



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

1959 · 50 · 2009

SECOND SECTION

CASE OF OĞRAŞ v. TURKEY

(Application no. 13918/03)

JUDGMENT

STRASBOURG

13 October 2009

FINAL

13/01/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Oğraş v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 22 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 13918/03) 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 Yahya Oğraş (“the applicant”), on 2 April 2003.

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

3. On 6 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

4. The applicant was born in 1972 and lives in Diyarbakır.

5. On 31 October 2000 the applicant was taken into police custody in Diyarbakır on suspicion of membership of Hezbollah, an illegal armed organisation. In his police statement dated 9 November 2000, taken in the absence of a lawyer, the applicant accepted the charges against him.

6. On 10 November 2000 the applicant was brought before the public prosecutor and subsequently the investigating judge. Before the public prosecutor and the investigating judge, the applicant denied that he was a member of Hezbollah.

7. On 30 November 2000 the public prosecutor at the Diyarbakır State Security Court filed a bill of indictment and accused the applicant of

membership of an illegal armed organisation. He requested that the applicant be charged and sentenced pursuant to Article 168 of the Criminal Code. On 30 April 2002 the Diyarbakır State Security Court convicted the applicant as charged and sentenced him to twelve years and six months' imprisonment. In convicting the applicant, the court had regard to his statement taken in the absence of a lawyer.

8. On 30 April 2002 the applicant appealed. On 19 June 2002 the Principal Public Prosecutor at the Court of Cassation lodged a written opinion, in which he submitted that the Court of Cassation should uphold the judgment of the State Security Court. This opinion was not served on the applicant or his representative. On 21 October 2002 the Court of Cassation upheld the judgment of the Diyarbakır State Security Court.

9. On 8 July 2005 the applicant was released from prison.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

10. The applicant complained that the written opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to him. He further stated that he had been denied the assistance of a lawyer while in police custody and that his statements taken in the absence of a lawyer had been used by the domestic courts for his conviction. Finally, the applicant raised complaints about the fairness of the proceedings and alleged that two witnesses, whose evidence had been used for his arrest and subsequent conviction, were not summoned before the trial court and, consequently, he had not had an opportunity to have these witnesses questioned by the court. He also stated that the evidence used against him for his conviction was not submitted to the judicial authorities in a proper manner, which cast doubt on its reliability. According to the applicant, the transcription of the hard disks had not been undertaken by the experts. He invoked Article 6 §§§ 1, 2 and 3 in respect of his complaints.

11. The complaints which the Court finds of particular importance are the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation and the absence of legal assistance to the applicant during his police custody. It therefore considers it appropriate to limit its examination solely to these matters.

A. The non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation

12. Relying on Article 6 § 1 of the Convention, the applicant complained that the written opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to him.

13. The Court notes in the first place 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 and must therefore be declared admissible.

14. It observes that it has already examined the same grievance in the case of *Göç v. Turkey* and found a violation of Article 6 § 1 of the Convention ([GC], no. 36590/97, ECHR 2002-V, §§ 55-58). In that judgment, the Court held that, having regard to the nature of the principal public prosecutor's submissions and to the fact that the applicant had not been given an opportunity to make written observations in reply, there had been an infringement of the applicant's right to adversarial proceedings.

15. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned *Göç* judgment.

16. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

B. Access to a lawyer during police custody

17. The applicant complained that he had been denied legal assistance during his police custody and that his police statement which had been taken in the absence of a lawyer was subsequently used for his conviction by the trial court. In respect of his complaints, the applicant invoked Article 6 §§ 2 and 3 (c) of the Convention.

18. 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 and must therefore be declared admissible.

19. 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 at the material time, regardless of his or her age, in connection with an offence falling within the jurisdiction of the State Security Courts.

20. 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.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

22. Relying on Article 5 of the Convention, the applicant complained that his arrest had been unlawful as there had been no reasonable suspicion against him, and that the length of his police custody had exceeded the reasonable time requirement. He further alleged that he was unable to challenge the lawfulness of his detention on remand and that he had no enforceable right to compensation for his Article 5 grievances. However, the Court finds that these complaints are to be rejected, either as having been lodged outside the six-month time-limit prescribed by Article 35 § 1 of the Convention, or as being wholly unsubstantiated, and therefore manifestly ill-founded, within the meaning of Article 35 § 3. They must therefore be rejected pursuant to Article 35 § 4 of the Convention.

23. Invoking Article 6 § 1 of the Convention, the applicant also complained about the length of the criminal proceedings against him. However as these proceedings only lasted one year and eleven months before two levels of jurisdiction, this complaint is also to 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

24. 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

25. The applicant claimed 38,202 Turkish liras (YTL) (approximately 17,600 euros (EUR)) in respect of pecuniary damage. He did not specify any claims as regards non-pecuniary damage.

26. The Government contested the applicant's claim.

27. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As regards non-pecuniary damage, the Court considers that where it finds that an applicant has been convicted in criminal proceedings which were found to be in breach of Article 6 § 1 of the Convention, in principle, the most appropriate form of relief would be to ensure that the applicant, as far as possible, be put in the position in which he would have been had this

provision not been disregarded. The Court therefore concludes 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 the applicant so request (see, *Salduz*, cited above, § 72).

B. Costs and expenses

28. The applicant also claimed YTL 20,000 (approximately EUR 9,200) in respect of costs and YTL 800 (approximately EUR 370) in respect of legal fees.

29. The Government contested these claims.

30. In respect of costs and expenses, 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 are reasonable as to quantum. In the present case, the applicant has not substantiated that he has actually incurred the costs claimed. Accordingly, it makes no award under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the lack of legal assistance to the applicant during his police custody and the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation admissible and the remainder of the application inadmissible;
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 when he was in police custody;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention, in respect of the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation;
4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President