



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

1959 · 50 · 2009

SECOND SECTION

CASE OF DEMİRKAYA v. TURKEY

(Application no. 31721/02)

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 Demirkaya 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. 31721/02) 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 Hasan Demirkaya (“the applicant”), on 13 May 2002.

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

3. On 18 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

4. The applicant was born in 1978 and lives in İzmir.

5. On 8 October 2001, the applicant was taken into police custody in İzmir on suspicion of aiding and abetting an illegal organisation, namely the PKK (*Kurdistan Workers' Party*). During his police custody, the applicant signed a form explaining arrested persons' rights, whereby he was reminded of his right to remain silent. On 9 October 2001 the police officers interrogated the applicant at the Anti-Terrorism department of the İzmir Security Directorate, in the absence of a lawyer. The applicant admitted that he had aided and abetted the PKK and acted as courier for the organisation. Another accused, N.S. was also arrested in the course of the operation. In

his police statement, N.S. stated that he was a member of the PKK and that he had stayed at the applicant's house when he had come to Izmir and maintained that the applicant had acted as a PKK courier and helped him in certain illegal activities.

6. On 12 October 2001 the applicant was questioned by the public prosecutor and he denied that he had been involved in the PKK. He also claimed that he had signed his police statement without reading it.

7. On the same day, the applicant was brought before the investigating judge, who questioned him and sixteen other suspects in relation to their involvement in the PKK. The applicant's lawyer was also present during the questioning. In his statement to the investigating judge, the applicant denied all the charges against him. After the interrogation, the applicant was placed in pre-trial detention on the order of the judge.

8. In an indictment dated 19 October 2001, the Public Prosecutor at the Izmir State Security Court charged the applicant and fifteen others with aiding and abetting an illegal organisation. The charges were brought under Article 169 of the Criminal Code and Article 5 of Law no. 3713 (the anti-terrorist law).

9. During the trial, the applicant denied any connection with the PKK. Furthermore N.S., one of the co-defendants, admitted to being a PKK member before the court, but stated that although he had stayed at the applicant's house when he had come to Izmir, the applicant did not know that he was a PKK member. In this connection, N.S. rejected his police statement, alleging that it had been taken under duress. On 20 June 2002 the Izmir State Security Court convicted the applicant as charged and sentenced him to three years and nine months' imprisonment. In convicting the applicant, the Izmir State Security Court relied on the applicant's police statement, which had been taken in the absence of a lawyer. The court further took into consideration the police statement of N.S. who had given evidence that the applicant had been involved in the activities of the PKK. It therefore concluded that the applicant's police statement, in which he had admitted to his involvement in the PKK, had been confirmed by other evidence in the case file.

10. On 10 October 2003 the Court of Cassation dismissed the applicant's appeal.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

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

12. The Government argued in the first place that the applicant had failed to comply with the six months time-limit. In their view, the six months period should start running from 9 October 2001, the date on which the applicant's police statement was taken. As regards the merits, the Government submitted that the applicant had been assisted by a lawyer during his questioning before the investigating judge on 12 October 2001 and thereafter during the subsequent criminal proceedings.

13. The Court recalls that, in assessing whether or not a trial was fair, regard should be had to the entirety of the proceedings (*John Murray v. the United Kingdom*, 8 February 1996, § 63, *Reports of Judgments and Decisions* 1996-I). In the present case, the applicant lodged his application with the Court within six months following the final decision of the Court of Cassation that had been delivered on 10 October 2003, in accordance with Article 35 § 1 of the Convention. Consequently, the Government's objection cannot be upheld.

14. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

15. The Court observes that the applicant's right of access to a lawyer was restricted during his police custody pursuant to Section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. As a result, he did not have access to a lawyer during his interrogation by the police and the public prosecutor. Moreover, the Court observes that during his police interrogation, the applicant accepted the charges against him and this statement was subsequently used for his conviction by the trial court. The Court takes note of the fact that the applicant had legal representation during his questioning by the investigating judge. However, in the present case, the applicant was undoubtedly affected by the absence of a lawyer when his statement had been taken by the police as, although the applicant repeatedly denied his police statement, the State Security Court used this statement as the main evidence. The Court further finds it significant that the police statement of N.S., although retracted subsequently during the trial, was also used to confirm the applicant's police statement.

16. In view of the foregoing, the Court considers that neither the assistance provided by a lawyer during the interrogation by the investigating judge, nor the adversarial nature of the subsequent criminal proceedings could cure the defects which occurred during the applicant's questioning by the police.

17. The Court therefore concludes that, even though the applicant had the opportunity of being represented by a lawyer during his interrogation by the investigating judge, the absence of a lawyer during his police interrogation irretrievably affected his defence rights as his police statement was used for his conviction (*Salduz v. Turkey* [GC], no. 36391/02, §§56-62), 27 November 2008).

18. 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

19. Relying on Article 5 of the Convention, the applicant alleged that his family was not informed of his arrest, that he had not been informed about the reasons of his arrest, that he had not been able to challenge the lawfulness of his police custody and that he had been held in police custody for a long time. The applicant further invoked Article 13 of the Convention and stated that Law no. 466 pertaining to the payment of compensation to persons unlawfully arrested or detained was not an effective remedy for his Article 5 complaints.

20. The Court finds nothing whatsoever in the case file which might disclose any appearance of a violation of these provisions. It follows that this part of the application is manifestly-ill founded and must be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

21. The applicant requested 5,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary compensation. He further claimed EUR 1,000 for costs and expenses incurred before the domestic courts and EUR 3,800 for legal fees, solely referring to the Izmir Bar Association's scale of fees. 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 1,000 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 the applicant so request (see, *Salduz*, cited above, § 72).

24. As regards 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 established that he actually incurred the costs claimed. Accordingly, the Court makes no award under this head.

25. 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 complaint concerning the lack of legal assistance to the applicant during his police custody 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*
 - (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 1,000 (one thousand 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 13 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President