



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

SECOND SECTION

CASE OF AYDOĞAN AND OTHERS v. TURKEY

(Application no. 41967/02)

JUDGMENT

STRASBOURG

2 December 2008

FINAL

02/03/2009

This judgment may be subject to editorial revision.

In the case of Aydoğan and Others 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 13 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 41967/02) 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 six Turkish nationals, Mr Hasan Aydoğan, Ms Türkan Özen, Mr Hüseyin İşeri, Mr Süleyman Evren, Mr Ünsal Varol and Mr Hüseyin Öztürk (“the applicants”), on 7 October 2002.

2. The applicants were represented by Mr M. Filorinali and Ms. Y. Başara, lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 16 April 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. At the time of the lodging of the application the applicants Mr Aydoğan and Ms Özen were in Tekirdağ and Kütahya prisons respectively. The other applicants were residing in Istanbul.

5. In the course of an operation carried out against the activities of an illegal armed organisation, namely DHKP/C (Turkish People’s Liberation

Party/Front) the applicants were arrested and taken into custody on 22 and 23 October 1996.

6. On 5 November 1996 the applicants were brought before a judge who remanded them in custody.

7. In an indictment dated 11 November 1996, the public prosecutor at the Istanbul State Security Court accused Mr Aydoğan and Ms Özen of attempting to undermine the constitutional order of the State and requested their conviction and sentence under Article 146 § 1 of the Criminal Code. They were accused of taking part in armed attacks on various political party buildings and police stations and of being responsible for the death of Mr Mehmet Ünlü and causing bodily harm to two other persons. The other applicants were accused of aiding and abetting an illegal armed terrorist organisation. The prosecutor requested their conviction and sentence under Article 169 of the Criminal Code.

8. On an unspecified date the criminal proceedings against the applicants commenced before the Istanbul State Security Court, which was composed of one military and two civilian judges.

9. Mr İşeri, Mr Evren, Mr Varol and Mr Öztürk were released pending trial, on various dates, in 1996 and 1997.

10. On 18 June 1999 the Constitution was amended and the military judges sitting on the bench of State Security Courts were replaced by civilian judges.

11. At a hearing held on 7 July 1999 the judge who had been appointed to replace the military judge sat as a member of the trial court for the first time. In this hearing the prosecutor maintained his earlier submissions as regards the merits. Mr Aydoğan read out his submissions on the merits. The court granted Ms Özen's lawyer's requests regarding obtaining information about the outcome of other cases pending against the accused and additional time to prepare her submissions.

12. Between 10 September 1999 and 19 October 2001 the court held eleven hearings, during which the judges dealt with procedural matters connected with the completion of the case file and, in particular, with the securing of final defence statements of the accused, whose representative had several times requested additional time to submit them. The court warned the applicants' representative three times and in a hearing held on 29 November 2000 held that the case was being prolonged due to the failure of the applicants to submit their final observations on the merits of the case. However, the court granted the applicants' representative's request for an extension in the next hearing; since the security forces had a widespread operation in prisons the lawyer said he was not sure if his clients were still alive. At a hearing held on 4 April 2001 the applicants' representative complained that the prison authorities were making it difficult for him to prepare his defence, for example by not admitting him to see his client if he did not have the power of attorney on him. The court granted leave to the

applicants' lawyer to complain about this situation to the prosecutor and Minister of Justice. During this time the court ordered the continued detention of Mr Aydoğan and Ms Özen at the end of each hearing.

13. On 19 October 2001 the Istanbul State Security Court, after having examined the evidence in the case file, convicted Mr Aydoğan and Ms Özen as charged and sentenced them to death. The evidence in the case file included verbatim records of reconstructions of events, search and seizure protocols, forensic reports, statements by others tried before another State Security Court and testimony from a number of witnesses. As to the other applicants, the court decided to defer the imposition of a final sentence, pursuant to Law no. 4616.

14. On 8 April 2002 the Court of Cassation, after having reviewed Mr Aydoğan's and Ms Özen's case from a procedural and a substantive point of view, upheld the judgment of the first-instance court. The decision indicates that their lawyer, despite having requested the court to hold a hearing, had failed to attend it. As regards the other applicants, the court refused them leave to appeal since the first-instance court's decision in their respect was not open to appeal.

15. On 24 September 2002 Mr Aydoğan's and Ms Özen's sentences were commuted to life imprisonment. No information was submitted by the parties as to further developments.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. A description of the relevant domestic law at the material time can be found in the *Öcalan v. Turkey* judgment ([GC], no. 46221/99, §§ 52-54, ECHR 2005-IV) and in *Öktem v. Turkey* ((dec.), no. 74306/01, 19 October 2006).

17. 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 OF THE CONVENTION

18. The applicants complained that they had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge sitting on the bench of the Istanbul State Security Court which tried them. They further submitted that the written opinion of the principal public prosecutor at the Court of Cassation had never been served on them, thus depriving them of the opportunity to put forward their

counter-arguments. Moreover, the applicants also claimed that they had been denied the assistance of a lawyer during the initial stages of the criminal proceedings. They relied on Article 6 of the Convention, which, in so far as relevant, provides:

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

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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.”

A. Admissibility

19. As regards Mr Aydoğan and Ms Özen, the Court considers that their complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

20. As to Mr İşeri, Mr Evren, Mr Varol and Mr Öztürk, the Court reiterates that a person may not claim to be a victim of a violation of the right to a fair hearing under Article 6 of the Convention where the criminal proceedings have been halted by a discontinuation (see *Koştı and Others v. Turkey* (dec.), no. 74321/01, 3 May 2007). The Court finds that the applicants' situation is comparable. The Court observes that on 19 October 2001 the Istanbul State Security Court decided to defer the imposition of a final sentence upon the applicants, pursuant to Law no. 4616. Consequently, the Court is not in a position to make an examination of the proceedings as a whole, as is usually required by complaints under Article 6 of the Convention, because of this conditional suspension of the proceedings (see *Güneş v. Turkey* (dec.), no. 38413/02, 1 September 2005). Unless the applicants were to face new criminal charges, thereby reviving the present case, the Court finds that the applicants cannot claim to be victims within the meaning of Article 34 of the Convention at this stage of the proceedings (see *Sincar v. Turkey* (dec.), no. 46281/99, 19 September 2002, and *F.A. v. Turkey* (dec.), no. 36094/97, 1 February 2005). It follows that their

complaints under this head should be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Merits

1. Independence and impartiality of the Istanbul State Security Court

21. The Government maintained that, by Law no. 4388 of 18 June 1999, amendments had been made to remove military judges from the bench of the State Security Courts. In this connection they pointed out that, in the present case, the military judge sitting on the bench of the Istanbul State Security Court had already been replaced by a civilian judge before the applicants' lawyer had put forward their submissions on the merits of the case and that the applicants had been convicted by a State Security Court which was composed of three civilian judges.

22. The applicants did not specifically comment on this point.

23. 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 *Incal 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* (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.

24. In the present case, the Court notes that, following the constitutional amendment (see paragraph 10 above), the military judge was replaced by a civilian judge, and Mr Aydoğan and Ms Özen were convicted by the newly composed State Security Court. It observes, however, that although the applicants' trial continued before the Istanbul State Security Court, which was composed of three civilian judges, for more than two years, the replacement of the military judge was not capable of remedying the defect in the composition of the court. In particular, it appears from the minutes of the hearings submitted by the Government that the entire prosecution case against the applicants was based on information already obtained prior to the replacement of the military judge, which included witness testimonies the court subsequently relied upon to convict them (see paragraph 13). In fact, the Court considers that, except for the applicants' final defence submissions, no other statements or evidence of importance were admitted

to the case file after the military judge was replaced by the civilian judge and that the State Security Court, when composed of three civilian judges, did not take any decision concerning the merits of the case. In short, most of the trial, during which interlocutory decisions of importance were made, in particular for the rights of defence of the applicants, had already taken place before the military judge ceased to be a member of the court and none of these acts were renewed after the military judge was replaced by a civilian judge.

25. In these circumstances, taking into account the importance of the procedural acts taken before the replacement of the military judge, the Court considers that the replacement of the military judge did not dispose of Mr Aydoğan's and Ms Özen's reasonably held concern about the trial court's independence and impartiality (see *Hidir Kaya v. Turkey*, no. 2624/02, § 37, 9 January 2007 and, *a contrario*, *Kabasakal and Atar v. Turkey*, nos. 70084/01 and 70085/01, § 35, 19 September 2006).

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

2. Fairness of the proceedings

27. Having regard to the facts of the case, the submissions of the parties and its finding of a violation of Article 6 § 1 of the Convention above (paragraph 33), the Court considers that it has examined the main legal question raised under Article 6 of the Convention. It concludes therefore that there is no need to make a separate ruling on Mr Aydoğan's and Ms Özen's remaining complaints under this provision (see, for example, *Benli v. Turkey*, no. 65715/01, § 40, 20 February 2007, *Getiren v. Turkey*, no. 10301/03, § 132, 22 July 2008 and *Juhnke v. Turkey*, no. 52515/99, § 94, 13 May 2008).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

28. In the application form the applicants further complained that their detention had exceeded the "reasonable time" requirement as provided in Article 5 § 3. Under Article 6 of the Convention the applicants claimed that the length of the criminal proceedings had been excessive. Finally, the applicants complained, in general, about being detained far away from Istanbul, about their lawyer being searched in prison and that they had been discriminated against due to the differences in the criminal procedures and the execution of sentences for offences tried before the State Security Courts. In addition, Mr İşeri, Mr Evren, Mr Varol and Mr Öztürk complained about the suspension of the criminal proceedings against them, which they considered to have denied them the right to be tried and acquitted.

29. As regards the length of the criminal proceedings against the applicants Mr Aydoğan and Ms Özen, after examining the overall duration of the proceedings which lasted five years and six months, and taking into account that the case was of some complexity, the number of accused, the fact that the case was dealt with at two levels of jurisdiction and that no significant delay resulted at the appeal stage, the Court does not consider that the length of the proceedings in the present case was excessive. In this connection, the Court takes note that the applicants were themselves partly responsible for the prolongation of the proceedings after the military judge was replaced by not duly submitting their final defence submissions (see paragraph 12 above). In addition, they have not shown any substantial periods of inactivity attributable to the judicial authorities. It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 and 4 of the Convention.

30. As regards the length of the criminal proceedings regarding Mr İşeri, Mr Evren, Mr Varol and Mr Öztürk, the Court notes that the criminal proceedings against these applicants were brought to an end on 19 October 2001 when the criminal proceedings against them were suspended (see, in particular, *Koç and Tambaş v. Turkey* (dec.), no. 46947/99, 24 February 2005) whereas this complaint was introduced to the Court on 7 October 2002, i.e. more than six months later. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for failure to comply with the six-month rule.

31. Moreover, in the light of all the material in its possession, the Court finds that the applicants' remaining submissions above do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these parts of the application must also be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. Mr Aydoğan and Ms Özen claimed, in total, 38,000 euros (EUR) in respect of loss of earnings during the six years they were in prison. They also claimed, in total, EUR 40,000 in respect of non-pecuniary damage.

34. The Government contested the amount.

35. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

36. The Court considers that the finding of a violation of Article 6 § 1 constitutes in itself sufficient compensation for any non-pecuniary damage suffered by Mr Aydoğan and Ms Özen (see *Hıdır Kaya v. Turkey*, no. 2624/02, cited above, § 43). Nevertheless, the Court observes 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, *in fine*, § 210).

B. Costs and expenses

37. The two applicants, Mr Aydoğan and Ms Özen, also claimed, in total, EUR 7,000 for costs and expenses incurred before the domestic courts and the Court.

38. The Government contested the amounts.

39. The Court finds that since the applicants submitted no justification as regards costs and expenses, as required by Rule 60 of the Rules of Court, it makes no award under this head.

C. Default interest

40. 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 Mr Aydoğan's and Ms Özen's right to a fair hearing by an independent and impartial tribunal admissible, and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards Mr Aydoğan's and Ms Özen's complaint relating to the independence and impartiality of the Istanbul State Security Court;
3. *Holds* that it is not necessary to examine separately these applicants' other complaints under Article 6 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by Mr Aydoğan and Ms Özen;
5. *Dismisses* the remainder of these applicants' claim for just satisfaction.

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

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President