



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

SECOND SECTION

CASE OF TAŞÇIGİL v. TURKEY

(Application no. 16943/03)

JUDGMENT

STRASBOURG

3 March 2009

FINAL

03/06/2009

This judgment may be subject to editorial revision.

In the case of Taşçıgil 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 Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 10 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 16943/03) 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 Fırat Taşçıgil (“the applicant”), on 9 April 2003. The applicant was represented by Mr M. Nacak, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) were represented by their Agent.

2. On 16 October 2007 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the alleged unfairness of the criminal proceedings against the applicant on account of the use made of computer hard discs which were found in the flats raided by the police, the use by the Diyarbakır State Security Court of his statements allegedly taken under duress in the absence of legal assistance during his detention in police custody, and the non-communication of the observations 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

THE CIRCUMSTANCES OF THE CASE

3. The applicant was born in 1981 and lives in Diyarbakır.

4. On 14 March 1999 the police carried out an operation against Hizbullah, an illegal organisation, in Mardin. At around 3 a.m. the police raided a flat after receiving information from a certain A.T., who was allegedly a member of Hizbullah. During the search conducted in the apartment, three weapons with their cartridges and three computer hard discs, among other objects, were found. According to information retrieved from one of these hard discs, the applicant was allegedly involved in Hizbullah and had been giving religious lessons to children in the Kuba mosque in Diyarbakır.

5. On 5 June 1999 the public prosecutor at the Diyarbakır State Security Court drew up a list of the material seized during the raid in Mardin in order to place it in the custody of the State Security Court. The material included the computer hard discs.

6. On 18 October 1999 at around 8.30 p.m. the applicant was arrested while leaving the Kuba mosque in Diyarbakır along with four other persons. According to the arrest report, he was arrested as part of the investigation being conducted into Hizbullah.

7. On 19 October 1999 the security forces conducted a search of the applicant's house. According to the house search and seizure report signed by three police officers and the applicant's father, nine books with religious content and four tapes were found in the apartment.

8. On 25 October 1999 the applicant made statements to the police. According to these submissions, the applicant admitted that he was involved in the activities of Hizbullah.

9. On 26 October 1999 the applicant was examined by a doctor in a health clinic in Diyarbakır, along with four other suspects. The doctor observed no sign of ill-treatment on the applicant's person.

10. On the same day the applicant was brought before the public prosecutor and subsequently a single judge at the Diyarbakır State Security Court and was questioned about his affiliation to Hizbullah. The applicant maintained that he was not a member of Hizbullah and denied that he had given religious lessons on behalf of this organisation. As regards the books found in his apartment, the applicant contended that he had been a student in an İmam Hatip High School¹ and that he had bought them at a book fair. The applicant contended that he had been blindfolded in police custody and forced to sign the document allegedly containing his statements.

11. On the same day, the judge remanded the applicant in custody.

12. On 2 November 1999 the public prosecutor at the Diyarbakır State Security Court filed a bill of indictment against six persons, including the applicant, charging them with membership of Hizbullah under Article 168 of the former Criminal Code and Section 5 of Law no. 3713.

1. İmam Hatip High Schools serve the purpose of educating imams to perform religious duties at mosques.

13. On 16 December 1999 the applicant made statements before the first-instance court. He maintained that one of the other accused was his schoolmate and that he did not know the other persons. He stated in this connection that he had no affiliation with Hizbullah. The applicant also denied the accuracy of his police statements, alleging that they had been made under duress. He contended that he had been in the mosque for prayer and that he had not given religious lessons to children there. The applicant lastly submitted that the tapes which had allegedly been found in his apartment did not belong to him.

14. On the same day, the State Security Court ordered the applicant's release pending trial.

15. On 17 January 2000 the police carried out operations against Hizbullah in Istanbul. Security forces raided an apartment where three leaders of Hizbullah lived. One of the leaders was killed and two others were captured. The police also found several hard discs containing information about the organisation. On one of these hard discs a personal history form belonging to the applicant was found.

16. On 19 October 2000 the Diyarbakır State Security Court ordered the detention of the applicant *in absentia*.

17. On 21 July 2001 at 8.15 p.m. the applicant was arrested under the detention order of 19 October 2000 and subsequently detained pending trial.

18. On 8 November 2001 the public prosecutor at the State Security Court made his submissions on the merits of the case. In respect of the applicant, the public prosecutor submitted that he had been involved in the activities of Hizbullah, had given religious lessons to children in the Kuba mosque and had provided a personal history form to Hizbullah, relying on the information contained in the hard discs found during the police operations of 14 March 1999 and 17 January 2000.

19. On 23 March 2002 the applicant's representative submitted the applicant's reply to the public prosecutor's submissions of 8 November 2001. He contended, *inter alia*, that the personal history form contained in the hard disc found in Istanbul could not be relied on in evidence, as there was nothing to prove that the applicant had given this information to Hizbullah. The lawyer further noted that it was not clear how the hard discs had been seized and that transcription of these discs had not been undertaken by experts. He also maintained that the applicant's statements to the police could not be used as evidence against him as he had not subsequently reiterated these statements before the judicial authorities.

20. On 16 May 2002 the Diyarbakır State Security Court convicted the applicant of membership of Hizbullah and sentenced him to twelve years and six months' imprisonment. It noted that, according to the information found in one of the computer hard discs in Mardin, the applicant was giving religious lessons to children and that according to his personal history form found in a hard disc in Istanbul, he was involved in Hizbullah activities in

the Aksakal mosque. The court further observed that five persons who had also been accused of membership of Hizbullah had mentioned the applicant in their statements to the police and that books written by the Ayatollah Khomeini, the founder of the Islamic Republic of Iran, had been found in the applicant's house. The State Security Court lastly noted that the applicant had accepted, in his statements to the police, that he had had an affiliation with Hizbullah.

21. On the same day the applicant appealed.

22. On an unspecified date the public prosecutor at the Court of Cassation submitted his written opinion (*tebliğname*) on the merits of the appeal. This opinion was not served on the applicant.

23. On 17 December 2002 the Court of Cassation upheld the judgment of the Diyarbakır State Security Court.

24. On 29 January 2006 the applicant was released conditionally.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

25. The applicant submitted under Article 6 §§ 1 and 3 (c) of the Convention that he had been denied legal assistance while in police custody and that he had been convicted on the basis of his statements to the police which had been made under duress.

The applicant alleged under Article 6 § 1 of the Convention that the evidence used against him for his conviction had not been handed over to the judicial authorities promptly, thus casting doubt on its reliability. He further submitted under the same provision that the transcription of the hard discs had not been undertaken by experts, but by the police.

The applicant lastly complained under the same head that the written observations of the Principal Public Prosecutor at the Court of Cassation on the merits of his appeal had not been served on him.

A. Admissibility

1. Use of the computer hard discs as evidence by the Diyarbakır State Security Court

26. The Government argued that the applicant had failed to exhaust the domestic remedies available to him, within the meaning of Article 35 § 1 of the Convention. They maintained that the applicant had not raised the substance of this complaint before the domestic courts.

27. The Court observes that the applicant submitted his complaints concerning the hard discs to the first-instance court with his submissions of 23 March 2002. The Court therefore finds that the applicant raised this complaint before the national authorities.

28. However, the Court notes that it has already examined a similar complaint and found it manifestly ill-founded in the case of *Ayçoban and Others v. Turkey* ((dec.), nos. 42208/02, 43491/02 and 43495/02, 13 January 2005). It finds no elements, in the present case, which would allow it to conclude that the State Security Court acted in an arbitrary or unreasonable manner in assessing the evidence found during the police operations of 14 March 1999 and 17 January 2000.

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

2. Use by the Diyarbakır State Security Court of statements allegedly taken under duress, in the absence of legal assistance, and non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation

30. The Government argued that the applicant had also failed to raise the substance of these complaints before the national authorities.

31. The Court observes at the outset that on 26 October and 16 December 1999 the applicant maintained before the judicial authorities that he had been coerced into signing certain documents while in police custody.

32. The Court further notes, as regards the complaint concerning the absence of legal assistance available to the applicant in police custody, that the applicant's right of access to a lawyer was restricted pursuant to section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. The Court further notes that the applicant did not allege that the law had been incorrectly applied. Therefore, in the Court's view, the applicant's request for a lawyer while in police custody or his subsequent complaint as to the absence of legal assistance before the national authorities would be devoid of any prospect of success (see, *mutatis mutandis*, *Özel v. Turkey*, no. 42739/98, § 25, 7 November 2002).

33. Finally, regarding the applicant's complaint concerning the failure to communicate to him the observations of the Principal Public Prosecutor at the Court of Cassation, the Court reiterates that it has already examined and rejected similar preliminary objections by the Government (see, for example, *Maçın v. Turkey* (no. 2), no. 38282/02, § 20, 24 October 2006).

34. In view of the above, the Court rejects the Government's preliminary objections and declares this part of the application admissible.

B. Merits

35. As regards the complaint concerning the use by the Diyarbakır State Security Court of statements allegedly taken under duress and in the absence of legal assistance, the Court observes at the outset that, on the basis of the case file, it cannot be concluded beyond reasonable doubt that the applicant was subjected to ill-treatment or was otherwise coerced into making statements in police custody (contrast *Örs and Others v. Turkey*, no. 46213/99, §§ 59-60, 20 June 2006). The Court therefore considers that the examination of this part of the application should be confined to the use by the trial court of statements made to the police in the absence of a lawyer.

36. The Court further reiterates that it has already examined the same grievance in the case of *Salduz v. Turkey* and found a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 ([GC], no. 36391/02, §§ 56-62, 27 November 2008). The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned *Salduz* judgment. There has therefore been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1.

37. As to the applicant's complaint that the failure to communicate to him the Principal Public Prosecutor's written opinion had infringed his right to a fair trial, the Court notes that it has already examined the same grievance in the past and has found a violation of Article 6 § 1 of the Convention (see, for example, *Göç v. Turkey* ([GC], no. 36590/97, § 55, ECHR 2002-V; *Ayçoban and Others v. Turkey*, nos. 42208/02, 43491/02 and 43495/02, § 28, 22 December 2005). It finds no reason to depart from that conclusion in the present case. Consequently, the Court concludes that there has been a violation of this provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage. He further claimed EUR 25,000 in respect of pecuniary damage and EUR 1,500 for the costs and expenses incurred before the Court.

39. The Government contested the applicant's claims.

40. As regards the alleged pecuniary damage sustained by the applicant and the costs, the Court observes that the applicant did not produce any document in support of his claims, which the Court, accordingly, dismisses. As to the non-pecuniary damage, ruling on an equitable basis, the Court awards the applicant EUR 2,000.

41. The Court further considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of

Article 6 of the Convention, should the applicant so request (see *Salduz*, cited above, § 72).

42. The Court finally 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* admissible the complaints concerning the alleged unfairness of the criminal proceedings against the applicant on account of the lack of legal assistance during his detention in police custody and the non-communication of the observations of the Principal Public Prosecutor at the Court of Cassation;
2. *Declares* inadmissible the remainder of the application;
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 available to the applicant while he was in police custody;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention, on account of the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation;
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, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of the respondent Government at the rate applicable 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 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 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President