CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF BARIŞIK AND ALP v. TURKEY

(Applications nos. 29765/02 and 31420/06)

JUDGMENT

STRASBOURG

27 November 2007

FINAL

27/02/2008

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 Barışık and Alp 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. TÜRMEN,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mrs D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 6 November 2007,

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

PROCEDURE

1. The case originated in two applications (nos. 29765/02 and 31420/06) 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 two Turkish nationals, Mr Necati Barışık and Mr Yüksel Alp ("the applicants"), on 3 July 2002.

2. The applicants were represented by Mr and Mrs Değirmenci lawyers practising in İzmir. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. On 12 September 2006 the Court decided to give notice of the applications to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the applications at the same time as their admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1975 and 1963 respectively and live in İzmir. They were members of the executive board of the Izmir Branch of the Human Rights Association ("the Association") at the time of lodging their applications to the Court. The applications stemmed from two separate sets of criminal proceedings initiated against them.

A. Proceedings regarding the Association members with prior convictions

5. On 10 July 2001 the Izmir Governor sent a letter to the Association requesting that the membership of thirteen persons be annulled as they were considered to be involved in illegal activities.

6. On 6 August 2001 the Association replied to the Governor, maintaining that they would not execute the request since none of these thirteen persons had convictions which would ban them from founding or becoming a member of an association, as provided by Article 4 §§ 2 and 3 of the Law on Associations (Law No. 2908).

7. On 8 November 2001 and 13 November 2001, respectively, the İzmir Public Prosecutor took the applicants' statements and informed them that a prosecution had been initiated against them for non-compliance with Article 4 of Law No. 2908 and that no court proceedings would be initiated if they paid a fine of 142,366,000 Turkish liras (TRL)[1] per person within ten days. The applicants did not pay the fine within ten days as required by the payment order.

8. Subsequently, on 3 December 2001 the İzmir public prosecutor filed a bill of indictment against the applicants and the other members of the Board. The public prosecutor requested that the accused be sentenced to a fine under Article 75 of the Law on Associations and Article 119 of the Criminal Code for their failure to comply with the İzmir Governor's request. The bill of indictment was not notified to the applicants.

9. On 26 December 2001 the Izmir Magistrates' Court, without holding a hearing, found the applicants and other co-accused guilty as charged and, by a penal order (*ceza kararnamesi*), sentenced them to a fine of TRL 213,548,400[2] per person. In doing so, the court relied on the "simplified procedure" stipulated in Article 386 of the Code of Criminal Procedure for relatively minor offences.

10. The applicants and the other co-accused filed an objection with the Izmir Criminal Court against the decision of 26 December 2001.

11. On 6 February 2002 the İzmir Criminal Court dismissed the objection, without holding a hearing.

12. The applicants paid the due amounts.

13. Subsequently, on 16 December 2002 the first applicant applied to the Ministry of Justice, requesting the Minister to issue a written order (*yazılı emir*) and refer the case to the Court of Cassation.

14. On 29 January 2003 the Minister of Justice issued a written order and instructed the Chief Public Prosecutor at the Court of Cassation to ask the Court of Cassation to set aside the judgment concerned.

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[1] Approximately equivalent to EUR 100 at the time.

[2] Approximately equivalent to EUR 167 at the time.

15. On 14 April 2003 the Court of Cassation quashed the judgment of the Izmir Criminal Court dated 6 February 2002 and the case file was remitted to the Izmir Magistrates' Court.

16. On 14 May 2003 the İzmir Magistrates' Court held a preparatory hearing and included the case in its list. It further decided to summon all of the defendants, including the applicants, to its next hearing.

17. On 14 July, 7 August and 22 October 2003 respectively, the Court held three hearings. The applicants did not attend any of them.

18. At its last hearing held on 22 October 2003, the Magistrates' Court held that it lacked jurisdiction to hear the case because, following the promulgation of Law No. 4854 on 24 April 2003, the sentence faced by the applicants for not complying with the İzmir Governorship's order had been classified as an administrative fine. During these proceedings, none of the defendants made submissions to the court.

19. On 20 November 2003 the second applicant's lawyer appealed against this decision.

20. On 25 February 2004 the Court of Cassation upheld the decision of the İzmir Magistrates' Court Court. The case file was sent to the Governorship of İzmir.

B. Proceedings regarding the Platform of Conscientious Objectors to War

21. On 9 October 2001 the applicants participated in a collective press statement in protest against the military operations of the United States in Afghanistan.

22. By letters dated 8 November 2001 to Mr Barışık and 13 November 2001 to Mr Alp, the prosecutor notified the applicants that a prosecution had been initiated against them under Article 34 of the Law on contributing to the establishment of an unlawful organisation, the so-called “Platform of Conscientious Objectors to War”. The prosecutor also informed the applicants that no court proceedings would be initiated if each of them paid a fine of TRL 142,366,000 within ten days.

23. In the absence of payment, the prosecutor filed an indictment, on 3 December 2001, charging the applicants and five directors of the Association with a violation of Article 34 of the Act. Again, the bill of indictment was not served on the applicants.

24. On 31 December 2001 the Magistrates' Court of İzmir, following the simplified procedure and, thus, without holding a hearing, convicted the applicants as charged (case no. 2001/2160). By issuing a penal order, it sentenced them to an increased fine of TRL 213,548,400 per person. However, the court suspended the sentence pursuant to Article 6 of Law No. 647 on the execution of sentences.

25. On 18 February 2002 the applicants filed an objection with the İzmir Criminal Court against the penal order. They argued that their convictions violated their right to freedom of expression and that "a collective statement to the press" could not be classified as a contribution to the establishment of an unlawful organisation. They further complained that the indictment had not been communicated to them and that the court had not obtained their statements or heard their counter-evidence.

26. On 20 February 2002 the criminal court dismissed their objection, again without holding a hearing.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

Article 302

"Unless otherwise specifically provided by law, objection proceedings are conducted without a hearing. If necessary, the public prosecutor [may be] heard."

Article 386

"As regards infringements falling within its jurisdiction, the ... magistrates' court makes its ruling, without holding a hearing, through a penal order. The order can only be given in cases of simple or aggravated fines or in relation to offences carrying a maximum prison sentence of three months ..."

Article 387

"The judge schedules a hearing if he sees an inconvenience in ruling in the absence of one."

Article 390

"A hearing shall be held if the objection is raised against a prison sentence imposed by a penal order. (...)

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

The objections against 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."

28. 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 the lack of a public hearing before the Criminal Court of First Instance which examines objections to penal orders, would be

in breach of the right guaranteed by Article 6 of the Convention, as well as Article 36 of the Constitution.

29. Article 343 § 1 of the Code of Criminal Procedure, concerning references to the Court of Cassation by written order of the Minister of Justice (*Yazılı emir ile bozma* – " the reference by written order") provides:

> "Where the Minister of Justice has been informed that a judge or court has delivered a judgment that has become final without coming under the scrutiny of the Court of Cassation, he may issue a formal order to the Chief Public Prosecutor requiring him to ask the Court of Cassation to set aside the judgment concerned ..."

THE LAW

30. Given the similarity of the applications, both as regards fact and law, the Court deems it appropriate to join them.

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

31. The applicants complained under Article 6 § 1 of the Convention that they had been deprived of their right to a fair and public hearing in the determination of the criminal charges against them. They stressed the fact that the courts had determined their case without holding a hearing. The applicants further alleged a breach of Article 6 § 3 (a) of the Convention in that they had not been informed promptly of the accusations against them as the public prosecutor's indictment had not been communicated to them. Finally, they complained that they had been deprived of their right to submit counter-arguments and evidence, including the examination of witnesses, within the meaning of Article 6 § 3 (b) and (d).

Article 6, in so far as relevant reads 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:
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. Admissibility

32. The Government argued that the applicants have failed to exhaust the domestic remedies in respect of the second set of criminal proceedings. In this connection, they recalled that at the end of the first set of criminal proceedings the first applicant had applied to the Ministry of Justice, requesting the Minister to refer the case to the Court of Cassation. The Minister had acted in line with this request and, as a result, the case had been referred to the Court of Cassation. As the applicants did not follow the same procedure for the second set of proceedings, in the Government's view, they could not be considered to have exhausted domestic remedies, within the meaning of Article 35 § 1 of the Convention.

33. The Court notes that the remedy referred to by the Government is an extraordinary remedy under Turkish law. According to Article 343 of the Code of Criminal Procedure (see paragraph 29 above), only the Chief Public Prosecutor at the Court of Cassation is empowered to refer a case to the Court of Cassation, but he may do so only on the formal instructions of the Minister of Justice. The remedy in question is therefore not directly accessible to people whose cases have been tried. Consequently, regard being had to the generally recognised rules of international law, it is not necessary to try this remedy in order to comply with the requirements of Article 35 § 1 of the Convention (see *Öztürk v. Turkey* [GC], no. 22479/93, § 45, ECHR 1999-VI). Accordingly, the Court dismisses the Government's preliminary objection.

34. 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. The general principles

35. 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).

36. 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).

37. Furthermore, Article 6 § 1 does not guarantee a right of 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

38. The Court considers that, in the instant case, it is more appropriate to deal with the applicants' 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.

39. At the outset, the Court notes that, in a judgment delivered 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.

40. The Court observes, however, that in accordance with the relevant domestic law prevailing at the time of the events, no public hearing was held during the applicants' prosecution. Both the İzmir Magistrates' Court which issued the penal orders and fined the applicants, and the İzmir Criminal Court which examined their objections, took their decisions on the basis of the documents in the case files. Only the İzmir Public Prosecutor took the applicants' statements in November 2001. They were not given the opportunity to defend themselves in person or through a lawyer before the courts which determined their cases. The Court, therefore, considers that the applicants were not able to follow the criminal proceedings effectively. As regards the subsequent procedure which started upon the written order issued by the Minister of Justice on 29 January 2003, the Court notes that no defence submissions were taken from the applicants and the other co-accused during the proceedings, which ended without curing, or providing redress for the earlier defects (see *a contrario, Şentuna v. Turkey* (dec.), no. 71988/01, 25 January 2007).

41. In view of the above, the Court concludes that the procedure followed by the judicial authorities prevented the applicants from exercising

their defence rights properly and thus rendered the criminal proceedings unfair.

42. Consequently, there has been a violation of Article 6 § 1 of the Convention.

II. 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 applicants each claimed 427.09 New Turkish Liras (YTL) in respect of pecuniary damage and EUR 15,000 in respect of non-pecuniary damage.

45. The Government contested these claims.

46. As regards pecuniary damage, the Court notes that it cannot speculate as to what the outcome of proceedings compatible with Article 6 of the Convention would have been. Accordingly, it considers that no award can be made to the applicants under this head (*Karahanoğlu v. Turkey*, no. 74341/01, § 43, 3 October 2006).

47. Moreover, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicants.

B. Costs and expenses

48. The applicants also claimed EUR 4,000 for legal fees and EUR 300 for the costs and expenses incurred before the Court.

49. The Government contested the claims.

50. According to the Court's case-law, an applicant is entitled to the 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, the applicants have not substantiated that they have actually incurred the costs so claimed. Accordingly, it makes no award under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 27 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President