



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

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FOURTH SECTION

**CASE OF ÖNGÜN v. TURKEY**

*(Application no. 15737/02)*

JUDGMENT

STRASBOURG

23 June 2009

**FINAL**

**23/09/2009**

*This judgment may be subject to editorial revision.*



**In the case of Öngün v. Turkey,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Işıl Karakaş,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 2 June 2009,

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

## PROCEDURE

1. The case originated in an application (no. 15737/02) 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 Ahmet Öngün (“the applicant”), on 3 December 2001.

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

3. On 10 October 2006 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the applicant’s right to a fair hearing by an independent and impartial tribunal 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 1976 and lives in Izmir.

5. On 18 March 1999 the applicant was arrested and taken into police custody on suspicion of involvement in various acts of arson with a view to protesting against the arrest of Abdullah Öcalan, the former leader of the PKK (Workers’ Party of Kurdistan), an illegal armed organisation.

6. On 21 March 1999 the applicant was questioned by two police officers in the absence of a lawyer. In the verbatim records, signed by the applicant, the latter admitted, *inter alia*, to taking part in three separate acts of arson together with Mr M.K. and Mr F.D. in order to protest against the arrest of Abdullah Öcalan.

7. On 22 March 1999 the applicant, Mr M.K. and Mr F.D. were first brought before the prosecutor and later before a judge at the Izmir State Security Court. On both occasions the applicant, who was not represented by a lawyer, repeated his earlier statements and gave details about each set of events. He also accepted the contents of his police statement and verbatim records of a reconstruction of events that had been carried out, and admitted that after each act they had called the television station MED TV to claim responsibility under the name of "Apo's tigers of revenge".

8. On 5 April 1999 the public prosecutor at the Izmir State Security Court filed a bill of indictment with the latter, charging the applicant, Mr M.K. and Mr F.D. under Article 168 § 2 of the Criminal Code with membership of an illegal organisation and under Articles 516 § 7, 517, 522 of the Criminal Code with, *inter alia*, damaging other persons' property. They were accused of setting fire to a car on 19 February 1999 and setting fire to two buildings on 13 and 14 March 1999.

9. On 7 April 1999 the Izmir State Security Court held a preparatory hearing where it decided on procedural matters, such as the measures to be taken for securing the presence of the accused.

10. On 11 May 1999 the first-instance court held its first hearing, in the presence of the applicant and his lawyer. It heard evidence from the accused and three complainants, Mr A.Ş., Mr I.Ö. and Mr H.K., who had not witnessed the incidents. It also read out the evidence compiled at the pre-trial investigation stage, including witness statements and the verbatim records of the reconstruction of events. Before the court the applicant retracted his earlier submissions, claiming that he had made them under duress. The co-accused also retracted their earlier statements on the same grounds. He further contested the veracity of the verbatim records of the reconstruction of events and other evidence which incriminated him. The court did not respond to the applicant's lawyer's request to make additional defence submissions under Article 169 of the Criminal Code.

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

12. At the second hearing held on 19 August 1999 the judge who had been appointed to replace the military judge sat as a member of the trial court for the first time. The court heard another complainant, Mr A.A., and gave a number of procedural decisions. The next hearing was held on 7 October 1999 where the court heard evidence from one complainant, Mr R.G., who had not witnessed the incidents, Ms F.K., the sister of one of

the accused who maintained that she and her brother had been subjected to torture in custody, and Ms S.G., an eye-witness to one act of arson who testified that the man she had seen that night might have been one of the accused, namely, Mr M.K. The court further asked the accused whether they had any additional submissions to make under Article 169 of the Criminal Code. The applicant and his lawyer submitted that they repeated their earlier submissions. On the same day, following the parties' statement that they did not wish any additional investigation (*soruşturmanın genişletilmesi*) to be carried out, the prosecutor submitted his observations on the merits and the accused were given time to prepare their defence submissions.

13. At the hearing held on 11 November 1999 the court read out the defence submissions of the accused and heard evidence from them. On the same day, the court, referring particularly to the admissions the applicant made at the pre-trial stage, convicted the applicant under Articles 169, 516 § 7, 517 and 522 of the Criminal Code.

14. On 17 August 2000 the Court of Cassation upheld the judgment as regards the applicant's conviction for arson. It, however, quashed the judgment as regards his conviction under Article 169 of the Criminal Code on the ground that, in view of the statements of the accused, partially accepted before a judge, obtained at the preliminary investigation stage, he should have been tried under Article 168 of the Criminal Code.

15. On 9 November 2000 the Izmir State Security Court, taking into account the evidence in the case file, in particular, the statements made by the accused, including the applicant, at the pre-trial stage, held that the applicant had acted in the name of an organisation when he took part in arson, convicted him under Article 168 of the Criminal Code and sentenced him to 12 years and six months' imprisonment.

16. On 13 June 2001 the applicant appealed. In his petition, he submitted that, apart from evidence obtained under duress at the pre-trial stage, there was no evidence to demonstrate that he had taken part in these acts. He further complained that there was nothing to indicate that he was part of an illegal organisation and that therefore Article 168 should not have been applied to him.

17. On 29 June 2001 the Court of Cassation upheld the judgment of the first-instance court.

18. By letter dated 16 June 2008 the applicant's representative informed the Court that the applicant was no longer in prison.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

19. The relevant domestic law and practice in force at the material time as well as recent developments can be found in the following judgments: *Öcalan v. Turkey* [GC], no. 46221/99, §§ 52-54, ECHR 2005-IV, *Aydoğan and Others v. Turkey*, no. 41967/02, § 17, 2 December 2008, *Kolu*

*v. Turkey*, no. 35811/97, § 44, 2 August 2005, and *Salduz v. Turkey* [GC], no. 36391/02, §§ 27-31, 27 November 2008.

## THE LAW

20. The applicant complained, under Article 6 § 1 of the Convention, that he had been denied a fair hearing on account of the presence of a military judge on the bench of the Izmir State Security Court which tried him.

21. On communication of the application to the respondent Government, a question was raised *ex officio* concerning compliance with Article 6 § 1 of the Convention with regard to the trial, on account of the applicant's conviction on the basis of statements which he had later retracted and which had been obtained during the preliminary investigation.

22. The Government asked the Court to dismiss the application for failure to comply with the requirement of exhaustion of domestic remedies, or, alternatively, for failure to comply with the six-month rule. Under the first limb of their objection, the Government argued, in general terms, that the applicant had failed to raise his complaints before the domestic courts. As regards the second limb of their objection, the Government submitted that the applicant had failed to lodge his application, as regards his complaint pertaining to the independence and impartiality of the State Security Court, within six months following the date on which the Court of Cassation had rendered its first judgment on 17 August 2000.

23. As regards the applicant's complaint regarding the lack of independence and impartiality of the Izmir State Security Court, the Court considers it unnecessary to determine whether the applicant has exhausted domestic remedies or complied with the six-month rule within the meaning of Article 35 of the Convention because this complaint is inadmissible for the following reasons.

24. 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*, 9 June 1998, § 68, *Reports of Judgments and Decisions* 1998-IV, and *Çıraklar v. Turkey*, 28 October 1998, § 39, *Reports* 1998-VII). The Court also found in *Öcalan* (cited above, §§ 114-115) that when a military judge participated in one or more interlocutory decisions that remained in effect during the criminal proceedings in question, 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.

25. In the present case, the Court observes that the applicant's trial commenced before the Izmir State Security Court, whose composition included a military judge. On 19 August 1999, at the second hearing, the military judge sitting on the bench of this court was replaced by a civil judge. Consequently, when the applicant was convicted, *inter alia*, of damaging other persons' property on 11 November 1999 and, later, of membership of an illegal organisation on 9 November 2000, the Izmir State Security Court was composed of three civilian judges.

26. The Court notes that before his replacement, the military judge sat on the bench of the State Security Court at the preparatory hearing and at the first hearing. During this time, the court heard the accused and three complainants, whose testimonies did not have any bearing on the applicant's case (see *Kabasakal and Atar v. Turkey*, nos. 70084/01 and 70085/01, § 34, 19 September 2006). Although at the first hearing the court failed to respond to the applicant's request to make additional submissions under Article 169 of the Criminal Code, this matter was remedied at the hearing held on 7 October 1999 (see paragraph 12 above). Therefore, no interlocutory decisions of importance, in particular for the defence rights of the applicant, were taken by the domestic court during these hearings. In this connection, the Court notes that after the military judge was replaced by a civilian judge, the domestic court went on to hold a number of hearings, during which it heard the accused, including the applicant, the prosecutor, two complainants and two witnesses. It also took various decisions of minor importance. Furthermore, the final submissions of both the public prosecutor and the applicant were read out before the court, which was composed of three civilian judges.

27. The Court has examined the respective importance of the procedural acts which were carried out before and after the replacement of the military judge. It finds that in the instant case none of the acts which were carried out with the participation of the military judge required immediate renewal after his replacement by a civilian judge (see, among other authorities, *Kabasakal and Atar*, cited above, § 34, and *Tamamboğa and Gül v. Turkey*, no. 1636/02, § 47, 29 November 2007).

28. In view of the overall proceedings, the Court finds that, in the particular circumstances of the case, the replacement of the military judge in the course of the proceedings allayed the applicant's reasonably held concern about the trial court's independence and impartiality (see, among other authorities, *Osman v. Turkey*, no. 4415/02, § 17, 19 December 2006). In the light of the foregoing, the Court concludes that the applicant's complaint concerning the independence and impartiality of the Izmir State Security Court should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

29. As to the fairness of the proceedings, the Court points out that this matter was raised by it of its own motion and that it is not clear whether the Government's preliminary objection regarding the exhaustion of domestic remedies was duly raised under this head. However, assuming that this was the case, the Court considers that the applicant did raise the substance of the issue before the judicial authorities (see paragraph 16 above) and, consequently, it rejects the Government's preliminary objection under this head.

30. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established. It must therefore be declared admissible.

31. As to the merits, the Court maintains that the taking of evidence is governed primarily by the rules of domestic law and that it is in principle for the national courts to assess the evidence before them. The Court's task under the Convention is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, among other authorities, *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B). All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraph 1 of Article 6, provided that the rights of the defence have been respected. On this point, the Court relies on the basic principles laid down in its judgments concerning the notion of a fair procedure under Article 6 (see, in particular, *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275, *Öcalan*, cited above, § 131; *Salduz*, cited above, § 55, and *Jalloh v. Germany* [GC], no. 54810/00, § 100, ECHR 2006-...). It will examine the present case in the light of these principles.

32. In the instant case, the Court observes that prior to the trial the applicant made self-incriminating statements to the police, the public prosecutor and a judge at the State Security Court. On each of these occasions the applicant did not have access to a lawyer and there is no indication in the official documents that he was told that he had the right to remain silent. Since there is nothing in the case file to suggest that the applicant was subjected to ill-treatment or was otherwise coerced into making these statements, particularly before the prosecutor and the judge on 22 March 1999, the Court considers that the examination of this part of the application should be confined to the use by the trial court of statements made at the pre-trial stage in the absence of a lawyer.

33. The Court observes that 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. In the *Salduz* judgment, the Court found that this in itself falls short of the requirements of Article 6 of the Convention (§ 56).

34. The Court further observes that the applicant had access to a lawyer following his pre-trial detention and during the ensuing criminal proceedings, when he had the possibility of challenging the prosecution's arguments. Nevertheless, in convicting the applicant, the Izmir State Security Court gave weight to statements the applicant had later retracted and which had been obtained during the pre-trial investigation 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. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred while the applicant was in custody (see, in particular, *Kolu*, cited above, § 62, *Salduz*, cited above, § 58, and *Amutgan v. Turkey*, no. 5138/04, § 18, 3 February 2009<sup>1</sup>).

35. 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 damaged his defence rights.

36. There has therefore been a violation of Article 6 § 1 in the present case.

37. As regards just satisfaction under Article 41 of the Convention, the applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,000 for the costs and expenses incurred both before the domestic courts and before the Court. The Government contested the amounts.

38. As regards non-pecuniary damage, ruling on an equitable basis, the Court awards the applicant EUR 1,500.

39. 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).

40. As to costs and expenses, in the absence of any documentary justification for his claims under this head, as required by Rule 60 of the Rules of Court, the Court makes no award under this head.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the lack of independence and impartiality of the Izmir State Security Court inadmissible and the remainder of the application admissible;

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1. Judgment not yet final.

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the applicant's conviction on the basis of statements which had been obtained during the pre-trial stage in the absence of a lawyer;
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, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı  
Deputy Registrar

Nicolas Bratza  
President