



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

1959 · 50 · 2009

SECOND SECTION

CASE OF MERDAN v. TURKEY

(Application no. 38011/05)

JUDGMENT

STRASBOURG

29 September 2009

FINAL

29/12/2009

This judgment may be subject to editorial revision.

In the case of Merdan 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, *Deputy Section Registrar*,

Having deliberated in private on 8 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 38011/05) 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 Mustafa Merdan (“the applicant”), on 19 October 2005. The applicant was represented by Ms G. Bağcı, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

2. On 23 September 2008 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the applicant’s lack of access to classified documents submitted by the Ministry of Defence to the Supreme Military Administrative Court 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

3. The applicant was born in 1971 and lives in Şırnak.

4. On 8 June 2004 the applicant, an artillery captain at the Turkish Armed Forces, brought a case before the Supreme Military Administrative Court against the Ministry of Defence for the annulment of his transfer to a different garrison.

5. In their pleadings the Ministry of Defence argued that the applicant's transfer had been lawful and submitted certain confidential documents in support of their arguments for the Supreme Military Administrative Court's examination under Article 52 (4) of Law no. 1602. These documents were not communicated to the applicant.

6. On 15 February 2005 the Supreme Military Administrative Court held that the applicant's appointment had not been contrary to law and rejected his request. In taking this decision the Supreme Military Administrative Court relied on, *inter alia*, the confidential documents submitted by the Ministry of Defence by virtue of Article 52 (4) of Law no. 1602.

7. On 26 April 2005 the applicant's rectification request was rejected by the Supreme Military Administrative Court.

II. RELEVANT DOMESTIC LAW

8. A description of the relevant domestic law can be found in the decision of *Karayigit v. Turkey* ((dec.), no. 45874/05, 23 September 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

9. The applicant complained that he had been denied access to the classified documents and information submitted by the Ministry of Defence to the Supreme Military Administrative Court during the proceedings, which infringed the principle of equality of arms and the right to adversarial proceedings as safeguarded in Article 6 § 1 of the Convention.

10. Relying mainly on the jurisprudence of *Pellegrin v. France* ([GC], no. 28541/95, ECHR 1999-VIII), the Government argued that Article 6 § 1 of the Convention was not applicable in the instant case on account of the special relationship that existed between the applicant and the State.

11. The Court notes that it has already examined and rejected this objection raised by the Government in similar cases (see *Miran v. Turkey*, no. 43980/04, §§ 9-11, 21 April 2009, and *Topal v. Turkey*, no. 3055/04, §§ 12-15, 21 April 2009). The Court finds no particular circumstances in the instant case which would require it to depart from this jurisprudence and therefore rejects the Government's objection.

12. 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.

13. As regards the merits of this complaint, the Government contended that the applicant was cognizant of all the information relevant to the case. They did not, however, explain why certain documents deposited with the Supreme Military Administrative Court remained classified throughout the proceedings if the applicant was aware of their content as alleged.

14. The Court notes that it has previously considered similar complaints and found a violation of Article 6 § 1 of the Convention (see *Güner Çorum v. Turkey*, no. 59739/00, §§ 24-31, 31 October 2006; *Aksoy (Eroğlu) v. Turkey*, no. 59741/00, §§ 24-31, 31 October 2006; *Miran*, cited above, §§ 13 and 14; *Topal*, cited above, §§ 16 and 17). It considers that the Government have not put forward any fact or argument in the instant case which would require it to depart from this jurisprudence.

15. There has accordingly been a violation of Article 6 § 1 of the Convention on account of the applicant's lack of access to the classified documents submitted to the Supreme Military Administrative Court.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damages and costs and expenses

16. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

17. The Government contested this claim as being excessive.

18. The Court considers that the applicant must have suffered non-pecuniary damage which the findings of a violation of the Convention in the present judgment do not suffice to remedy. Ruling on an equitable basis, it awards the applicant EUR 6,500 (see *Güner Çorum*, cited above, § 39; *Aksoy (Eroğlu)*, cited above, § 39; *Miran*, cited above, § 22; and *Topal*, cited above, § 23).

19. The applicant did not claim any costs and expenses. Accordingly, no award is made under this head.

B. Default interest

20. 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 remainder of the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the applicant's lack of access to classified documents submitted to the Supreme Military Administrative Court ;
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 6,500 (six 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 29 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President