



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

SECOND SECTION

CASE OF FEDAI ŞAHİN v. TURKEY

(Application no. 21773/02)

JUDGMENT

STRASBOURG

21 October 2008

FINAL

21/01/2009

This judgment may be subject to editorial revision.

In the case of Fedai Şahin v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 30 September 2008,

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

PROCEDURE

1. The case originated in an application (no. 21773/02) 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 Fedai Şahin (“the applicant”), on 7 July 2000.

2. The applicant was represented by Mrs G. Altay, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 10 September 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1968 and lives in Turkey.

5. On 6 November 1992 the applicant was taken into custody within the context of a police operation carried out against an illegal organisation, namely the TKP/ML – TIKKO (*the Turkish Communist Party-Marxist Leninist - Turkish Workers and Peasants’ Liberation Army*). On 17 November 1992 the applicant was placed in detention on remand.

6. By an indictment dated 10 February 1993 the public prosecutor initiated criminal proceedings against the applicant before the Istanbul State Security Court, accusing him, *inter alia*, of membership of an illegal armed organisation and of involvement in activities which aimed at undermining the constitutional order of the State. The prosecution sought the death penalty under Article 146 § 1 of the Criminal Code.

7. On 18 June 1999 the Constitution was amended and the military judge sitting on the bench of the Istanbul State Security Court was replaced by a civilian judge.

8. On 12 June 2000 the applicant was convicted as charged by the Istanbul State Security Court and sentenced to death.

9. On 15 May 2001 the Court of Cassation quashed the applicant's conviction for procedural reasons. The case was remitted to the Istanbul State Security Court for further examination.

10. On 18 July 2001 the Istanbul State Security Court ordered the applicant's release pending trial.

11. On 7 May 2004 State Security Courts were abolished following a constitutional amendment and the applicant's case was transmitted to the Istanbul Assize Court.

12. On 31 January 2005 the Istanbul Assize Court found the applicant guilty and sentenced him to life imprisonment, pursuant to Article 146 § 1 of the Criminal Code.

13. On 20 March 2006 the Court of Cassation quashed the Istanbul Assize Court's judgment for having erred in its assessment of the facts. The case was remitted to the Istanbul Assize Court for re-trial.

14. Between 12 May 2006 and 30 May 2007 the Istanbul Assize Court held six hearings and dealt with procedural issues, such as the delivery of arrest warrants, the appointment of advocates for some of the accused and the extension of time-limits for defence submissions, etc.

15. On 21 May 2008 the Istanbul Assize Court delivered its judgment in respect of the applicant and thirteen other co-accused who stood trial for actively participating in the illegal activities of the TKP/ML – TIKKO with a view to undermining the constitutional order of the State. Having established that the applicant had been involved in armed attacks, the killing of several individuals and robberies, the court found the applicant guilty of the alleged offence and sentenced him to life imprisonment, pursuant to Article 146 § 1 of the Criminal Code. The applicant appealed.

16. The proceedings are currently pending before the Court of Cassation.

THE LAW

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

17. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement of Article 6 § 1 of the Convention, which reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

18. The Government submitted that the proceedings in question were complex due to the large number of co-accused, and that delays had been caused by the applicant’s conduct together with that of his co-accused.

19. The period to be taken into consideration began on 6 November 1992 and has not yet ended. It has thus lasted over 15 years and nine months **(to be updated)** for two levels of jurisdiction.

A. Admissibility

20. 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

21. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, as well as the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II)

22. The Court notes at the outset that it has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Pélissier and Sassi*, cited above).

23. The Court further observes that there were substantial delays both at first instance and in the appeal proceedings. It can accept that the case, mounted against a large number of defendants, was complex. However, it cannot but note that the proceedings have already lasted almost sixteen years to date. The length of this period is excessive and cannot be justified by the complexity of the case alone. In the Court’s opinion, the length of the proceedings against the applicant can only be explained by the failure of the domestic courts to deal with the case diligently.

24. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

25. The applicant complained under Article 6 § 1 of the Convention that he had been tried by a court which did not meet the requirements of independence and impartiality on account of the presence of a military judge on the bench. Finally, without invoking any Article of the Convention, the applicant complained he risked being sentenced to the death penalty.

A. Alleged unfairness of the proceedings before the Istanbul State Security Court

26. As regards the applicant’s complaint concerning the independence and impartiality of the Istanbul State Security Court, the Court considers that this complaint is premature since the criminal proceedings against the applicant are still pending before the Court of Cassation (see paragraph 16 above). In any event, it notes that when the trial of the applicant commenced before the Istanbul State Security Court, its composition indeed included a military judge. However, in the course of the criminal proceedings, in June 1999 the Constitution was amended and the military judges sitting on the bench of the state security courts were replaced by civilian judges. Following the decision of the Court of Cassation on 15 May 2001, the applicant’s trial resumed before the Istanbul State Security Court which was composed of three civilian judges who carried out a full re-examination of the facts of the case and a re-assessment of the evidence and law presented to it. Consequently, State Security Courts were abolished following a further constitutional amendment and from 7 May 2004 onwards the applicant was tried afresh by the Istanbul Assize Court.

27. This being so, and having regard to the case-law of the Court on this matter (see *Yaşar v. Turkey* (dec.), no. 46412/99, 31 March 2005, and *Tarlan v. Turkey* (dec.), no. 31096/02, 30 March 2006) the Court finds that, in the particular circumstances of the case, the removal of the military judge from the bench of the Istanbul State Security Court in the course of the proceedings and the applicant’s subsequent trial by the Istanbul Assize Court disposed of his reasonably held concern about the trial court’s independence and impartiality (see, among others, *Osman v. Turkey*,

no. 4415/02, § 17, 19 December 2006). Nevertheless, as noted above, the criminal proceedings against the applicant are still pending and the applicant has still the possibility of raising his concerns before the domestic courts.

28. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Alleged risk of death penalty

29. As to the applicant's complaint concerning the death penalty, the Court observes that since October 1984 the Turkish Grand National Assembly (TGNA) has not rendered any decision authorising the enforcement of a death penalty. Finally, on 9 August 2002 the TGNA abolished the death penalty. Accordingly, in the circumstances of the case, the Court considers that the risk of enforcement of the death penalty against the applicant was illusory and that therefore he cannot be considered to have suffered ever-present and mounting anguish at the prospect of being executed, exposing him to treatment going beyond the threshold set by Article 3 of the Convention (see *Abdülmenaf Osman v. Turkey* (dec.), no. 4415/02, 6 October 2005; *Sertkaya v. Turkey* (dec.), no. 77113/01, 11 December 2003).

30. It follows that this part of the application is also manifestly ill-founded, and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicant claimed 20,000 euros (EUR) in respect of pecuniary damage and EUR 20,000 for non-pecuniary damage.

33. The Government submitted that no award should be made under this head. They asserted, alternatively, that any award to be made by the Court should not lead to unjust enrichment.

34. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it considers that the applicant must have sustained some

non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 13,000 under that head.

B. Costs and expenses

35. The applicant also claimed 10,500 New Turkish Liras (approximately EUR 6,000) for the costs and expenses incurred before the Court.

36. The Government contended that the applicant's claim was unsubstantiated.

37. 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 head.

C. Default interest

38. 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 excessive length of the proceedings 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*
 - (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 13,000 (thirteen thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into New Turkish liras 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 October 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President