



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

1959 · 50 · 2009

SECOND SECTION

CASE OF ARZU v. TURKEY

(Application no. 1915/03)

JUDGMENT

STRASBOURG

15 September 2009

FINAL

15/12/2009

This judgment may be subject to editorial revision.

In the case of Arzu 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 25 August 2009,

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

PROCEDURE

1. The case originated in an application (no. 1915/03) 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 Arzu (“the applicant”), on 17 September 2002.

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

3. On 5 November 2007 the President of the Second 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 1970 and was detained in Mardin prison at the time when the application to the Court was lodged.

5. In the course of an operation carried out against the activities of an illegal armed organisation, namely the PKK (Workers’ Party of Kurdistan), the applicant, together with seven other suspects, was arrested and placed in custody at the anti-terrorism branch of the Diyarbakır police headquarters on 31 October 1993.

6. On the same day, the applicant was examined by a doctor at Çınar Medical Clinic. No physical signs of ill-treatment were noted on the applicant's person.

7. In the application form the applicant alleged, without any further details, that he had been subjected to torture and ill-treatment, including threats and coercion while he was detained.

8. On 31 October, 17 November and 18 November 1993 the applicant took part in a number of reconstructions of certain events.

9. The health of one of the suspects arrested on the same ground as the applicant deteriorated while in detention and he died¹. The applicant claimed that this person had also been tortured in custody.

10. In the meantime, on 12 November 1993, the applicant was taken for a medical examination because he did not feel well. It appears from his note that the doctor suspected a urinary infection. The laboratory results noted the presence of about 3 or 4 red blood cells in his urine. On 13 November 1993 the applicant paid for the medicament prescribed by the doctor.

11. On 20 November and 25 November 1993 the applicant, on being questioned by two police officers, made a number of incriminating statements concerning himself and some of the other accused.

12. On 26 November 1993 the applicant and ten other accused were examined by a doctor at Diyarbakır State Hospital. No physical signs of ill-treatment were noted on the applicant's person.

13. On 26 November 1993 the applicant was brought before the prosecutor at the Diyarbakır State Security Court (SSC), where he retracted his statements to the police, claiming that he had given them under torture. He accepted that he was the owner of two of the guns found as a result of reconstruction of the events but stated that he had no idea if one of these guns had been used, before he bought it, in the killing of a certain Mr H.B. and Mr M.S.G. as found in a ballistic report concerning their deaths. He also denied the content of the rest of the verbatim records of the reconstructions of the events, claiming that it was the police who had taken the suspects there and had told them what to say.

14. On 26 November 1993 the applicant was brought before a judge at the SSC where he reiterated the statements he had given to the prosecutor. In particular, he denied his police statements and the contents of the verbatim records of the reconstructions, claiming that he had signed them under duress and coercion. The court remanded him in custody.

15. On 30 November 1993 the applicant objected to his remand in custody. In his petition, he claimed his innocence and submitted that he had been subjected to constant and severe ill-treatment while in police custody. The applicant's request for release was rejected by the SSC on 7 December

¹ This event is documented in the inadmissibility decision of the European Commission of Human Rights in the case of *Nurcan Canpolat v. Turkey* ([dec.], no.28491/95, 9 April 1996).

1993, its reasons being stated as follows: “having regard to the nature of the offence with which he is charged and the state of the evidence”.

16. On 23 December 1993 the prosecutor at the SSC filed a bill of indictment charging the applicant under Article 125 of the Criminal Code with the offence of carrying out activities for the purpose of bringing about the secession of part of the national territory. The applicant was accused of taking part, on behalf of the PKK, in the killing of a certain Mr S.T. on 28 June 1993 and of Mr N.Y. on 5 August 1993, of kidnapping Mr C.Y. on 5 August 1993 and of taking part in two instances of laying down mines and shooting at police officers on 31 August 1993 and 22 October 1993. The prosecutor also noted that one automatic rifle belonging to the applicant had been, according to ballistic reports, used in the killing of Mr H.B. and Mr M.S.G.

17. On 28 December 1993 the criminal proceedings against eleven accused including the applicant commenced before the SSC.

18. In the course of the trial, at the end of each hearing, the SSC considered releasing the applicant pending trial, both of its own motion and at the request of his legal representative. At each hearing, taking into account the nature of the offence and the state of the evidence, the court decided to prolong the applicant’s detention.

19. On 23 March 1999 the SSC found the applicant guilty as charged and sentenced him to life imprisonment.

20. On 17 February 2000 the Court of Cassation held a hearing and quashed the judgment of the SSC in respect of the applicant and four other accused.

21. On 3 April 2000 the case was sent back to the first-instance court.

22. On 22 October 2002 the SSC found the applicant guilty as charged and sentenced him to life imprisonment. The trial court, on the basis of the evidence contained in the case file, including the applicant’s statements to the police and the verbatim records of the reconstructions of the events, found it established that the applicant had taken part in the killing of two persons and the kidnapping of another, had planted land mines and had opened fire on a police car.

23. On 18 June 2003 the applicant appealed. In his petition, invoking a number of Convention rights, the applicant asked the Court of Cassation to quash his conviction. In particular, he repeated that he had been tortured and ill-treated in police custody for 27 days and that as a result he had been taken to hospital and treated there. Moreover, he maintained that one of his co-accused had died as a result of torture. He submitted that it was unlawful for the trial court to convict him on the basis of statements obtained under such conditions.

24. On 30 September 2003 the Court of Cassation held a hearing and upheld the judgment in respect of the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. The relevant domestic law and practice 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), *Tamamboğa and Gül v. Turkey* (no. 1636/02, §§ 23-24, 29 November 2007) and *Salduz v. Turkey* ([GC], no. 36391/02, §§ 27-31, 27 November 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

26. The applicant complained under Article 3 of the Convention that he had been subjected to ill-treatment and torture while in police custody. He further submitted under Article 13 of the Convention that the domestic authorities had failed to conduct an effective investigation into his allegations.

27. The Court considers that these complaints should be examined from the standpoint of Article 3 alone, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

28. The Government asked the Court to dismiss the application as being inadmissible for failure to comply with the requirement of exhaustion of domestic remedies or, alternatively, for failure to comply with the six-month rule, both being requirements of Article 35 § 1 of the Convention. As to the merits, they submitted that the applicant’s allegations of ill-treatment were unsubstantiated.

29. The applicant maintained his allegations. In particular, he submitted that he had been beaten, left without food or water, threatened with torture and death, sworn at and forced to sign statements he had not made. He claimed that the torture had been continuous throughout his detention in police custody. The applicant challenged the veracity of the medical report established at the end of his police custody and submitted that, as a result of ill-treatment, he had had to be taken to hospital and treated. In this connection, he pointed out that one detainee had died as a result of torture during the time he was held in custody. The applicant further claimed that, despite complaining, numerous times, about his ill-treatment before the domestic authorities, no investigation had been initiated into his complaints, demonstrating the State authorities’ tolerance of such acts.

30. The Court considers it unnecessary to determine whether the applicant exhausted domestic remedies or complied with the six-month rule, within the meaning of Article 35 § 1 of the Convention, since his complaint is in any event inadmissible for the following reasons.

31. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence (see, in particular, *Tanrikulu and Others v. Turkey* (dec.), no. 45907/99, 22 October 2002). To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt”, but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among many others, *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV, and *Süleyman Erkan v. Turkey*, no. 26803/02, § 31, 31 January 2008).

32. In the instant case the Court observes that the applicant was held in detention for 26 days. It further takes note of the applicant’s allegation concerning the death of one of the detainees, who was held in custody on the same ground, while he was in detention (see paragraph 9 above). However, the Court observes that the applicant did not specifically set out in his application to the Court the details of the alleged ill-treatment. These only emerged in the applicant’s observations of 16 May 2008, and even then only by reference to the form which the alleged ill-treatment had taken without any further details.

33. Likewise, the Court observes that, in the course of criminal proceedings, the applicant, who was assisted by a lawyer, only claimed, in general terms to have been subjected to torture and ill-treatment. He gave no details as to the kind of treatment which he had allegedly sustained and did not provide the authorities with any physical or other identifying details as regards the alleged perpetrators. The Court considers that a mere allegation of ill-treatment, without any credible details, is insufficient to constitute an arguable claim giving rise to a positive obligation. Therefore the applicant could not legitimately demand that an in-depth investigation be carried out into his complaints of ill-treatment when neither he nor his lawyer had provided the relevant authorities with a reliable starting point for their inquiries (see, for example, *Yıldırım v. Turkey* (dec.), no. 33396/02, 30 August 2007).

34. Moreover, the Court observes that the medical reports established at the beginning and end of the applicant’s detention do not contain any indication that he was physically ill-treated as alleged. The Court is aware that this report lacks details and falls significantly short of the standards recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which are regularly taken into account by the Court in its examination of cases concerning ill-treatment (see, *inter alia*, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X), as well as the guidelines set out in the Manual on

the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “the Istanbul Protocol”, submitted to the United Nations High Commissioner for Human Rights (see *Bati and Others*, cited above, § 100). Nevertheless, it notes that there is no material in the case file which could call into question the findings in this report or add probative weight to the applicant’s allegations. In particular, the fact that the applicant was prescribed an unspecified medication following his examination by a doctor on 12 November 1999 cannot be regarded, in view of the contents of the doctor’s note and subsequent laboratory analysis, as affording strong support for the applicant’s allegations. In addition, although the applicant contested the veracity of the medical report established at the end of his detention, there is no indication in the case file that the applicant requested and was refused permission to see another doctor during or at the end of his detention. Consequently, the Court considers that the applicant has not submitted any medical evidence of either physical injuries to his person or mental trauma consistent with having been tortured and ill-treated as alleged (see, among others, *Yaşar v. Turkey* (dec.), no. 55938/00, 22 June 2006; *Künkül v. Turkey* (dec.), no. 57177/00, 30 November 2006; *S.T. v. Turkey* (dec.), no. 28310/95, 9 November 1999; and, *a contrario*, *Mehmet Eren v. Turkey*, no. 32347/02, § 43, 14 October 2008).

35. As regards the applicant’s allegations of verbal abuse, even assuming that there was some factual basis to them, leaving him with feelings of apprehension or disquiet, the Court reiterates that such feelings would not be enough in themselves to amount to degrading treatment within the meaning of Article 3 (see, in particular, *Hüsniye Tekin v. Turkey*, no. 50971/99, § 48, 25 October 2005; *K.Ö. v. Turkey*, cited above, § 41; *Çevik v. Turkey* (dec.), no. 57406/00, 10 October 2006).

36. In view of the above considerations, the Court finds that the applicant has not laid the basis of an arguable claim that he was subjected to ill-treatment in custody. It follows that he has not made out a case that the authorities failed in their procedural obligation under Article 3 of the Convention to investigate his claim (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 117, *Reports of Judgments and Decisions* 1998-VIII). For these reasons the Court considers that the complaint is inadmissible as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

37. The applicant complained under Article 6 § 2 of the Convention that he had been detained on remand for over nine years, and that his requests for release pending trial received no serious consideration by the first-instance court, in breach of his right to the presumption of innocence.

38. The Court considers that this complaint should be examined from the standpoint of Article 5 § 3 alone, which reads:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. Admissibility

39. The Court notes 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.

B. Merits

40. The Court observes that the applicant’s deprivation of liberty consisted of two periods of pre-trial detention and lasted around eight years and one month in total (see, in particular, *Solmaz v. Turkey*, no. 27561/02, §§ 23-36, 16 January 2007 as regards the calculation of periods of pre-trial detention). During this time, the first-instance court considered the applicant’s continued detention at the end of each hearing, either of its own motion or at the request of the applicant. It notes however, from the material in the case file, that the court ordered the applicant’s continued detention on remand using identical, stereotyped terms, such as “having regard to the nature of the offence and the state of the evidence”.

41. The Court has frequently found violations of Article 5 § 3 of the Convention in cases raising similar issues to those in the present application (see, for example, *Özden Bilgin v. Turkey*, no. 8610/02, § 32, 14 June 2007; *Tamamboğa and Gül*, § 37, cited above; *Hasan Ceylan v. Turkey*, no. 58398/00, § 28, 23 May 2006; *Dereci v. Turkey*, no. 77845/01, 24 May 2005; *Tacıroğlu v. Turkey*, no. 25324/02, 2 February 2006).

42. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court finds that the length of the applicant’s detention, which lasted over eight years and one month, given the stereotypical reasoning of the first-instance court, has not been shown to have been justified (see *Çetin Ağdaş v. Turkey*, no. 7331/01, § 33, 19 September 2006).

43. There has accordingly been a violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

44. The applicant complained that he had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge sitting on the bench of the State Security Court which tried him. He maintained that he had been denied access to a lawyer during the initial stages of the criminal proceedings. Lastly, the applicant submitted that the length of the criminal proceedings against him had been excessive. He relied on Article 6 §§ 1 and 3 of the Convention, which, in so far as relevant, provides:

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

45. 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 fairness of the proceedings*

46. The Court reiterates that it has already examined the same grievance of a lack of access to a lawyer whilst in police custody 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 (judgment cited above, §§ 56-62). 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.

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

48. Moreover, having regard to the facts of the case, the submissions of the parties and its preceding finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention, the Court considers that there is no need to make a separate ruling on the merits of the applicant's complaint concerning the independence and impartiality of the State Security Court under this provision (see *Getiren v. Turkey*, no. 10301/03, § 132, 22 July 2008 and the cases referred to therein).

2. *The length of the proceedings*

49. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, and the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

50. In the instant case, the Court observes that the period to be taken into consideration began on 31 October 1993, when the applicant was taken into police custody and ended on 30 September 2003 with the final decision of the Court of Cassation. It thus lasted approximately 9 years and 11 months during which time courts at two levels of jurisdiction examined the case twice.

51. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to that of the present application (see *Tamamboğa and Gül v. Turkey*, §§ 55-61, cited above; *Pakkan v. Turkey*, no. 13017/02, §§ 40-45, 31 October 2006; *Yaşar v. Turkey*, no. 46412/99, §§ 60-65, 24 January 2006).

52. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court finds that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

53. There has accordingly been a breach of Article 6 § 1.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

54. The applicant further complained under Article 13 in conjunction with Article 6 of the Convention that he had been denied an effective remedy in respect of his grievances under this head.

55. Under Article 14 of the Convention the applicant alleged that he had been discriminated against on account of his Kurdish ethnic origin. He further complained about the differences in the procedural guarantees for offences tried before the State Security Courts.

56. As regards the applicant's complaint under Article 13, in conjunction with Article 6 of the Convention, the Court considers that this complaint is linked to the one examined above and must therefore likewise be declared admissible. However, as the applicant has failed to develop his complaint under this head in any more detail, it finds it unnecessary to examine this complaint separately on the merits (see *Tekin and Baltaş v. Turkey*, nos. 42554/98 and 42581/98, § 42, 7 February 2006, and *Kiper v. Turkey*, no. 44785/98, § 44, 23 May 2006).

57. As to the applicant's complaints under Article 14 of the Convention, the Court has examined the applicant's allegation. However, it finds no evidence in the case file to support it, or which might disclose any appearance of a violation of this provision. Consequently, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed, in total, 135,000 euros (EUR) in respect of non-pecuniary damage.

60. The Government contested the amount.

61. The Court considers that the non-pecuniary damage suffered on account of the violations of Articles 5 § 3 and 6 §§ 1 and 3 (c) of the Convention cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the applicant EUR 10,600 in respect of non-pecuniary damage.

62. Furthermore, the Court considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request (see *Salduz*, cited above, § 72).

B. Costs and expenses

63. The applicant claimed EUR 7,693 for legal fees, including those incurred before the domestic courts. He further asked to be awarded an amount corresponding to the legal aid given by the Council of Europe, in

respect of costs and expenses. The applicant submitted a time sheet prepared by his legal representative and the Diyarbakır Bar Association's scale of fees. He further referred to an oral legal fees agreement concluded with his lawyer.

64. The Government contested the amount.

65. 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 rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the applicant EUR 2,500 for the proceedings before the Court.

C. Default interest

66. 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 complaints concerning the applicant's right to a fair hearing within a reasonable time by an independent and impartial tribunal, the length of his pre-trial detention and the absence of an effective remedy in respect of his grievances under Article 6;
2. *Declares* the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 5 § 3 of the Convention on account of the length of the applicant's pre-trial detention;
4. *Holds* that there has been a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention on account of the lack of legal assistance to the applicant while he was in police custody;
5. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings against the applicant;
6. *Holds* that there is no need to examine separately on the merits the applicant's other complaints under Articles 6 and 13 of the Convention;

7. *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 10,600 (ten thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,500 (two thousand five hundred 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;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President