



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

SECOND SECTION

CASE OF AMUTGAN v. TURKEY

(Application no. 5138/04)

JUDGMENT

STRASBOURG

3 February 2009

FINAL

03/05/2009

This judgment may be subject to editorial revision.

In the case of Amutgan 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,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 13 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 5138/04) 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 Nusret Amutgan (“the applicant”), on 29 December 2003.

2. The applicant was represented by Ms B Özpolat, a lawyer practising in Gaziantep. The Turkish Government (“the Government”) were represented by their Agent.

3. On 4 January 2008 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the lack of legal assistance to the applicant during his police custody to the Government. It 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. The applicant was born in 1970 and is serving his prison sentence in the Gaziantep H-type Prison.

5. On 27 April 1998 the applicant was taken into custody during a military operation carried out by the Turkish armed forces on suspicion of being a member of an illegal armed organisation, namely the PKK (the Workers’ Party of Kurdistan). The applicant was detained at a gendarme

station, where he was questioned in the absence of a lawyer and his detailed statement was recorded verbatim.

6. In the statement the applicant was quoted as having said that he had joined the PKK on 13 February 1995 and that he had carried out a number of armed activities since that date.

7. On 6 May 1998 the applicant was brought before the public prosecutor and subsequently the investigating judge. When questioned by the prosecutor and the judge, in the absence of a lawyer, the applicant confirmed the accuracy of the information contained in the statement he had made at the gendarme station, and repeated that he had carried out a number of armed activities. The applicant was placed in detention on remand on the order of the investigating judge.

8. On 15 June 1998 the public prosecutor at the Diyarbakır State Security Court filed an indictment, charging the applicant with the offence of carrying out activities for the purpose of bringing about the secession of part of the national territory. He sought the death penalty under Article 125 of the Criminal Code.

9. The trial of the applicant and his seven co-defendants began on 20 August 1998 before the Diyarbakır State Security Court. In the course of the trial, the applicant was represented by his lawyer. He informed the court that he had joined the PKK in 1995 and had received military training. He further admitted to certain charges brought against him. The applicant also stated, during the hearings, that he had been forced to put his thumbprint on the statement taken from him at the gendarme station.

10. On 28 November 2002 the Diyarbakır State Security Court found the applicant guilty as charged and sentenced him to death. The death penalty was commuted to a life sentence. The court found it established, on the basis of, *inter alia*, the statements taken from the applicant after his arrest and the testimony given by him during the trial, that he had carried out a number of illegal activities and had been involved in the killing and kidnapping of a number of village guards.

11. On 16 September 2003 the Court of Cassation dismissed the applicant's appeal.

II. RELEVANT DOMESTIC LAW

12. A description of the relevant domestic law may be found in *Salduz v. Turkey* ([GC] no. 36391/02, §§ 27-31, 27 November 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

13. The applicant alleged that his defence rights had been violated as he had been denied access to a lawyer during his police custody. He relied on Article 6 § 3 (c) of the Convention, which provides:

“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

14. The Court notes that the remainder 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. It must therefore be declared admissible.

B. Merits

15. The applicant stated that the restriction on his right to legal assistance while in police custody had breached his right to a fair trial. He maintained that he was illiterate and therefore he did not know what was written in his statement taken by the gendarmes. He also stated that this statement was not read out to him and that he was forced to put his thumbprint on the statement to authenticate it.

16. The Government maintained in the first place that, in assessing whether or not the trial was fair, regard should be had to the entirety of the proceedings. As the applicant was represented by a lawyer during the proceedings before the State Security Court and the Court of Cassation, his right to a fair hearing had not been violated. The Government further stated that, as the applicant was illiterate, his statement taken by the gendarmes was read out to him. They underlined the fact that his confessions during his custody period were not the sole basis of the conviction.

17. The Court reiterates the basic principles laid down in the *Salduz* judgment cited above (§§ 50-55).

18. In the present case, the Court notes that the restriction imposed on the applicant's right of access to a lawyer was systematic and applied to anyone held in custody in connection with an offence falling under the

jurisdiction of the State Security Courts. The Court observes that the applicant had access to a lawyer after his detention on remand and during the ensuing criminal proceedings, when he had the possibility of challenging the prosecution's arguments. Nevertheless, in convicting the applicant, the Diyarbakır State Security Court relied heavily on the applicant's statements taken while he had been in police custody, in the absence of a lawyer. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in respect of those statements. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure this defect.

19. In sum, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights.

20. There has therefore been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 in the present case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

21. 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

22. The applicant claimed 15,000 New Turkish liras (TRY) (approximately 7,700 euros (EUR)) in respect of pecuniary damage and TRY 30,000 (approximately EUR 15,400) in respect of non-pecuniary damage.

23. The Government contested these claims.

24. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. In respect of non-pecuniary damage, ruling on an equitable basis, it awards the applicant EUR 1,500.

25. The Court further considers that the most appropriate form of redress would be the re-trial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request (see, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; *Salduz*, cited above, § 72).

B. Costs and expenses

26. Referring to the Gaziantep Bar Association's scale of fees, the applicant's representative claimed TRY 8,400 (approximately EUR 4,300), covering 21 hours' legal work, spent in the preparation and presentation of this case before the Court. She also claimed TRY 1,825 (approximately EUR 940) for the costs and expenses. In this respect, she submitted an invoice amounting to TRY 325 (approximately EUR 167) paid for translation.

27. The Government contested the claims.

28. According to the Court's case-law, an applicant is entitled to 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 documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 to the applicant under this head.

C. Default interest

29. 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;
2. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the lack of legal assistance to the applicant while in police custody;
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, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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 3 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President