



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

SECOND SECTION

CASE OF ERSEVEN AND OTHERS v. TURKEY

(Application no. 27225/02)

JUDGMENT

This version was rectified on 26 June 2008
under Rule 81 of the Rules of Court

STRASBOURG

24 January 2008

FINAL

24/04/2008

*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 Erseven and Others v. Turkey,

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

Françoise Tulkens, *President*,

András Baka,

Ireneu Cabral Barreto,

Rıza Türmen,

Mindia Ugrekhelidze,

Vladimiro Zagrebelsky,

Danutė Jočienė, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 4 January 2008,

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

PROCEDURE

1. The case originated in an application (no. 27225/02) 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 Mr İlhami Erseven, Mr Hikmet Yıldırım, Mr Veli Ateş, Mr İsmail Özturun, Mr Ellez Duman, Mr İsmail Kaya, Mr Kenan Atakul, Mr Süleyman Çetinkaya and Mr Bekir Arslan (“the applicants”), on 22 April 2002.

2. The applicants were represented by Mr Fevzi Gümüş, 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 13 June 2006 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the alleged breach of the applicants' right to a fair hearing 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 applicants, who were born in 1954, 1957, 1961, 1965, 1960, 1956, 1959, 1964 and 1958 respectively, live in Ankara, Izmir, Istanbul and Çorum. They were members of the executive and auditors boards

of the Pir Sultan Abdal Cultural Association (“the Association”), a non-governmental organisation with its headquarters in Ankara.

5. On 15 November 2000 officers from the Ankara governor's office carried out an inspection at the headquarters of the Association. They found that the members of the executive board had failed to establish a membership registration book and that the members of the auditors board had failed to conduct a periodical inspection of the Association, in breach of Articles 62 and 29 of the Law on Associations (Law no. 2908).

6. On 21 November 2000 officers from the Ankara Security Directorate also conducted an inspection of the registers of the association and discovered a number of defects. The Security Directorate then requested an investigation against the members of the executive and auditors boards of the association.

7. On an unspecified date, the Ankara public prosecutor imposed a fine of 92,510,000¹ Turkish Liras (TRL) per person on the members of the executive and auditors boards of the Association.

8. On 15 January 2001 a payment order was served on the members of the executive and auditors boards who, however, did not pay the fine within the statutory ten-day time-limit.

9. Subsequently, on 17 April 2001 the Ankara public prosecutor filed a bill of indictment against the applicants, along with seventeen other persons who were also members of the executive and auditors boards of the Association. The public prosecutor requested that the accused be sentenced to a fine, under Article 86 of the Law on Associations and Article 119 § 5 of the Criminal Code, for their failure to comply with Articles 29 and 62 of the same Law.

10. On 11 September 2001 the Ankara Magistrates' Court (*sulh ceza mahkemesi*) found the applicants and the other co-accused guilty as charged and, by issuing an order (*ceza kararnamesi*), sentenced them to an increased fine of TRL 136,890,000² per person.

11. On 8, 9, 12 and 22 October 2001, the applicants filed objections against the decision of 11 September 2001. In their petitions, the applicants maintained that they had been deprived of the opportunity to make defence submissions and that, therefore, they did not receive a fair trial.

12. The Ankara Criminal Court of First Instance (*asliye ceza mahkemesi*) dismissed the applicants' objections on the following dates:

- 11 October 2001 in respect of İlhami Erseven, Bekir Aslan, Süleyman Çetinkaya and İsmail Kaya;³
- 15 October 2001 in respect of İsmail Öztörün;

¹ Approximately 158 euros (EUR) at the time.

² Approximately EUR 107 at the time; the fine was actually worth less by then because of high inflation.

³ Rectified on 26 June 2008. The former version read: “- 12 October 2001 in respect of Kemal Derin;”.

- 22 October 2001 in respect of Kenan Atakul and Hikmet Yıldırım;
and
- 30 October 2001 in respect of Ellez Duman.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. 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 an imprisonment sentence given by a penal order. (...)

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

The objections against the 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.”

14. 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 the objections against the penal orders would be in breach of the right guaranteed under Article 6 of the Convention, as well as Article 36 of the Constitution.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

15. The applicants complained that they had been denied a public hearing in the determination of the criminal charges against them and that they had not been allowed to defend themselves in person before the trial court in breach of Article 6 of the Convention, which reads, insofar as relevant, as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing by [a] tribunal...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(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...”

A. Admissibility

16. The Government submitted that six of the applicants, with the exception of Kenan Atakul, Hikmet Yıldırım and Ellez Duman, had failed to comply with the six months' rule. They noted that the penal orders had become definite by the decision of Ankara Criminal Court of First Instance on the dates indicated above (see paragraph 12) and that the application had been lodged on 22 April 2002, which was more than six months later. They therefore asked the Court to dismiss the application in respect of İlhami Erseven, Bekir Aslan, Süleyman Çetinkaya, İsmail Kaya and İsmail Öztörün¹ in accordance with Article 35 § 1 of the Convention.

17. The applicants did not respond to the Government's submission.

18. The Court notes that most of the penal orders became final by the decisions dated 11 October 2001, 12 October 2001 and 15 October 2001 rendered by the Ankara Criminal Court of First Instance, whereas the application was introduced with the Court on 22 April 2002. It is therefore clear that the application was not lodged within six months of the final decision in respect of the above-mentioned six applicants. Furthermore, in their observations in reply to those of the Government, the applicants have failed to provide any explanation concerning the date on which they had learned about the final decision given by the Ankara Criminal Court of First Instance. Nor did they establish the existence of specific circumstances

¹ Rectified on 26 June 2008. The former version read: “and Kemal Derin”.

which might have prevented them from observing the time-limit laid down in Article 35 § 1 of the Convention.

19. In view of the above, the Court concludes that the application has been introduced out of time in respect of the applicants İlhami Erseven, Bekir Aslan, Süleyman Çetinkaya, İsmail Kaya and İsmail Öztörün,¹ and must be rejected under Article 35 §§ 1 and 4 of the Convention.

20. As regards the remaining three applicants, namely Kenan Atakul, Hikmet Yıldırım and Ellez Duman, the Court holds 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. General principles

21. 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 hearing, the guarantee of which is one of the principles of any democratic society (see, among others, *Adem Arslan v. Turkey*, no. 75836/01, §§ 25-29, 19 December 2006; *Stefanelli v. San Marino*, no.35396/97, § 19, ECHR 2000-II).

22. 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).

23. Furthermore, Article 6 § 1 does not guarantee a right to appeal from a decision of first instance. Where, however, domestic law provides for such a right, 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).

¹ Rectified on 26 June 2008. The former version read: “and Kemal Derin,”.

2. *Application in the present case*

24. The Court notes at the outset 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 (see, *Adem Arslan*, cited above, § 28).

25. It notes, 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 Ankara Magistrates' Court which issued the penal orders and sentenced the applicants to pay fines, and the Ankara Criminal Court of First Instance which examined their objections, took their decisions on the basis of the documents in the case files. The applicants were not given the opportunity to defend themselves in person or through a lawyer before the courts which decided their case. The Court, therefore, considers that the applicants were not able to participate in the criminal proceedings effectively.

26. 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.

27. It holds that there has been a violation of Article 6 § 1 of the Convention in respect of the applicants Kenan Atakul, Hikmet Yıldırım and Ellez Duman.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. 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**

29. The applicants each claimed a total amount of 500,000 US dollars (USD) in respect of pecuniary and non-pecuniary.

30. The Government contested these claims.

31. 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).

32. 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

33. Without specifying any amount, the applicants asked the Court to make an award in respect of the costs and expenses incurred before the domestic courts and the European Court. In this connection, the applicants submitted a contract where each of them had agreed to pay EUR 1,000 to their representative.

34. The Government maintained that the amount claimed by each applicant was excessive.

35. 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 rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the total sum of EUR 1,500 to the applicants jointly for the proceedings before the Court.

C. Default interest

36. 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 remainder of the application admissible in respect of the applicants Kenan Atakul, Hikmet Yıldırım and Ellez Duman, and inadmissible for the other six applicants;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the applicants Kenan Atakul, Hikmet Yıldırım and Ellez Duman;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by these three applicants;
4. *Holds*
 - (a) that the respondent State is to pay Kenan Atakul, Hikmet Yıldırım and Ellez Duman, jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the total sum of EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into New Turkish liras at the rate applicable at the date of settlement;
 - (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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 24 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President