



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

SECOND SECTION

CASE OF ÇİMEN v. TURKEY

(Application no. 19582/02)

JUDGMENT

STRASBOURG

3 February 2009

FINAL

03/05/2009

This judgment may be subject to editorial revision.

In the case of Çimen 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. 19582/02) 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 Ali Çimen (“the applicant”), on 8 December 2001.

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

3. On 13 March 2007 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the lack of legal assistance to the applicant during his police custody and the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation. 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 1969 and lives in Izmir.

5. On 17 April 2000 the applicant was taken into custody by police officers from the Anti-Terrorist Branch of the Izmir Security Directorate on

suspicion of his involvement in the activities of an illegal armed organisation.

6. On the same day, the applicant was interrogated at the Anti-Terrorist branch in the absence of a lawyer. According to a form explaining arrested persons' rights which the applicant had signed, he had been reminded of the charges against him and of his right to remain silent. In his statement, the applicant admitted to his involvement in the illegal armed organisation.

7. On 20 April 2000 the applicant was brought before the public prosecutor and subsequently the investigating judge at the Izmir State Security Court. Before the public prosecutor and the judge, again in the absence of a lawyer, the applicant admitted that he had participated in certain activities of the illegal armed organisation.

8. On the same day, the applicant's lawyer requested to visit him; however this request was rejected by the Public Prosecutor.

9. On 2 May 2000 the Public Prosecutor at the Izmir State Security Court filed a bill of indictment with that court, accusing the applicant of aiding and abetting an illegal organisation. He requested that the applicant be sentenced and convicted under Article 169 of the Criminal Code and Section 5 of the Prevention of Terrorism Act (Law no. 3713).

10. On 5 December 2000 the Izmir State Security Court convicted the applicant as charged and sentenced him to three years and nine months' imprisonment. In its decision, the court attached particular importance to the applicant's statements to the investigating judge.

11. On 25 December 2000 the applicant appealed. On an unspecified date, the Principal Public Prosecutor at the Court of Cassation submitted his written opinion. This opinion was not served on the applicant or his representative. On 11 June 2001, the Court of Cassation, upholding the reasoning and assessment of the Izmir State Security Court, dismissed the applicant's appeal.

II. RELEVANT DOMESTIC LAW

12. A description of the relevant domestic law may be found in *Salduz v. Turkey* judgment ([GC], no. 36391/02, §§ 27-31, 27 November 2008) and *Göç v. Turkey* judgment ([GC], no. 36590/97, §§ 27-32, ECHR 2002-V).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

13. The applicant complained under Article 6 §§ 1 and 3 (c) of the Convention that the written opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to him, and that he had been denied the assistance of a lawyer while in police custody. Article 6 §§ 1 and 3 (c) of the Convention, in so far as relevant, read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... 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. The non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation

14. Relying on Article 6 § 1 of the Convention, the applicant complained that the written opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to him.

15. The Government submitted that the written opinion of the Principal Public Prosecutor was not binding on the Court of Cassation, as it was free to decide on appeals regardless of the Prosecutor's opinion. They further maintained that the applicant's representative had had the right to consult the case file and examine the documents. Finally, the Government pointed out that, on account of the recent amendment of 27 March 2003, Article 316 of the Code of Criminal Procedure now provides that the written opinion of the Principal Public Prosecutor of the Court of Cassation must be sent to the parties.

1. Admissibility

16. The Court notes in the first place 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.

2. *Merits*

17. It further observes that it has already examined the same grievance in the case of *Göç* and found a violation of Article 6 § 1 of the Convention (cited above, §§ 55-58). In that judgment, the Court held that, having regard to the nature of the principal public prosecutor's submissions and to the fact that the applicant had not been given an opportunity to make written observations in reply, there had been an infringement of the applicant's right to adversarial proceedings.

18. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned *Göç* judgment.

19. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

B. Access to a lawyer during police custody

1. Admissibility

20. The Government maintained in the first place that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention, since at no stage of the domestic proceedings did he rely on the fact that he had been deprived of his right to legal assistance during police custody. In the alternative, they stated that this part of the application was introduced outside the six months time-limit, since the applicant's police custody had ended on 20 April 2000, whereas the application was introduced on 8 December 2001 with the Court.

21. The Court notes that the restriction imposed on the applicant's right of access to a lawyer was in accordance with section 31 of Law no. 3842, and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts. Furthermore, the Court observes from the documents in the case file that, on 20 April 2000, the applicant's lawyer applied to the Public Prosecutor at the Izmir State Security Court for permission to see the applicant; however this request was rejected. Moreover, in his petition submitted to the Izmir State Security Court on 4 December 2000, the applicant's lawyer stated that the restriction on the applicant's right to legal assistance had constituted a breach of Article 6 of the Convention. Accordingly, the Court rejects the Government's preliminary objection regarding remedies.

22. As to the objection concerning the failure of the applicant to comply with the six months time-limit, the Court recalls that, in assessing whether or not the trial was fair, regard should be had to the entirety of the proceedings (see *John Murray v. the United Kingdom*, 8 February 1996, § 63, *Reports of Judgments and Decisions* 1996-I). In the present case, the

applicant lodged his application with the Court within six months of the delivery of the final decision by the Court of Cassation. He therefore lodged his application to the Court within the six months time-limit, as required by Article 35 § 1 of the Convention. In conclusion, this objection cannot be upheld either.

2. *Merits*

23. The applicant stated that the restriction on his right to legal assistance during his police custody had breached his right to a fair trial. He argued that the domestic court judgment was based on his statement given before the investigating judge, which was taken in the absence of a lawyer.

24. The Government argued that the applicant had been represented by a lawyer during the proceedings and his statement to the investigating judge was not the sole basis for his conviction.

25. The Court reiterates the basic principles laid down in the case of *Salduz* (cited above, §§ 50-55). It will examine the present case in the light of those principles.

26. The Court repeats that, in the present case, the restriction imposed on the applicant's right of access to a lawyer was systematic and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts. Even though the applicant repeatedly denied the content of his statements taken during this initial period of detention, the Izmir State Security Court used his statement taken before the investigating judge for his conviction. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer. Therefore, neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred earlier.

27. 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.

28. 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

29. 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.”

30. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, “failing which the Chamber may reject the claim in whole or in part”.

31. In the instant case, the applicant failed to submit his claims for just satisfaction within the prescribed time-limit, and they were not, therefore, admitted to the file.

32. Nevertheless, where the Court finds that an applicant has been convicted in criminal proceedings which were found to be in breach of Article 6 § 1 of the Convention, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant, as far as possible, be put in the position in which he would have been had this provision not been disregarded (see *Şirin v. Turkey*, no. 47328/99, § 30, 15 March 2005). The Court therefore 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).

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 § 1 of the Convention, in respect of the non-communication to the applicant of the written opinion of the Principal Public Prosecutor at the Court of Cassation;
3. *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 he was in police custody;
4. *Dismisses* 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