



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

SECOND SECTION

CASE OF ŞÜKRAN YILDIZ v. TURKEY

(Application no. 4661/02)

JUDGMENT

STRASBOURG

3 February 2009

FINAL

03/05/2009

This judgment may be subject to editorial revision.

In the case of Şükran Yıldız 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. 4661/02) 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, Ms Şükran Yıldız (“the applicant”), on 21 June 2001.

2. The applicant was represented by Mr Beştaş, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) were represented by their Agent.

3. On 3 July 2007 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the length of the applicant’s detention on remand, the right to have the lawfulness of her detention decided by a court and the right to legal assistance during her 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 1980 and lives in Diyarbakır.

5. On 22 September 1996 the applicant, who was sixteen years old at the time, was taken into custody by policemen from the Diyarbakır Security Directorate on suspicion of membership of an illegal armed organisation, namely the PKK (the Kurdistan Workers’ Party). In her police statements

dated 6 and 8 October 1996 respectively, the applicant accepted the charges against her. During her interrogations, the applicant did not have the assistance of a lawyer.

6. On 22 October 1996 the applicant was brought before the Diyarbakır public prosecutor and subsequently before the investigating judge. She was interrogated in the absence of a lawyer by the public prosecutor and the investigating judge respectively and denied the allegations against her. Taking into account the seriousness of the allegations, the judge ordered that the applicant be placed in detention on remand. The applicant was then allowed to have access to a lawyer.

7. By an indictment dated 3 December 1996, the public prosecutor at the Diyarbakır State Security Court initiated criminal proceedings against the applicant and nine other accused. He accused the applicant of being a member of the PKK and accordingly called for her to be sentenced pursuant to Article 168 § 2 of the Criminal Code.

8. The trial commenced before the Diyarbakır State Security Court. In the subsequent twenty hearings, the court refused to release the applicant on account of the nature of the alleged offence and the state of evidence.

9. On 2 June 1999 the Diyarbakır State Security Court concluded that the applicant was a member of the PKK and accordingly sentenced her to eight years and four months' imprisonment pursuant to Article 168 § 2 of the Criminal Code.

10. On 20 December 1999 the Court of Cassation quashed the judgment of the first-instance court.

11. On 10 August 2001 the applicant was released pending trial.

12. On 9 April 2002 the court rendered its judgment and sentenced the applicant to eight years and four months' imprisonment pursuant to Article 168 § 2 of the Criminal Code. In convicting the applicant, the State Security Court had particular regard to the applicant's police statements.

13. On 7 October 2002 the Court of Cassation upheld the judgment of the Diyarbakır State Security Court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

14. The applicant complained that her detention on remand exceeded the reasonable time requirement. She also contended that she had had no effective remedy to challenge the lawfulness of her detention on remand. In respect of her complaints, the applicant relied on Article 5 §§ 3 and 4 of the Convention, which provides as relevant:

Article 5

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Article 5 § 3 of the Convention

1. *Admissibility*

15. The Government argued that, as the applicant had lodged her complaint under Article 5 § 3 of the Convention on 21 June 2001, the time she had spent in detention between 22 September 1996 and 2 June 1999 should be rejected for having been introduced outside the six-month time-limit laid down in Article 35 § 1.

16. The Court refers to the principles adopted in the *Solmaz v. Turkey* judgment (no. 27561/02, § 36, ECHR 2007-...), where it held that, if the applicant was imprisoned continuously, the multiple, consecutive detention periods should be regarded as a whole and the six-month period should only start running from the end of the last period. In the instant case, the applicant's detention on remand began when she was arrested on 22 September 1996. She was detained within the meaning of Article 5 § 3 of the Convention until her conviction by the Diyarbakır State Security Court on 2 June 1999. As from that date, until 20 December 1999, when the Court of Cassation quashed the decision of the first-instance court, she was detained “after conviction by a competent court”, within the meaning of Article 5 § 1 (a) and, therefore, this part of her detention falls outside the scope of Article 5 § 3. From 20 December 1999 until her release pending trial on 10 August 2001, the applicant was again in pre-trial detention falling under Article 5 § 3 of the Convention. As a result, given the applicant's continued detention throughout these different phases, the six-month period should only start running from the end of the last period of pre-trial custody, which is 10 August 2001 (see *Akyol v. Turkey*, no. 23438/02, § 25, 20 September 2007).

17. The Court accordingly dismisses the Government's objection.

18. It further notes this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

19. The Court notes that, as explained above, the period in question began on 22 September 1996 with the applicant's arrest and ended on 10 August 2001, when the applicant was released pending trial. In line with its case-law, after deducting the time during which the applicant was detained as a convicted prisoner under Article 5 § 1 (a) of the Convention between 2 June 1999 and 20 December 1999, the period to be taken into consideration under Article 5 § 3 in the instant case is over four years and three months. The domestic courts had constantly extended the applicant's detention on remand using identical, stereotyped terms, such as "having regard to the nature of the offence and the state of evidence".

20. The Court has frequently found violations of Article 5 § 3 of the Convention in cases raising similar issues to those in the present application (see, for example, *Atıcı v. Turkey*, no. 19735/02, 10 May 2007; *Solmaz*, cited above; *Dereci v. Turkey*, no. 77845/01, 24 May 2005, and *Tacıroğlu v. Turkey*, no. 25324/02, 2 February 2006).

21. 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. In the light of the foregoing, and especially having regard to the fact that the applicant was a minor at the time, the Court finds that the length of the applicant's pre-trial detention contravened Article 5 § 3 of the Convention.

22. There has accordingly been a violation of this provision.

B. Article 5 § 4 of the Convention

1. Admissibility

23. The Government asked the Court to dismiss the applicant's complaint under Article 5 § 4 of the Convention for failure to exhaust domestic remedies under Article 35 § 1. Referring to the Court's decision in the case of *Köse v. Turkey* ((dec.), no. 50177/99, 2 May 2006), the Government maintained that the applicant had failed to object to her continued remand in custody pursuant to Articles 297-304 of the former Code of Criminal Procedure.

24. The Court reiterates that it has already examined and rejected the Government's preliminary objections in cases similar to the present application (see *Koştı and Others v. Turkey*, no. 74321/01, §§ 18-24, 3 May 2007). It finds no particular circumstances in the instant case which would require it to depart from this jurisprudence. Consequently, it rejects the Government's preliminary objection.

25. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for

declaring it inadmissible has been established. It must therefore be declared admissible.

2. Merits

26. The Government contended that the domestic law provided an effective remedy to challenge the lawfulness of the applicant's detention on remand.

27. The applicant maintained that her objection to her detention had received no serious consideration by the domestic courts, which used stereotyped wording in dismissing her requests.

28. The Court notes that, in several cases raising similar issues to the present application, it has rejected the Government's foregoing contention. It concluded that Article 298 of the Code of Criminal Procedure could not be considered an effective remedy and found a violation of Article 5 § 4 of the Convention (see, *mutatis mutandis*, *Koşti and Others*, cited above, §§ 21-25; *Nart v. Turkey*, no. 20817/04, § 39, 6 May 2008; *Öcalan v. Turkey* [GC], no. 46221/99, §§ 71-72, ECHR 2005-IV). The Court finds no particular circumstances in the instant case which would require it to depart from these previous findings.

29. In conclusion, the Court holds that there has been a violation of Article 5 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. The applicant alleged that her defence rights had been violated as she had been denied access to a lawyer during her police custody. She 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

31. 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

32. The applicant stated that the restriction on her right to legal assistance during her police custody had breached her right to a fair trial, particularly having regard to the serious charges brought against her and the fact that she had been a minor at the material time.

33. The Government maintained 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, her right to a fair hearing had not been violated.

34. The Court reiterates the basic principles laid down in the case of *Salduz v. Turkey* ([GC], no. 36391/02, §§ 50-55, 27 November 2008).

35. In the present case, the restriction imposed on the applicant's right of access to a lawyer was systemic and applied to anyone held in custody in connection with an offence falling under the jurisdiction of the State Security Courts. The Court further observes that the applicant had access to a lawyer following her detention on remand and during the ensuing criminal proceedings, when she had the possibility of challenging the prosecution's arguments. Nevertheless, in convicting the applicant, the Diyarbakır State Security Court used the applicant's police statements taken in the absence of a lawyer. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on her access to a lawyer. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the applicant's custody period.

36. Moreover, the Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody (see *Salduz*, cited above, §§ 32-36), the Court stresses the fundamental importance of such a service (*ibidem*, § 60).

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

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicant claimed 14,800 New Turkish liras (TRY) (approximately 7,100 euros (EUR)) in respect of pecuniary damage and TRY 30,000 (approximately EUR 14,500) in respect of non-pecuniary damage.

41. The Government contested the claims.

42. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, the Court considers that the applicant must have suffered certain non-pecuniary damage which cannot be sufficiently compensated by the finding of a violation alone. Ruling on an equitable basis, it awards her EUR 4,500 under that head.

43. 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, and *Salduz*, cited above, § 72).

B. Costs and expenses

44. Referring to the Diyarbakır Bar Association’s scale of fees, the applicant’s representative claimed a total of TRY 12,650 (approximately EUR 6,100) covering twenty one hours’ legal work spent in the preparation and presentation of this case before the Court, and other costs and expenses.

45. The Government contested the claim.

46. 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 documentation in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

47. 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 5 § 3 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
4. *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 she was in police custody;
5. *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 sums, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and
 - (ii) EUR 2,000 (two 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *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