



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF SEYİTHAN DEMİR v. TURKEY

(Application no. 25381/02)

JUDGMENT

STRASBOURG

28 July 2009

FINAL

28/10/2009

This judgment may be subject to editorial revision.

In the case of Seyithan Demir 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,

Päivi Hirvelä,

Ledi Bianku,

Işıl Karakaş, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 7 July 2009,

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

PROCEDURE

1. The case originated in an application (no. 25381/02) 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 Seyithan Demir (“the applicant”), on 21 March 2002.

2. The applicant was represented by Ms T. Aslan, a lawyer practising in Izmir. The Turkish Government (“the Government”) were represented by their Agent.

3. On 6 December 2007 the President of the Fourth Section decided to give notice of the application to the Government. 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 applicant was born in 1980 and lives in Antalya.

5. On 24 May 2000 the applicant started his compulsory military service.

6. On 10 July 2000 two conscripts, Mr Karaman and Mr Gezici, informed their superiors and other soldiers that the applicant had made several improper comments to them.

7. Mr Karaman claimed that the applicant had shown him a map of Turkey indicating how they were going to establish Kurdistan and put up its flag and had also said that the Special Forces and soldiers were killing their people and innocent children. According to Mr Karaman, the applicant also stated that “during target practice they can if they want shoot right on target but that they would not”.

8. Mr Gezici alleged that the applicant had kept telling him that they were going to establish Kurdistan and that he had a commando physique and they should take him to the camps.

9. On the same day the head of the military unit heard the applicant, Mr Karaman and Mr Gezici, Mr Dere and Mr Sancı.

10. The applicant maintained that he had never made such remarks and that it was nothing but lies and smears. He stated that he did not have any quarrel with the people who had accused him.

11. Subsequently, on 15 December 2000, the public prosecutor at the Izmir State Security Court filed a bill of indictment with that court charging the applicant with the offence defined in section 8 of the Anti-Terrorism Act, namely, disseminating separatist propaganda.

12. On 18 December 2000 the Izmir State Security Court held a preparatory hearing at which it decided on procedural matters, namely issuing rogatory letters to various authorities in order to secure the applicant’s and the witnesses’ statements. The next hearing was fixed for 6 February 2001.

13. On 2 February 2001 the applicant appeared before the Erzurum State Security Court. The indictment was read out to him. The applicant denied the accusations against him and claimed that Mr Karaman, with whom he had had an argument, was lying. He maintained that he had never uttered the words mentioned in the indictment. The record of the hearing noted that the applicant had requested to be exempted from the obligation to appear at the hearing (*duruşmadan vareste tutulma*). The applicant was not represented by a lawyer.

14. On various dates the rogatory courts heard evidence from Mr Sancı, Mr Gezici, Mr Karaman and Mr Dere. In their statements, Mr Sancı and Mr Dere both affirmed, *inter alia*, that they had not heard the applicant making the impugned remarks but had been informed of them through Mr Gezici and Mr Karaman.

15. In his statement Mr Gezici claimed, *inter alia*, that the applicant had told him “we have camps in the east. Let me take you to them. You have a commando physique”. He stated that the applicant was smiling and it looked like a joke. However, he started to take his words seriously when he heard what the applicant had said to Mr Karaman and decided to complain about him to their hierarchical authorities.

16. In his statement Mr Karaman claimed, *inter alia*, that on various occasions the applicant had told him “Turkish soldiers are traitors, they kill

our people. Special Forces have killed our people and blame it on us. Before military service I was receiving instruction at a camp.” He further claimed that the applicant was pointing at the eastern part of Turkey on the map and saying “We are going to divide Turkey and establish Kurdistan”.

17. On 6 February, 27 March, 10 May and 26 June 2001 the first-instance court held hearings, in the absence of the applicant, during which the statements of the applicant and two of the witnesses taken by way of rogatory letters were read out.

18. During the trial the applicant was doing his military service in Erzurum.

19. In the hearing held on 4 September 2001 the statements of the other two witnesses, taken by way of rogatory letters, were read out. The prosecutor did not ask for an additional investigation and read out his observations on the merits of the case. On the same day the court, on the basis of witness testimonies, considered that the applicant had disseminated separatist propaganda and convicted him as charged. He was sentenced to one year’s imprisonment and to a heavy fine. This decision was served on the applicant on 24 September 2001.

20. On 28 September 2001 the applicant appealed.

21. On 8 October 2001 the applicant hired a lawyer.

22. On 31 October 2001 the applicant’s lawyer filed an appeal.

23. On 8 January 2002 the principal public prosecutor at the Court of Cassation submitted his written opinion to that court. The prosecutor asked the court to dismiss the applicant’s legal representative’s appeal, in accordance with Article 317 of the Code on Criminal Procedure, on the ground that it had been submitted out of time. This opinion was not communicated to the applicant.

24. On 28 January 2002 the Court of Cassation dismissed the applicant’s objections and upheld the judgment of the first-instance court. In its judgment the court stated, *inter alia*, that, having regard to the evidence and the conviction and the assessment of the first-instance court in line with the conclusions of its investigation, the applicant’s conviction had been in accordance with the procedure and the law.

25. On 17 April 2002 the principal public prosecutor at the Court of Cassation dismissed a request by the applicant’s lawyer for rectification of the Court of Cassation’s judgment.

26. On 7 March 2003 the applicant started serving his prison sentence.

27. The applicant paid the fine, in three instalments, on 26 March 2003, 29 April 2003 and on 27 May 2003.

28. By an additional judgment, dated 25 July 2003, the Izmir State Security Court, taking into account that section 8 of Law no. 3713 had been abolished pursuant to Law no. 4928, annulled the applicant’s conviction and ordered his immediate release. On the same day the applicant was released.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. Article 226 of the Code of Criminal Procedure, in force at the material time, provided as follows:

“1. If the accused or his lawyer, who has a power of attorney in this respect, so requests, the court may exempt the accused from the obligation to be present during the hearing.

2. ... the accused shall be questioned by a judge in another judicial district, acting on rogatory letters, about the principal facts of the case.

4. Even if the accused does not so request, if the accused has been remanded in custody or is serving a sentence for another crime, the trial court can decide that the accused shall be questioned by a judge in another judicial district, acting on rogatory letters.

5. The public prosecutor and the accused’s lawyer shall be notified of the date set for questioning. There is no obligation for them to be present during the questioning.

6. The record of the questioning shall be read out at the hearing.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. Under Article 6 §§ 1 and 3 of the Convention, the applicant argued that he had been denied a fair hearing on account of the failure of the domestic courts to respect the rights of the defence. In this connection the applicant submitted that he had been deprived of his right to attend the hearings and the opportunity to examine the prosecutor’s witnesses or to call witnesses or adduce evidence on his own behalf. He stated in this regard that the first-instance court had convicted him without ever hearing him or the prosecutor’s witnesses. He further complained that he had not been sent either the public prosecutor’s observations before the first-instance court or the opinion of the principal public prosecutor at the Court of Cassation. In addition, the applicant maintained that in his case the first-instance court had arbitrarily failed to apply Article 59 of the Criminal Code and that he had been denied the assistance of a lawyer since the Court of Cassation had failed, without reason, to examine the objections submitted by his legal representative.

31. The relevant parts of Article 6 §§ 1 and 3 of the Convention read as follows:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ...

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 ...;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

A. Admissibility

32. The Government asked the Court to dismiss the applicant’s complaint regarding his inability to participate in the hearings before the first-instance court for failure to comply with the six-month rule because he had failed to lodge his application within six months following the date on which he had appeared before the rogatory court.

33. The Court reiterates that, in assessing whether or not a 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 in the case given by the Court of Cassation. He therefore lodged his application to the Court within the six-month time-limit, as required by Article 35 § 1 of the Convention. Consequently, the Government’s objection cannot be upheld.

34. Moreover, the Court notes 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. *The parties’ observations*

35. The Government maintained that the applicant’s trial had been fair. In this connection they submitted, giving examples, that the criminal procedure in Turkey provided equal rights to the defence and the prosecution. In particular, the Government claimed that the applicant had asked to be exempted from the obligation to attend the hearings and had failed to ask for witnesses to be heard before the first-instance court.

36. The applicant maintained his allegations. In particular, he submitted that the trial had been conducted in his absence. In this connection he pointed out that he had been unable to leave his army barracks since he had

been doing his military service during the trial and that it was up to the trial court to secure his attendance before it.

2. The Court's assessment

37. The Court reiterates that although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person “charged with a criminal offence” is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to “everyone charged with a criminal offence” the right “to defend himself in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”, and it is difficult to see how he could exercise these rights without being present (see *Sejdovic v. Italy* [GC], no. 56581/00, § 81, ECHR 2006-II and the references therein).

38. In this connection the Court further reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A). Furthermore, it must not run counter to any important public interest (see *Håkansson and Stureson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A). The Court has also pointed out that, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

39. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together (see, among other authorities, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

40. In the present case the Court observes that the applicant was doing his compulsory military service in Erzurum throughout the criminal proceedings held before the Izmir State Security Court. It further observes that, at the outset, he was not invited to attend the hearings before the Izmir State Security Court which tried and sentenced him. The Erzurum State Security Court had been asked to take evidence from him in his defence, under the powers delegated to it by the Izmir State Security Court (see paragraph 12 above).

41. The Court further observes that, according to the record of the hearing held before the Erzurum State Security Court on 2 February 2001, the applicant did give evidence to this court and requested to be exempted from the obligation to appear at the trial court (see paragraph 13 above). The Court points out that the fact that the applicant raised no objection when the rogatory court took his statement does not signify that he implicitly waived his right to defend himself or to appear before the Izmir State Security Court (see, for example, *Kahraman v. Turkey*, no. 42104/02, § 31, 26 April 2007). Moreover, having regard to the fact that the applicant was not assisted by a lawyer at that hearing and that the rogatory court neither read out his rights, including his right to a lawyer, nor provided information to the applicant regarding the consequences of such a request, the Court considers that the applicant, as a layman, cannot have been expected to appreciate that such a demand would result in his being tried and convicted in his absence. Thus, the circumstances surrounding the applicant's decision deprived it of any validity from the point of view of the Convention. In such circumstances, it cannot be said, therefore, that the applicant unequivocally and intentionally waived his rights under Article 6 (see *Jones*, cited above, and, *mutatis mutandis*, *Pfeifer and Plankl v. Austria*, 25 February 1992, § 38, Series A no. 227).

42. Moreover, the Court considers that, in view of the prominent place held in a democratic society by the right to a fair trial (see, among many other authorities, *Delcourt v. Belgium*, 17 January 1970, § 25 *in fine*, Series A no. 11), Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of and participate in the proceedings against him where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit (see, *mutatis mutandis*, *Somogyi v. Italy*, no. 67972/01, § 72, ECHR 2004-IV). While it is not fully clear from the judgment of the court whether the Court of Cassation only examined the grounds of appeal submitted by the applicant and disregarded those submitted by his legal representative, the Court does not find any indication from the judgment that any scrutiny was exercised by that court, on its own motion pursuant to Article 320 § 1 of the Code of Criminal Procedure, to determine whether the applicant had unequivocally waived the right to appear at his trial or whether he had been given an adequate and proper opportunity to challenge and question the witnesses against him. In this connection the Court reiterates that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 65, ECHR 2001-VIII). This is even more so

when the witnesses whose testimonies on which the conviction was based have not appeared or given evidence before the trial court which convicted the applicant. In such circumstances the Court is not convinced that the subsequent appeal proceedings remedied the fact that the proceedings before the first-instance had taken place in the applicant's absence despite the fact that it had not been established that he had waived his right to appear and to defend himself or that he intended to escape trial.

43. In view of the above, the Court concludes that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c) in the present case.

44. Having regard to the violation found above, the Court deems it unnecessary to examine the applicant's remaining complaints under Article 6 of the Convention (see, for example, *Sejdovic*, § 107, cited above, and *Juhnke v. Turkey*, no. 52515/99, § 94, 13 May 2008).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

45. In the application form the applicant also complained that section 8 of Law no. 3713 was incompatible with Article 10 of the Convention and had infringed his freedom of expression.

46. The applicant further complained under the same provision that he had been denied a fair hearing by an independent and impartial tribunal on account of the different rules of procedure applicable in the proceedings before the State Security Courts and the fact that judges were appointed by the Supreme Council of Judges and Prosecutors in Turkey. In his observations dated 8 August 2008, the applicant claimed under Article 34 that his right of individual petition had been infringed because the judgment of the Court of Cassation was never served on him.

47. As regards the applicant's complaint under paragraph 45, the Court notes that it is linked to the one examined above and must likewise be declared admissible. However, having regard to the facts of the case, the submissions of the parties and its finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention above, the Court considers that it has examined the main legal question raised in the present application. It concludes therefore that there is no need to give a separate ruling on the applicant's complaint under Article 10 of the Convention (see, for example, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007; *Getiren v. Turkey*, no. 10301/03, § 132, 22 July 2008; and *Juhnke*, cited above, § 99).

48. As to the applicant's submissions under paragraph 46, the Court finds, in the light of all the materials in its possession, that they 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 §§ 1, 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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, costs and expenses

50. The applicant claimed, in total, 7,500 euros (EUR) in respect of pecuniary damage. This sum concerned loss of earnings incurred during his imprisonment and the fine he had paid as a result of his conviction. He further claimed, in total, EUR 4,150 for the costs and expenses incurred both in the domestic proceedings and before the Court. In support of that request, the applicant referred to the Izmir Bar Association’s scale of fees and submitted a time sheet prepared by his legal representative. In addition, the applicant claimed EUR 30,000 in respect of non-pecuniary damage.

51. The Government contested the amounts.

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

53. As regards non-pecuniary damage, ruling on an equitable basis, the Court awards the applicant EUR 2,000 (see *Kahraman*, cited above, § 43).

54. Moreover, 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 v. Turkey* [GC], no. 36391/02, § 72, 27 November 2008).

55. As to costs and expenses, the Court reiterates that 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 rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the applicant EUR 1,000 for the proceedings before the Court.

B. Default interest

56. 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 complaints concerning the alleged lack of a fair hearing on account of the failure of the domestic courts to respect the rights of the defence (see paragraph 30 above) and the alleged interference with his freedom of expression (see paragraph 45 above) admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c) on account of the fact that the proceedings before the first-instance had taken place in the applicant's absence;
3. *Holds* that there is no need to examine the applicant's remaining complaints under Articles 6 and 10 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, 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 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President