



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

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SECOND SECTION

CASE OF OKAN ERDOĞAN v. TURKEY

(Application no. 43696/04)

JUDGMENT

STRASBOURG

29 September 2009

FINAL

29/12/2009

This judgment may be subject to editorial revision.

In the case of Okan Erdoğan 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. 43696/04) 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 Okan Erdoğan (“the applicant”), on 20 October 2004. The applicant was represented by Mr M. N. Eldem, a lawyer practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

2. On 15 January 2008 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

3. The applicant, who was born in 1980 and lives in Kayseri, was a student at a military academy. At the time of his registration at this academy, his father had signed a promissory note for the reimbursement of the applicant’s educational expenses in the event of his leaving the school, due to expulsion or otherwise.

4. In March 2003 the applicant was expelled from the military academy following a secret security investigation conducted by the Ministry of

Defence into him and his family. The applicant was not notified of the specific reasons for his expulsion.

5. Subsequently, the applicant asked the Supreme Military Administrative Court to annul the expulsion decision. During the proceedings, he did not have access to the classified documents and information submitted by the Ministry of Defence to the Supreme Military Administrative Court in support of its decision to expel him from the military academy.

6. On 10 December 2003 the Supreme Military Administrative Court refused to annul the expulsion decision. It stated that information and documents the confidentiality of which was required and necessitated for the performance of military service could not be disclosed to the applicant. The Court further emphasised that it was not bound by the classification made by the administration and that it made its own assessment as to whether the confidentiality of the documents was justified in each case. The written opinion submitted by the principal public prosecutor to the Supreme Military Administrative Court during the proceedings was not communicated to the applicant.

7. On 7 April 2004 the Supreme Military Administrative Court rejected the applicant's rectification request, which decision was served on the applicant on 20 April 2004.

8. The Ministry of Defence subsequently filed an action with the Kayseri Civil Court against the applicant for the reimbursement of his educational expenses. On 3 May 2004 the Kayseri Civil Court ordered the applicant to pay the Ministry of Defence 5,050,500,000 Turkish liras (TRL) (approximately 3,000 euros (EUR)), plus interest running from 8 April 2003.

II. RELEVANT LAW

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 8 OF THE CONVENTION

10. The applicant complained under Article 6 § 1 of the Convention that the principle of equality of arms had been infringed on account of his lack of access to the classified information submitted by the Ministry of Defence

to the Supreme Military Administrative Court and the non-communication to him of the written opinion of the principal public prosecutor attached to this court. He further complained under Article 8 of the Convention that the secret security investigation conducted by the Ministry of Defence in relation to him and his family had breached his right to private life.

A. Admissibility

11. 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.

12. The Court notes that it has recently revised its case-law concerning the applicability of Article 6 § 1 to disputes between the State and civil servants in its *Vilho Eskelinen and Others v. Finland* judgment ([GC], no. 63235/00, § 62, ECHR 2007-IV). Having regard to the new criteria adopted in the aforementioned case, the Court notes that the Government failed to demonstrate, first, that the applicant did not have a right of access to a court under national law and, secondly, that any exclusion of the rights under Article 6 for the applicant was justified by the subject matter of the dispute. In these circumstances, the Court considers that Article 6 § 1 is applicable in the instant case and it therefore dismisses the Government's preliminary objection (see *Miran v. Turkey*, no. 43980/04, §§ 9-12, 21 April 2009, and *Topal v. Turkey*, no. 3055/04, §§ 12-15, 21 April 2009).

13. The Court further notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they are not inadmissible on any other grounds. This part of the application must therefore be declared admissible.

B. Merits

1. Lack of access to classified documents and non-communication of the principal public prosecutor's written opinion

14. As regards the applicant's complaint concerning the non-communication of the principal public prosecutor's written opinion, the Government argued that the applicant had the opportunity of examining the case file, which included the written opinion of the principal public prosecutor, at any time. They further argued that the opinion of the principal public prosecutor had no effect on the decision of the court in administrative proceedings. The Government did not submit any observations on the merits of the complaint concerning the lack of access to classified documents.

15. 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; *Meral v. Turkey*, no. 33446/02, §§ 32-39, 27 November 2007; *Miran*, cited above, §§ 13-18; and *Topal*, cited above, §§ 16 and 17). The Court finds no particular circumstances in the instant case which would require it to depart from this jurisprudence.

16. 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 and the non-communication of the written opinion of the principal public prosecutor to the applicant.

2. Right to respect for private life

17. As regards the complaint under Article 8 of the Convention, the Court considers that the main legal question raised by the instant application is whether the applicant's request for the annulment of the expulsion decision had been rejected by way of a fair hearing within the meaning of Article 6 of the Convention. Having already replied to this question in the negative (see paragraph 15 above), the Court is of the opinion that there is no need to give a separate ruling on this complaint (see *Güner Çorum*, cited above, § 35, and *Topal*, cited above, § 20).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

18. The applicant complained under Articles 6 § 1 and 13 of the Convention that he had been denied a fair hearing by an independent and impartial tribunal as the Supreme Military Administrative Court had been composed of military judges and that it had acted as a first and only instance court, which had also infringed his right to an effective remedy. He further maintained under Article 6 § 1 that he had been denied a public hearing due to the lack of reference to the principal public prosecutor's name in the court decisions. The applicant contended that his expulsion from the military academy had amounted to a punishment without a law, in violation of Article 7 of the Convention. Lastly, he maintained under Article 14 of the Convention that he had been expelled from the military academy by reason of his father's affiliations with a certain trade union, which amounted to discrimination.

19. As regards the applicant's complaints concerning the lack of independence and impartiality of the Supreme Military Administrative Court and the unavailability of an appeal procedure against the decisions of this court, the Court considers in the first place these complaints should be examined from the standpoint of Article 6 § 1 of the Convention alone. The

Court further notes that these complaints were declared inadmissible in previous similar cases (see *Yavuz and Others v. Turkey* ((dec.)), no. 29870/96, 25 May 2000; *Delcourt v. Belgium*, 17 January 1970, § 8, Series A no. 11; *Piroğlu and Karakaya v. Turkey*, nos. 36370/02 and 37581/02, § 37, 18 March 2008; *Karakaya v. Turkey* (dec.), no. 5173/05, 28 August 2008). It follows that this part of the application should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

20. As regards the complaint under Article 6 § 1 that the applicant had been denied a public hearing due to the lack of reference to the principal public prosecutor's name in the court decisions, the Court notes that this does not raise any issues under Article 6 § 1, considering specifically that the Supreme Military Administrative Court has only one principal public prosecutor attached to it, whose identity may be readily discovered. It follows that this part of the application should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

21. As for the complaint under Article 7 of the Convention, the Court notes that the applicant was not held guilty of a criminal offence within the meaning of this provision. It follows that this part of the application should be rejected as being incompatible *ratione materiae*, pursuant to Article 35 §§ 3 and 4 of the Convention.

22. With regard to the allegation under Article 14 of the Convention, the Court observes that the applicant has failed to submit any evidence to indicate that his expulsion from the military academy had been based on any discriminatory grounds. It follows that this part of the application should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

23. The applicant claimed 204,000 euros (EUR) in respect of pecuniary damage: EUR 200,000 for the salaries and pension rights he would have been entitled to as a non-commissioned officer, as well as EUR 4,000 for the educational expenses his father was asked to reimburse following his expulsion from the military academy. He also claimed EUR 10,000 for non-pecuniary damage. The Government contested these claims.

24. The Court considers that, in the present case, an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6 of the Convention. The Court cannot speculate as to the outcome of the trial had the position been otherwise and therefore rejects the applicant's claims for pecuniary damage. The Court

considers, however, 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, in accordance with Article 41, it awards the applicant EUR 6,500 (see *Güner Çorum*, cited above, § 39; *Aksoy (Eroğlu)*, cited above, § 39; *Miran*, cited above, § 22; *Topal*, cited above, § 23).

B. Costs and expenses

25. The applicant also claimed EUR 37,980 for the costs and expenses incurred before the domestic courts and the Court. Relying on the Ankara Bar Association's scale of fees and a legal fee agreement concluded with his representative, he claimed EUR 32,100, being 15% of the total damages claimed from the Court; EUR 1,300 on the basis of the recommended fee list of the Ministry of Justice in international cases and EUR 4,500 for the 45 hours work his representative carried in relation to the instant case (EUR 100 per hour). He also claimed EUR 80 for postal expenses and domestic court fees. The applicant submitted a legal fees agreement, a time-sheet prepared by his representative and various invoices to substantiate his expenses.

26. The Government contested these claims.

27. 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 information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads.

C. Default interest

28. 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 under Articles 6 § 1 and 8 of the Convention concerning the applicant's lack of access to classified documents submitted to the Supreme Military Administrative Court, the non-communication to the applicant of the written opinion of the principal public prosecutor and the applicant's right to respect for his private life admissible and the remainder of the application inadmissible;

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 and the non-communication to the applicant of the written opinion of the principal public prosecutor;
3. *Holds* that there is no need to examine separately the complaint under Article 8 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 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 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two 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 29 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President