



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

1959 · 50 · 2009

SECOND SECTION

CASE OF HALİL KAYA v. TURKEY

(Application no. 22922/03)

JUDGMENT

STRASBOURG

22 September 2009

FINAL

22/12/2009

This judgment may be subject to editorial revision.

In the case of Halil Kaya 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,

András Sajó,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 1 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 22922/03) 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 Halil Kaya (“the applicant”), on 4 February 2003.

2. The applicant was represented by Mr K. Derin, a lawyer practising in Adana. The Turkish Government (“the Government”) were represented by their Agent.

3. On 28 September 2006 the Court declared the application partly inadmissible and decided to communicate to the Government the complaint concerning the lack of legal assistance to the applicant during his police custody. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

4. The applicant was born in 1983 and lives in Adana.

5. On 31 December 2000 at about 00.15 a.m. the applicant, who was seventeen years old at the time, was taken into police custody in Adana on suspicion of aiding and abetting an illegal organisation by way of chanting slogans in favour of that organisation and by burning tyres in the streets. The same day he was interrogated by the police and the public prosecutor respectively, in the absence of a lawyer. According to the information in the file, the applicant was released on the second day of custody.

6. On 10 January 2001 the Public Prosecutor at the Adana State Security Court filed an indictment accusing the applicant and three others of aiding and abetting an illegal organisation, an offence under Article 169 of the Criminal Code and Section 5 of the Prevention of Terrorism Act (Law no. 3713).

7. Between 10 January and 13 August 2001, the court held thirty-four hearings, during which the applicant was not represented by a lawyer. A lawyer was assigned to the applicant for the hearing of 3 September 2001.

8. On 3 December 2001 the State Security Court delivered its judgment. It convicted the applicant as charged and sentenced him to two years and six months' imprisonment. In convicting the applicant, the court had regard to the applicant's statements to the police and the public prosecutor, which were taken in the absence of a lawyer. On 8 July 2002 the Court of Cassation dismissed the applicant's appeal, without holding a hearing on the merits. The decision dated 8 July 2002 was deposited with the registry of the Adana State Security Court on 21 August 2002. Subsequently, on 11 September 2002 the applicant was sent to prison to serve his sentence.

9. In the meantime, on 30 July 2003 Law no. 4963 entered into force, which amended Article 169 of the Criminal Code. Relying on the fact that the new law provided more favourable provisions for the applicant, on 29 August 2003 the applicant's lawyer requested the re-opening of the proceedings. On 15 September 2003 the Adana Criminal Court decided to re-open the case and ordered the applicant's release from prison. The matter was accordingly re-examined by the Adana Criminal Code and, in view of the new wording of Article 169 of the Criminal Code, on 7 October 2004 the court held that the applicant should not be convicted under Article 169 but under Article 312. As a result, he was sentenced to three months and ten days' imprisonment and his sentence was converted to a fine. Furthermore, in accordance with Law no. 647, the execution of his sentence was postponed. On 7 October 2004 the applicant appealed.

10. On 19 December 2005 the Principal Public Prosecutor at the Court of Cassation decided that the case file should be remitted to the Adana Criminal Court for re-examination. In his decision, the prosecutor referred to new legislation which had entered into force on 12 October 2004, amending the Criminal Code once again. The Prosecutor drew further attention to another new amendment which had been made on 31 March 2005 to Law no. 5326 concerning misdemeanours.

11. The applicant's case was once again examined by the Adana Criminal Court in view of the recent legislative amendments. Finally, on 8 May 2006 the court found the applicant guilty under Article 215 of Law no. 5326 and sentenced him to twenty five days' imprisonment. The court further converted the sentence to a fine and, pursuant to Law no. 5395 on Juvenile Protection, it decided to defer adjudication of the sentence. This decision was upheld by the Adana Assize Court on 20 June 2007.

THE LAW

12. Relying on Article 6 § 3 (c) of the Convention, the applicant complained that, although he was a minor at the time, he had been denied the assistance of a lawyer during his police custody.

13. The Government maintained in the first place that the applicant had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention, since at no stage of the domestic proceedings did he rely on the fact that he had been deprived of his right to legal assistance during police custody. In the alternative, they stated that the application was introduced outside the six months time-limit, since the applicant was represented by a lawyer during his trial after 3 September 2001. In the alternative, relying on the Court's case-law in the *Okul v. Turkey* decision (no. 45358/99, 4 September 2003), they considered that the six months time-limit should run from 8 July 2002, the date on which the Court of Cassation delivered its decision.

14. The Court notes that the restriction imposed on the applicant's right of access to a lawyer was systemic, pursuant to section 31 of Law no. 3842, and applied to anyone held in police custody in connection with an offence falling within the jurisdiction of the State Security Courts. As a result, this restriction was applied as a blanket rule and the applicant could not request the benefit of legal assistance during his police custody. Accordingly, the Court rejects the Government's preliminary objection regarding exhaustion of domestic remedies. As to the Government's contention that the applicant failed to comply with the six months time-limit, the Court recalls 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). Furthermore, in the *Okul* decision, referred to by the Government, the Court had referred to Article 324 of the Code of Criminal Procedure, which states that, if the Court of Cassation holds a hearing, it should deliver its decision within one week following that hearing. However, in the present case, the Court of Cassation did not hold a hearing on the merits of the case.

15. The Court reiterates that where an applicant is not entitled to be served *ex officio* with a written copy of the final domestic decision and if she or he was represented by a lawyer during the domestic proceedings, as in the present case, the date on which the final domestic decision was deposited with the registry of the first-instance court should be taken as the starting-point under Article 35 § 1 of the Convention, being the latest date by which the applicant or his or her representative was definitively able to find out about the content of the final decision (see *İpek v. Turkey* (dec.), no. 39706/98, 7 November 2000). In the present case, the decision dated 8 July 2002 was deposited with the Registry of the Adana State Security Court on 21 August 2002. As the applicant lodged his application with the

Court on 4 February 2002, the Court considers that he has lodged his application with 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.

16. At this point, the Court observes that, after the introduction of the present application with the Court, the criminal proceedings against the applicant were reopened following several amendments in the national legislation. At the end of the trial, the domestic courts found the applicant guilty under Article 215 of Law no. 5326, but deferred sentencing. As a result, the applicant was placed under supervision for a period of five years and the conviction was not noted in his criminal record. However, before this decision, the applicant had already been serving his prison sentence between 11 September 2002 and 15 September 2003. Consequently, the applicant can still be considered as a victim within the meaning of Article 34 of the Convention (see, *mutatis mutandis*, *Birdal v. Turkey*, no. 53047/99, § 24, 2 October 2007; *a contrario*, *Koç and Tambaş* (dec.), no. 46947/99, 24 February 2005).

17. The Court notes that this remaining 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 and must therefore be declared admissible.

18. As regards the merits, the Court observes that it has already examined the same grievance in the case of *Salduz v. Turkey* and found a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 ([GC], no. 36391/02, §§ 56-62, 27 November 2008). In that judgment, the Court held that, the restriction imposed on the right of access to a lawyer was systematic and applied to anyone held in police custody during that period, regardless of his or her age, in connection with an offence falling within the jurisdiction of the State Security Courts. 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.

19. The Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody (see *Salduz*, cited above, §§ 32-36), the Court stresses the fundamental importance of such a service (*ibidem*, § 60).

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

21. As regards just satisfaction under Article 41 of the Convention, the applicant requested 40,000 euros (EUR) in respect of pecuniary damage and EUR 40,000 in respect of non-pecuniary damage. He also requested EUR 5,000 in respect of legal fees and EUR 300 in respect of costs and

expenses. In support of his requests, he submitted an invoice from a translator in the amount of EUR 200. The Government contested the claims.

22. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. In respect of non-pecuniary damage, ruling on an equitable basis, it awards EUR 1,500 to the applicant.

23. The Court further considers that the most appropriate form of redress would be the re-trial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should he so request (see *Salduz*, cited above, § 72).

24. 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 finds it reasonable to award the sum of EUR 200 under this head.

25. The Court further finds 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 remainder of the application admissible;
2. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the lack of legal assistance to the applicant while in police custody;
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, 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) plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 200 (two 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;

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

Done in English, and notified in writing on 22 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President