



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

1959 · 50 · 2009

SECOND SECTION

CASE OF TAĞAÇ AND OTHERS v. TURKEY

(Application no. 71864/01)

JUDGMENT

STRASBOURG

7 July 2009

FINAL

07/10/2009

This judgment may be subject to editorial revision.

In the case of Tağaç and Others 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,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Françoise Elens-Passos, *Section Deputy Registrar*,

Having deliberated in private on 16 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 71864/01) 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 5 Turkish nationals, Ms Sevgi Tağaç, Mr Cihan Kırmızıgül, Mr Mehmet Akbaba, Ms Evrim Sarısaltıkoğlu and Ms Suna Yaşar (“the applicants”), on 18 July 2000.

2. The applicants were represented by Mr F. N. Ertekin, Mr T. Açık, Mr K. Öztürk, Mrs G. Yoleri and Mrs F. Kılıçgün (only the fourth applicant), lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 3 November 2005 the President of the Second Section decided to give notice of the application. It was 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 applicants were born in 1967, 1978, 1979, 1973 and 1965, respectively, and live in Istanbul, except for Ms Yaşar who resides in Allschwill, in Switzerland.

5. On 24 March 1995¹ the applicants were arrested and taken into police custody on suspicion of membership of an illegal armed organisation, namely the MLKP-K (Marxist-Leninist Communist Party Foundation), and of organising illegal demonstrations in the Gazi neighbourhood on 12 and 13 March 1995² on behalf of that organisation.

6. On an unspecified date the Istanbul Security Directorate held a press conference and presented the applicants to the press³. There is no information as to the content of the police statement.

7. On 28 March 1995, upon his lawyer's request and following authorisation from the prosecutor on the basis of a Ministry circular, Mr Kırmızıgül met with his lawyer between 4 and 4.05 p.m.

8. On 28, 30 and 31 March 1995, the applicants Mr Kırmızıgül, Ms Tağaç, Mr Akbaba and Ms Sarısaltıkoğlu were questioned by two police officers and made a number of statements incriminating both themselves and other applicants.

9. According to a verbatim record drafted on 31 March 1995, Ms Yaşar refused to give a statement to the police.

10. On 31 March 1995, following her lawyer's request of 29 March 1995 and authorisation from the prosecutor on 29 and 31 March 1995 on the basis of a Ministry circular, Ms Yaşar met with her lawyer at 2.45 p.m. The applicant stated this meeting lasted for about twenty minutes.

11. On 1 April 1995 the applicants, Mr Kırmızıgül and Mr Akbaba, took part in a reconstruction of events where they showed their positions and where and how many shots they had fired during the Gazi incidents.

12. On the same day the applicants were confronted with each other.

13. On 3 April 1995 a superintendent from the Istanbul Security Directorate drafted a report (*fezleke*) in which he considered, on the basis of various documents such as arrest protocols and the applicants' statements, as well as the documents and firearms discovered during house searches, that the applicants had been involved in MLKP-K activities. In addition, an information note was prepared on the MLKP-K - its origins, aims and activities.

14. On 4 April 1995 the applicants were examined by a doctor at the Istanbul Forensic Department. The doctor found no signs of traumatic lesions on the applicants' bodies. She noted that Ms Yaşar had complained of pain in her throat and shoulders and Ms Sarısaltıkoğlu of shoulder and back pain, while Ms Tağaç had claimed that her urine was dark. The latter was examined by a urologist who found no pathological signs on her body or in the results of laboratory tests.

1. In some of the official documents Ms Tağaç, Mr Akbaba and Ms Yaşar are stated to have been arrested on 25 March and Ms Sarısaltıkoğlu on 26 March 2003.

2. The events known as the Gazi incidents are documented in the case of *Şimşek and Others v. Turkey*, nos.35072/97 and 37194/97, §§ 15-25, 26 July 2005.

3. The applicants submitted two newspaper clippings, with photographs.

15. On 4 April 1995 the applicants were brought before the prosecutor at the Istanbul State Security Court (“ISSC”). Those applicants who had given statements to the police retracted them, with Ms Tağaç and Mr Akbaba claiming that their statements had been made under duress and ill-treatment and Ms Yaşar alleging that she had been ill-treated.

16. On 5 April 1995 the applicants were brought before a judge at the ISSC where they reiterated the statements they had given to the prosecutor. They claimed that their police statements had been given under torture.

17. On 3 May 1995 the prosecutor at the ISSC filed a bill of indictment accusing the applicants of membership of the MLKP-K and of inciting the public to rebellion during the Gazi incidents. The charges were brought under Articles 149 and 168 § 2 of the Criminal Code and section 5 of Law no. 3713.

18. On 17 May 1995 criminal proceedings against thirteen accused including the applicants commenced before the ISSC.

19. In the course of the proceedings the applicants challenged the evidence against them and, in particular, requested the court not to take into account statements that had been obtained in police custody under torture and coercion. They also requested the court to hear evidence from the head of the intelligence department of the Istanbul Security Directorate, Mr Avcı, and two members of the Grand National Assembly Susurluk inquiry⁴ as regards allegations of State collusion in the Gazi incidents and to conduct an on-site inspection concerning the Gazi incidents. The court, having regard to Mr Avcı’s submissions during the Susurluk inquiry, considered that these statements had no bearing on the case. It also found that, in view of the facts of the case and the evidence in the case file, an on-site inspection was not necessary.

20. On 16 February 1999 the ISSC convicted the applicants of membership of an illegal armed organisation. In so doing, they took into account the evidence in the case file, including the verbatim records of the reconstruction of the events, the arrest and search protocols, documents and firearms that had been found on two of the accused, the verbatim record of the confrontation of the suspects and the statements of the accused, particularly in police custody. Mr Kırmızıgül and Mr Akbaba were sentenced to eight years and four months’ imprisonment and the other applicants to twelve years and six months’ imprisonment. The applicants were acquitted of the charge of incitement to rebellion.

21. The applicants’ appealed. In particular, they claimed that the first-instance court’s judgment had attached significant weight to statements unlawfully obtained during police custody.

4. Background information on the Susurluk incident, inquiry and report; the Court refers to *Ülkü Ekinci v. Turkey*, no.27602/95, §§ 111-118, 16 July 2002.

22. On 21 January 2000 the Court of Cassation upheld the judgment of the ISSC following a hearing.

23. On 4 May 2000 the prosecutor at the Court of Cassation dismissed the applicants' request for rectification of the Court of Cassation's judgment.

24. In their observations to the Court dated 3 July 2006, the applicants' lawyers submitted that Ms Tağaç, Mr Kırmızıgül and Mr Akbaba had been conditionally released after serving six years and three months in prison. The other applicants' sentences had not yet been enforced.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. 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

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

26. The applicants complained that they had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge on the bench of the Istanbul State Security Court which had tried and convicted them. They further submitted that they had been denied the assistance of a lawyer while in police custody. They relied on Article 6 §§ 1 and 3 of the Convention, which, in so far as relevant reads:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...

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...”

A. Admissibility

27. The Government asked the Court to dismiss the applicants' complaint of a lack of legal assistance during their time in police custody for failure to comply with Article 35 § 1 of the Convention, as regards

exhaustion of domestic remedies or, alternatively, the six-month rule. In this connection, they maintained, firstly, that the applicants had failed to raise this complaint before the domestic courts. Secondly, they argued that the applicants had failed to lodge their application within six months following the date on which the preliminary investigation was terminated.

28. The Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Taşçigil v. Turkey*, no. 16943/03, §§ 31-32, 3 March 2009⁵; and *Çimen v. Turkey*, no. 19582/02, § 22, 3 February 2009). The Court finds no particular circumstances in the instant case which would require it to depart from its findings concerning the above-mentioned applications.

29. Consequently, the Court rejects the Government's preliminary objection.

30. Moreover, the Court considers that this part 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

1. Independence and impartiality of the Istanbul State Security Court

31. The Court has examined a large number of cases raising similar issues to those in the present case and found a violation of Article 6 § 1 of the Convention (see *Özel v. Turkey*, no. 42739/98, §§ 33-34, 7 November 2002, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

32. The Court finds no reason to reach a different conclusion in the instant case. Accordingly, it concludes that there has been a violation of Article 6 § 1.

2. Fairness of the proceedings

a) The parties' observations

33. The Government maintained that there had been no obstacle to the applicants' consulting with their lawyers. In this connection, they pointed out that two of the applicants had met with their lawyers while they were in police custody.

34. The applicants submitted that, at the material time, if a lawyer with a duly executed authority form managed to get authorisation from the prosecutor than he/she would take it to the police and, depending on their goodwill, might manage to see the client. In this connection, they pointed

5. Judgment not yet final.

out that, despite authorisation from the prosecutor on 29 March 1995, the lawyer of Ms Yaşar had not been given access to his client until he obtained a further authorisation on 31 March 1995. Moreover, even when a lawyer did manage to speak with the client, the police would watch and listen and would not permit any discussion about the investigation. The lawyer would not be allowed to examine the investigation file and the meeting would be kept short. In the instant case, only two of the applicants, Mr Kırmızıgül and Ms Yaşar, were able to meet with their lawyers and then only for periods of about 5 and 20 minutes respectively. The police had attended their meetings. Finally, the applicants submitted that they had not been given access to a lawyer while they were being questioned by the police, the prosecutor or the judge at the Istanbul State Security Court during the pre-trial stage.

b) The Court's assessment

35. The Court 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 (cited above, §§ 56- 62). In that case, the Court found that the applicant's right of access to a lawyer had been restricted during his police custody, 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. As a result, he had not had access to a lawyer when he made his statements to the police, the public prosecutor or the investigating judge. No justification had been given for denying the applicant access to a lawyer other than the fact that it was a requirement of the relevant legal provisions. This fell short of the guarantees of Article 6.

36. 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. In this connection, having regard to the uncontested information provided by the applicants, the Court considers that the fact that two of the applicants were able to meet with their lawyers, without privacy, for 5 and 20 minutes respectively on the fourth and seventh days after their arrest, failed to ensure that their lawyers were able to give them effective assistance (see, for example, *Brennan v. the United Kingdom*, no. 39846/98, § 58, ECHR 2001-X). In this respect, the Court reiterates that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" (*ibid.* § 51).

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

38. The applicants complained under Article 5 § 3 of the Convention of the length of their detention in police custody. Under Article 6 of the

Convention they further maintained that the first-instance court had been unduly influenced by prejudicial reports prepared by the police and that the indictment contained statements establishing their criminal guilt in breach of the right to be presumed innocent. In that connection, the applicants further complained that, subsequent to their arrest, the police had organised a press conference where they were presented to journalists as criminals. In addition, the applicants complained of the refusal of the domestic court to hear evidence from their witnesses or to allow an on-site inspection. They criticised the manner in which the procedure for rectification of judgments was set out under domestic law. Finally, they alleged that they had been convicted on the basis of statements given under torture and duress.

39. However, in the light of all the material in its possession, the Court finds that the applicants' above submissions do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. As regards pecuniary damage, Ms Tağaç, Mr Kırmızıgül and Mr Akbaba each claimed 19,000 euros (EUR). Ms Sarısaltıkoğlu claimed EUR 1,500. As to non-pecuniary damage, Mr Kırmızıgül and Mr Akbaba each claimed EUR 30,000. Ms Tağaç claimed EUR 20,000, Ms Sarısaltıkoğlu EUR 10,000 and Ms Yaşar EUR 7,500.

42. The Government contested the amounts.

43. On the question of pecuniary damage, the Court considers that it cannot speculate as to what the outcome of proceedings compatible with Article 6 §§ 1 and 3 (c) would have been. It therefore makes no award in respect of pecuniary damage.

44. As regards non-pecuniary damage, ruling on an equitable basis, the Court awards the applicants EUR 1,500 each.

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

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

B. Costs and expenses

46. The applicants also claimed EUR 1,534 for the costs and expenses incurred before the domestic courts and EUR 17,409 for those incurred before the Court. They submitted invoices regarding various expenses and legal fees incurred in the proceedings before the domestic courts. In respect of the legal fees incurred before the Court, the applicants relied on the Istanbul Bar Association's recommended fee list.

47. The Government contested the amounts.

48. 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 documents in its possession and the above criteria, the Court considers it reasonable to make a joint award in the sum of EUR 2,600 to cover costs under all heads.

C. Default interest

49. 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* admissible the applicants' complaints concerning their right to a fair hearing by an independent and impartial tribunal and the lack of legal assistance during their detention in police custody;
2. *Declares* inadmissible the remainder of the application;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of independence and impartiality of the Istanbul State Security Court;
4. *Holds* that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention on account of the lack of legal assistance while the applicants were in police custody;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to 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) each in respect of non-pecuniary damage, plus any tax that may be chargeable;

(ii) EUR 2,600 (two thousand six hundred euros) jointly in respect of costs and expenses, plus any tax that may be chargeable to the applicants;

(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;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President