22. The Court considers that the charges against the applicant fell within the criminal sphere since they could lead to serious punishment involving lengthy deprivation of liberty (*Engel and Others*, cited above, § 85). Taking into account, therefore, the nature and severity of the penalty, the Court finds that the applicant was subject to a criminal charge within the meaning of Article 6 § 1 of the Convention.

23. In short, the Court concludes that Article 6 § 1 of the Convention is applicable to the instant case.

2. The substance of the alleged violation of Article 6 § 1

24. The applicant contended that the Military Disciplinary Court which tried and sentenced him was not independent and impartial as its members, in addition to their judicial function, also occupied an administrative post where they were subordinate to the commander who appointed them. He also alleged that there were no safeguards against outside pressures.

25. The Government argued that, in the light of the relevant provisions of the Constitution and Law no. 477, the officers sitting on the bench of the Military Disciplinary Courts provided sufficient safeguards against undue pressure. These courts were therefore considered to be independent and impartial.

26. The Court reiterates that the Convention does not prohibit military courts from ruling on criminal charges against military personnel, provided that the guarantees of independence and impartiality enshrined in Article 6 § 1 are respected (see *Cooper v. the United Kingdom* [GC], no. 48843/99, § 106, ECHR 2003-XII; *Hakan Önen v. Turkey* (dec.), no. 32860/96, 10 February 2004).

27. It notes that, in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 281, § 73).

28. As to the condition of “impartiality” within the meaning of that provision, there are two tests to be applied: the first being subjective, determining the personal convictions of a particular judge in a given case, and the second being objective, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (*Findlay*, cited above, § 73).

29. The Court notes that the present case concerns proceedings before a military jurisdiction where a serviceman was tried for failure to comply with the rules of military discipline. It further notes that it is only the independence and the objective impartiality of the judges who were sitting on the bench of Military Disciplinary Court which are in issue; the applicant did not contest their subjective impartiality (see, *mutatis mutandis*, *Gautrin and Others v. France*, judgment of 20 May 1998, *Reports* 1998-III, pp. 1030–1031, § 58).

30. The Court observes that, according to Article 2 of Law no. 477, the Military Disciplinary Courts consist of three officers, who are servicemen in the army, which takes its orders from the Executive. It notes that only one of these officers is a member of the Military Legal Service with a legal education (Article 6 of Law no. 477). A striking feature of their appointment is the fact that their mandate is limited to a year (*İrfan Bayrak v. Turkey*, no. 39429/98, §§ 34-41, 3 May 2007). They are appointed by the chief officer of the military unit (Article 3 of Law no. 477). Thus, they are placed under the orders of their commanders, within the military hierarchy. They remain subject to military discipline and are assessed by the army for that purpose. The Court notes, in particular, that in the instant case the general brigadier who filed the indictment against the applicant was the hierarchical superior of the officers who were sitting on the bench of the Military Disciplinary Court which tried and sentenced the applicant (*Yavuz and others v. Turkey* (dec.), no. 29870/96, 25 May 2000; *Hakan Önen*, cited above).

31. In view of these elements, the Court concludes that the applicant had legitimate cause to doubt the independence and impartiality of the Military Disciplinary Court.

32. Consequently, it finds that there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 (a) OF THE CONVENTION

33. The applicant complained that the Military Disciplinary Court which ordered his deprivation of liberty was not a competent court within the meaning of Article 5 § 1 (a) of the Convention.

34. The Court observes that this complaint is closely linked to the one examined above and must therefore be declared admissible.

35. The Court further notes it has already found that the Military Disciplinary Court which tried the applicant and sentenced him to “room arrest” was not independent and impartial (paragraphs 31-32 above). Having regard to the violation found and in the circumstances of the case, the Court does not consider it necessary to examine separately the applicant's allegations under Article 5 § 1 (a) of the Convention.

III. 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. In view of the statutory minimum wage in Turkey, the applicant claimed 507.28 New Turkish Liras (YTL) [approximately 275 euros (EUR)] in respect of pecuniary damage caused by the 40-day delay in his discharge from military service. Moreover he claimed EUR 10,000 in respect of non-pecuniary damage.

38. The Government disputed these claims

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. Moreover, the applicant's claim in respect of pecuniary damage is not supported by any evidence. It therefore rejects this claim.

40. As regards the applicant's claim for non-pecuniary damage, it 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

41. The applicant claimed YTL 3,540 [approximately EUR 1,915] for his lawyer's fee, as well as the costs and expenses incurred during the domestic proceedings and before the Court.

42. The Government contested this claim.

43. According to the Court's case-law, an applicant is entitled to reimbursement of 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 considers it reasonable to award the applicant a global sum of EUR 1,000 under this head.

C. Default interest

44. 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 there is no need to examine separately the complaint under Article 5 § 1 (a) of the Convention;
4. *Holds* that the finding of the violation constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant;
5. *Holds*
 - (a) that the respondent State is to pay the applicant EUR 1,000 (one thousand euros) for costs and expenses, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, to be converted into new Turkish liras at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the abovementioned 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 claim for just satisfaction.

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

F. ELEN-PASSOS
Deputy Registrar

F. TULKENS
President