



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

THIRD SECTION

CASE OF KENAR v. TURKEY

(Application no. 67215/01)

JUDGMENT

STRASBOURG

13 December 2007

FINAL

13/03/2008

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 Kenar v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,

Mr C. BÎRSAN,

Mr R. TÜRMEŖ,

Mrs E. FURA-SANDSTRÖM,

Mrs A. GYULUMYAN,

Mr E. MYJER,

Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 22 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 67215/01) 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 İbrahim Kenar (“the applicant”), on 18 September 2000.

2. The applicant was represented by Ms H. Çekiç, a lawyer practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 1 December 2005 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the alleged unfairness of the proceedings 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

4. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The arrest and detention of the applicant

5. The applicant was born in 1972 and lives in Edirne.

6. On 7 February 1996 the applicant was arrested by police officers from the anti-terrorist branch of the Edirne Security Directorate on suspicion of membership of an illegal armed organisation, namely the DHKP-C (*Devrimci Halk Kurtuluş Partisi-Cephesi*; the Revolutionary People's Liberation Party-Front).

7. In a letter of 8 February 1996 the Edirne Security Director asked the Chief Public Prosecutor to grant permission to keep the applicant and four other arrested persons in police custody until 12 February 1996. The security director reasoned that the police needed time to question the detainees in detail so that they could apprehend other members of the DHKP-C. On the same day, the Chief Public Prosecutor granted the leave requested until the end of the working day on 11 February 1996.

8. On 10 February 1996 police officers took statements from A.İ. and Ü.U. who had been victims of illegal acts committed by members of the DHKP-C. In particular, Ü.U. named the applicant as the perpetrator of the petrol bomb (Molotov cocktail) attack on his lorry.

9. During his detention in police custody the applicant later alleged that he was subjected to various forms of ill-treatment and forced to sign certain statements under duress.

10. Following his release from police custody, on 12 February 1996, the applicant underwent a medical examination at the Edirne Forensic Institute. The medical report stated that there was no sign of injury or physical violence on the applicant's body.

11. On 12 February 1996 the Chief Public Prosecutor questioned the applicant in connection with the acts allegedly committed by him and his statements made at the Security Directorate. The applicant submitted that the police officers had targeted him because he had previously been convicted for a similar offence and had been kept in prison for five months. The applicant maintained that he had been forced to sign a prepared statement under duress in which he admitted to having carried out illegal activities on behalf of the DHKP-C.

12. On 12 February 1996 the applicant's father filed an application with the Chief Public Prosecutor's office in Edirne inquiring into the whereabouts of his son. He complained that he had not been able to see or learn about the fate of his son since his detention by the police officers on 8 February 1996 and that he was worried about his son's life.

13. On the same day, the applicant was brought before the Edirne Magistrates' Court (*Edirne Sulh Ceza Mahkemesi*), which ordered his detention on remand. He allegedly raised his complaint concerning the alleged ill-treatment before the court. He stated that he had been tortured while in custody and denied the accusations during the trial before the Istanbul State Security Court ("SSC"). He did not, however, give details of the alleged ill-treatment, but merely asserted that he had been threatened by the officers and had signed documents without being aware of the contents.

2. The criminal proceedings before the Istanbul SSC

14. On 11 March 1996 the Chief Public Prosecutor attached to the Istanbul SSC filed a bill of indictment charging the applicant and four other co-accused with membership of an illegal armed organisation, notably the DHKP-C, and aiding and abetting members of the said organisation. The charges against the applicant were brought under Article 168 § 2 of the Criminal Code and Article 5 of Law no. 3713 (Anti-terrorism Act). The indictment contained three counts of crimes allegedly perpetrated by the applicant. Under count one, the applicant was alleged to have been involved in distributing illegal leaflets containing propaganda by the DHKP-C; count two consisted of the allegations that the applicant had thrown a petrol bomb at a lorry belonging to Ü.U. and that he had also put up a poster in the entrance to a shop; and under count three, it was alleged that the applicant had painted a slogan on the walls of a stadium.

15. At the hearing of 21 May 1996 held by the Istanbul SSC, the applicant denied the charges against him and claimed that, following his arrest on 6 February 1996, he had been subjected to various forms of torture and that he had been forced to sign written statements prepared by the police officers. He thus denied the accuracy of the statements allegedly made by him during his detention in police custody. He accepted that his statements before the Chief Public Prosecutor and the investigating judge were true.

16. In his observations on the merits of the criminal proceedings against the applicant and other co-accused, the public prosecutor submitted that the applicant had denied the allegation that he had thrown a petrol bomb at a cash dispenser belonging to a bank, but that other co-accused had admitted to having committed the offence in question. He noted, however, that there was sufficient evidence on which to convict the applicant for having aided and abetted the illegal organisation. Thus, the public prosecutor asked the court to apply Article 169 of the Criminal Code and Article 5 of Law no. 3713 in respect of the applicant.

17. On 20 March 1997 the applicant filed his observations on the merits of the case and also responded to the public prosecutor's submissions. He denied the charges against him and asserted that his statements at the police station had been obtained under duress. He asserted that only the statements which he had made before the judge were accurate.

18. On 8 April 1997 the Istanbul SSC found the applicant guilty of the offence under Article 169 of the Criminal Code, notably for aiding and abetting the DHKP-C, and sentenced him to four years and six months' imprisonment. The court noted that the applicant had earlier been given leave to comment on the re-qualification of his acts as constituting an offence under Article 169 rather than Article 168 § 2 of the Criminal Code. The court further reasoned that the applicant's statements at the Security Directorate, the testimonies of his co-accused during the preliminary

investigation, the testimonies of the police officers under oath and the evidence contained in the case-file had supported the conviction and punishment of the applicant for the offence under Article 169 of the Criminal Code.

19. The court also noted the applicant's allegations, as part of his defence submissions, that he had been subjected to various forms of torture and that he had been made to sign written statements prepared by the police officers. However, relying on the medical report dated 12 February 1996, it found them unconvincing.

3. The appeal and subsequent proceedings

20. On 21 May 1997 the applicant appealed to the Court of Cassation. He argued that he had been convicted solely on the basis of the statements made by him and his co-accused under duress at the police station. He pointed out that his co-accused had already denied the accuracy of the statements allegedly made by them in the police station. He therefore contended that the first-instance court had erred in its judgment in relying on the statements obtained under duress.

21. On 9 December 1997 the Court of Cassation quashed the judgment of the first-instance court. It held that the applicant's activities were of a varied and continuous nature. It therefore ruled that the applicant should have been tried and convicted of the offence under Article 168 § 2 of the Criminal Code, namely for membership of an illegal armed organisation.

22. By a judgment of 7 July 1998 the Istanbul SSC reiterated its previous finding that the applicant's acts constituted the offence under Article 169 of the Criminal Code. The case was transferred to the Grand Chamber of the Court of Cassation for Criminal Law Matters (*Yargıtay Ceza Genel Kurulu*).

23. On 11 May 1999 the Grand Chamber quashed the judgment of the first-instance court. It reasoned that the evidence contained in the case-file had clearly indicated that the applicant had been an active member of the DHKP-C. The court therefore referred the case to the Istanbul State Security Court for reconsideration.

24. Meanwhile, on 18 June 1999 the Grand National Assembly amended Article 143 of the Constitution and excluded military members from the state security courts. Following similar amendments made on 22 June 1999 to the Law on the State Security Courts, the military judge sitting on the bench of the Istanbul State Security Court hearing the applicant's case was replaced by a civilian judge.

25. On 22 July 1999 the applicant was examined by a medical doctor at the Edirne Forensic Medicine Institute. The doctor noted that there was no sign of ill-treatment or physical violence on the applicant's body.

26. By a judgment of 4 April 2000 the Istanbul SSC, composed of three civilian judges, adhered to the Court of Cassation's decision and convicted

the applicant for membership of an illegal armed organisation, namely the DHKP-C, under Article 168 § 2 of the Criminal Code. The court however acquitted the applicant of the charges of throwing a petrol bomb at a lorry and burning down a cash dispenser belonging to a bank. It sentenced the applicant to twelve years and six months' imprisonment and further disbarred him from public service.

27. On 1 February 2002 the applicant was released from prison following a decision to suspend the execution of his sentence.

28. Following the entry into force of the new Criminal Code on 1 June 2005, which prescribed a less severe sentence under Article 314 § 2 for the offence committed by the applicant, in a decision of 14 October 2005 the Istanbul Assize Court reviewed the applicant's sentence and reduced it to six years and three months' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002), *Öcalan v. Turkey* [GC], no. 46221/99, §§ 52-54, ECHR 2005-IV).

30. By Law no. 5190 of 16 June 2004, published in the Official Journal on 30 June 2004, State Security Courts were abolished.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

31. The applicant complained that he had not received a fair hearing by an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention on account of the presence of a military judge sitting on the bench of the Istanbul State Security Court. He alleged further that his conviction had been based solely on the confessions extracted from him under duress.

Article 6 § 1 of the Convention reads as follows:

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

32. The Government contested these allegations.

33. The applicant maintained his complaints.

A. Admissibility

34. The Court notes that this part of 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. The remainder of the application must therefore be declared admissible.

B. Merits

1. *Independence and impartiality of the State Security Court*

35. The Government submitted that the applicant had been convicted by a state security court which had been composed of three civilian judges since the military judge had been replaced before the end of the proceedings.

36. The applicant maintained his allegations.

37. The Court has consistently held that certain aspects of the status of military judges sitting as members of the state security courts rendered their independence from the executive questionable (see *İncal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 68; and *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, § 39). The Court also found in *Öcalan v. Turkey* case (cited above, §§ 114-115) that, when a military judge participated in one or more interlocutory decisions that continued to remain in effect in the criminal proceedings concerned, the military judge's replacement by a civilian judge in the course of those proceedings before the verdict was delivered, failed to dissipate the applicant's reasonably held concern about that trial court's independence and impartiality, unless it was established that the procedure subsequently followed in the state security court sufficiently allayed that concern.

38. In the instant case, the Court observes that the military judge sitting on the bench of the Istanbul State Security Court was replaced only at the last stage of the proceedings (see paragraph 24 above). Prior to this period, the domestic court had already established the guilt of the applicant. The only remaining issue to be decided by a bench composed of the three civilian judges was the re-qualification of the offence and the imposition of the final sentence subsequent to the decision of the Grand Chamber of the Court of Cassation (see paragraphs 21 and 26 above).

39. In this connection, the present application can be distinguished from the Court's decision in the case of *Mahmut Yaşar v. Turkey* (no. 46412/99 (dec.), 31 March 2005). In that case, in dismissing the applicant's complaint concerning the alleged lack of independence and impartiality of the Diyarbakır State Security Court, the Court considered that subsequent to the decision of the 9th Chamber of the Court of Cassation to quash its judgment,

the Diyarbakır State Security Court, composed of three civilian judges, made a full re-examination of the facts of the case and a re-assessment of the evidence, before once again convicting the applicant. In the present case, however, the State Security Court was bound by the decision of the Grand Chamber of the Court of Cassation and has not re-examined or re-assessed the evidence.

40. In these circumstances, the Court considers that the replacement of the military judge before the end of the proceedings failed to dispose of the applicant's reasonably held concern about the trial court's independence and impartiality (see *Aslan and Şancı v. Turkey*, no. 58055/00, 5 December 2006).

41. There has accordingly been a violation of Article 6 § 1 of the Convention.

2. Alleged unfairness of the proceedings

42. The applicant maintained that the Istanbul State Security Court convicted him on the basis of the statements obtained under torture.

43. The Government claimed that the applicant's allegations were manifestly ill-founded. They noted in this connection that the domestic courts examined the applicant's allegations and found that they were unfounded having regard in particular to the medical report dated 12 February 1996 (see paragraph 10 above) and to the applicant's failure to substantiate his claims.

44. Having regard to its finding that the applicant's right to a fair hearing by an independent and impartial tribunal has been infringed, the Court considers that in the circumstances of this case it is unnecessary to examine the applicant's remaining complaint concerning the alleged unfairness of the proceedings (*Işık v. Turkey*, no. 50102/99, § 38-39, 5 June 2003).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 5,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 for non-pecuniary damage.

47. The Government submitted that no award should be made under this heading

48. Regarding the question of pecuniary damage, the Court considers that it cannot speculate as to what the outcome of the proceedings before the State Security Court might have been had the violation of the Convention not occurred (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, § 85). Moreover, the applicant's claim in respect of pecuniary damage was not borne out by any evidence. It is therefore inappropriate to award the applicant compensation for pecuniary damage.

49. With regard to non-pecuniary damage, the Court considers that the finding of a violation constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant (see *Çıraklar*, cited above, § 49).

50. Furthermore, the Court considers that where an individual, as in the instant case, has been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see *Öcalan*, cited above, § 210, *in fine*).

B. Costs and expenses

51. The applicant also claimed EUR 5,500 for the costs and expenses incurred before the Court.

52. The Government submitted that no award should be made under this head since he failed to substantiate his claims with relevant supporting documents.

53. 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, regard being had to the above criteria and the applicant's failure to substantiate his claim, the Court makes no award under this heading.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of the application admissible;
2. *Holds* there has been a violation of Article 6 § 1 of the Convention as regards the complaint relating to the independence and impartiality of the Istanbul State Security Court;
3. *Holds* that it is not necessary to consider the applicant's remaining complaint under Article 6 of the Convention relating to the fairness of the proceedings;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
5. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 13 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley NAISMITH
Deputy Registrar

Boštjan M. ZUPANČIČ
President