



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

SECOND SECTION

CASE OF DAĞLI v. TURKEY
(Application no. 28888/02)

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 Dağlı 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. TÜRMEŒ,

Mr V. ZAGREBELSKY,

Mrs A. MULARONI,

Mrs D. JOČIENĚ,

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 an application (no. 28888/02) 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 Ahmet Dağlı (“the applicant”), on 17 May 2002.

2. The applicant was represented by Mr S. Cengiz, a lawyer practising in İzmir. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 19 September 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it also 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 1963 and lives in İzmir.

5. The applicant was a member of the executive board of the İzmir Branch of the Human Rights Association (“the Association”) at the time of lodging his application to the Court.

6. On 10 July 2001 the İzmir 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.

7. 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).

8. On 8 August 2001 the İzmir Public Prosecutor took the applicant's statement and informed him that a prosecution had been initiated against him for non-compliance with Article 4 of Law No. 2908 and that no court proceedings would be initiated if he paid a fine of 142,366,000 Turkish liras (TRL)¹ within ten days. The applicant did not pay the fine within ten days as required by the payment order.

9. Subsequently, on 3 December 2001 the İzmir public prosecutor filed a bill of indictment against the applicant and the other members of the executive board of the İzmir Branch of the Human Rights Association. 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 applicant.

10. On 26 December 2001 the İzmir Magistrates' Court, without holding a hearing, found the applicant and other co-accused guilty as charged and, by a penal order (*ceza kararnamesi*), sentenced them to a fine of TRL 213,548,400² 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.

11. The applicant and the other co-accused filed an objection with the İzmir Criminal Court against the decision of 26 December 2001.

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

13. On 13 February 2002 a payment order was issued in respect of the applicant. The applicant paid the due amount in three instalments on 12 March, 9 April and 9 May 2002 respectively.

14. Subsequently, on 16 December 2002 one of the co-accused, Mr N.B., applied to the Ministry of Justice, requesting the Minister to refer the case to the Court of Cassation by way of a written order (*yazılı emir*).

15. 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.

16. On 14 April 2003 the Court of Cassation quashed the judgment of the İzmir Criminal Court dated 6 February 2002 and the case file was remitted to the İzmir Magistrate's Court.

¹ Approximately equivalent to EUR 100 at the time.

² Approximately equivalent to EUR 167 at the time.

17. 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 applicant, to its next hearing.

18. On 14 July, 7 August and 22 October 2003 respectively, the court held three hearings. The applicant did not attend any of them.

19. 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 imposed on the applicant for not complying with the İzmir Governorship's order had been classified as an administrative fine. During the proceedings, none of the defendants made submissions to the court.

20. On 20 November 2003 some of the defendants, but not the applicant, appealed against this decision.

21. On 25 February 2004 the Court of Cassation upheld the decision of the İzmir Criminal Court. The case file was sent to the Governorship of İzmir.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. 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.”

23. 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.

24. 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*) 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

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained under Article 6 § 1 of the Convention that he did not have a fair and public hearing in the determination of the criminal charges against him. He stressed the fact that the courts had determined his case without holding a hearing. He further alleged a breach of Article 6 § 3 and stated that he had not been informed promptly of the accusations against him as the public prosecutor's indictment had not been communicated to him. 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;

(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;”

26. The Government contested these claims. They contended that the procedure followed by the judicial authorities was in compliance with the relevant provisions of the Code of Criminal Procedure. It was a simplified procedure for minor crimes, aimed at diminishing the work load of the

courts. They argued that the right to an effective remedy did not necessarily mean the right of appeal in every circumstance. In the instant case, the applicant had the opportunity to object to the penal order, before the nearest Criminal Court of First Instance.

A. Admissibility

27. The Court 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

1. *The general principles*

28. 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).

29. 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).

30. 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*

31. The Court considers that, in the instant case, it is more appropriate to deal with the applicant's 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.

32. 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.

33. 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 applicant's prosecution. Both the İzmir Magistrates' Court which issued a penal order and fined the applicant, and the İzmir Criminal Court which examined his objection, took their decisions on the basis of the documents in the case file. Only the İzmir Public Prosecutor took the applicant's statement on 8 August 2001. He was not given the opportunity to defend himself in person or through a lawyer before the courts which determined his case. The Court, therefore, considers that the applicant was not able to follow the criminal proceedings effectively. As regards the subsequent procedure which started upon the written order of the Minister of Justice on 29 January 2003, the Court notes that the applicant had already paid his fine by that date (see paragraph 13 above). Furthermore, no defence submissions were taken from the applicant and the other co-accused during these 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).

34. In view of the above, the Court concludes that the procedure followed by the judicial authorities prevented the applicant from exercising his defence rights properly and thus rendered the criminal proceedings unfair.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

36. In his reply to the Government's observations, the applicant submitted further complaints. He invoked Article 13, stating that during the appeal proceedings the İzmir Criminal Court also did not hold any hearings. He further complained under Article 1 of Protocol No. 1 that he had had to pay a fine which was imposed on him as a result of unfair proceedings.

37. The Court recalls that, pursuant to Article 35 § 1 of the Convention, the Court may only deal with a matter "within a period of six months from the date on which the final decision was taken". The running of the six

months time-limit is, as a general rule, interrupted by the first letter from the applicant indicating an intention to lodge an application and giving some indication of the nature of the complaints made. As regards complaints not included in the initial application, the running of the six months time-limit is not interrupted until the date when the complaint is first submitted to a Convention organ (see, *Allan v. the UK* (dec.), no. 48539/99, 28 August 2001).

38. In the present case, the Court notes that these complaints were not mentioned in any communication prior to 20 March 2007.

39. Consequently, the Court concludes that this part of the application should be rejected as being out of time, pursuant to Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 7 TO THE CONVENTION

40. The applicant complained that he had been deprived of his right to have his sentence reviewed by a higher tribunal in breach of Article 2 of Protocol No. 7 to the Convention.

41. The Court notes that, as Turkey has not ratified Protocol No. 7, this complaint is incompatible *ratione personae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 1 and 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant claimed 438 euros (EUR) in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage.

44. The Government contested these claims.

45. 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 applicant under this head (*Karahanoğlu v. Turkey*, no. 74341/01, § 43, 3 October 2006).

As regards the applicant's claim for non-pecuniary damage, the Court 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

46. The applicant also claimed EUR 3,540 for the costs and expenses incurred before the Court. In this respect, he submitted a legal fee agreement.

47. The Government contested this claim.

48. 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, regard being had to the information in its possession and the above criteria, the Court finds it reasonable to award the sum of EUR 500 covering all heads.

C. Default interest

49. 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 the applicant's right to a fair hearing admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
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 500 (five hundred euros) in respect of costs and expenses, 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 27 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President