



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

1959 · 50 · 2009

SECOND SECTION

CASE OF FİKRET ÇETİN v. TURKEY

(Application no. 24829/03)

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 Fikret Çetin v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

András Sajó,

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. 24829/03) 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 Fikret Çetin (“the applicant”), on 7 April 2003.

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

3. The applicant alleged, in particular, that the criminal proceedings brought against him had not been fair.

4. On 6 March 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

5. The applicant was born in 1969 and lives in Diyarbakır.

A. The first trial

6. In 1994 criminal proceedings were brought against the applicant before the Diyarbakır State Security Court (“the trial court”) for the offence

of membership of an illegal organisation¹. On 15 April 1999 he was acquitted of the charges. When acquitting him, the trial court considered that there was insufficient evidence to prove that the applicant was a member of the illegal organisation. It found, however, that there was sufficient evidence to show that he had aided and abetted the organisation. Nevertheless, considering that the applicant had been coerced to aid and abet the organisation by its members, the trial court concluded that the applicant did not have the requisite *mens rea* and acquitted him.

7. Before the appeal lodged by the prosecutor against the applicant's acquittal was examined by the Court of Cassation, the statute of limitations for the offence in question had been reached. Accordingly, on 1 February 2000 the Court of Cassation discontinued the criminal proceedings against the applicant.

B. The second trial

8. On 2 June 2000 the applicant was arrested once more and was examined by a doctor before he was placed in police custody in Diyarbakır. According to the report of the medical examination, there were no injuries on the applicant's body.

9. According to the applicant, during his time in police custody he was subjected to ill-treatment.

10. On 5 June 2000 police officers took the applicant to a café and two shops in the nearby town of Ergani, which had been bombed in 1993. According to the statements drawn up pertaining to those visits, the applicant told the police officers that he had carried out the bombings with the assistance of a number of other persons.

11. In a statement taken from the applicant in police custody the same day, the applicant was reported as having detailed his activities within the PKK.

12. On 6 June 2000 the applicant was released from police custody and was brought before a prosecutor and then before a judge, who questioned him further. The applicant denied the statements taken from him by police officers the previous day, and added that he had not been involved in any bombing. The applicant told the judge that he had signed the statements in police custody because he had thought that he would be ill-treated by the police officers if he refused to sign them. He added that in 1993 he had collected money by making threats on behalf of the PKK, taken part in demonstrations and distributed leaflets in support of that organisation, but that he had already been tried and spent time in prison for those activities (see paragraphs 6-7 above). The judge remanded the applicant in custody pending the introduction of criminal proceedings against him. The same day

1. The PKK, the Workers' Party of Kurdistan.

the applicant was examined by a doctor, who reported that there were no injuries on the applicant's body.

13. When questioned by the police officers and subsequently by the prosecutor and the judge, the applicant was not represented by a lawyer.

14. On 1 August 2000 the prosecutor at the Diyarbakır State Security Court filed an indictment with that court, accusing the applicant of activities carried out for the purpose of bringing about the secession of part of the national territory.

15. In the proceedings before the trial court the applicant was represented by a lawyer. During the trial the applicant repeatedly denied his police custody statements and told the trial court that the statements had been taken from him under "intense pressure".

16. On 6 November 2001 the trial court found the applicant guilty of offences of membership of an illegal organisation and planting explosives. He was sentenced to seventeen years, four months and ten days' imprisonment. In convicting the applicant the trial court relied on the statements taken from him in police custody (see paragraph 11 above). In response to the applicant's lawyer's submissions that the applicant was being tried twice for the same offence, the trial court stated in its judgment that the previous trial had not concerned the bombing incidents.

17. On 13 November 2001 the applicant appealed against his conviction and argued, *inter alia*, that he had been subjected to ill-treatment in police custody and that he had been forced to sign a number of documents.

18. In his written observations submitted to the Court of Cassation the prosecutor referred to the applicant's allegations of ill-treatment and drew the Court of Cassation's attention to the trial court's failure to take into account a video recording which had apparently been made at the time when the police officers took the applicant to the café. The prosecutor's observations were not communicated to the applicant.

19. As requested by the applicant, the Court of Cassation held a hearing before it rendered its decision on the appeal. Nevertheless, neither the applicant nor his lawyer attended the hearing. On 20 June 2002 the Court of Cassation rejected the appeal and upheld the applicant's conviction. The decision was deposited with the registry of the trial court on 16 December 2002.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

20. The applicant complained that that he had been subjected to ill-treatment in police custody in violation of Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

21. The Government contested that argument.

Admissibility

22. The Government submitted, *inter alia*, that there was no evidence in support of the applicant's allegations of ill-treatment. In any event, the applicant had failed to make use of a number of civil and administrative remedies. Finally, the applicant had not complied with the six-month rule as he had not brought his allegations to the attention of the national authorities until 2001.

23. The applicant maintained that he had complied with the admissibility requirements of Article 35 of the Convention and that he had introduced his application within six months of being notified of the Court of Cassation decision of 20 June 2002.

24. The Court considers it unnecessary to determine whether the applicant complied with the six-month rule or whether he exhausted domestic remedies, since this part of the application is inadmissible for the following reasons.

25. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence (see, in particular, *Tanrıkulu and Others v. Turkey* (dec.), no. 45907/99, 22 October 2002). To that end, the Court notes that the medical report prepared at the end of the applicant's detention in police custody does not contain any indication that he was ill-treated in police custody (see paragraph 12 above). In this connection the Court observes that the applicant did not challenge the medical report's accuracy at the national level or before the Court. Moreover, there is no information in the file to show that the applicant requested but was refused permission to see another doctor at the end of the custody period.

26. Finally, and equally importantly, the Court notes that, beyond alleging that he was ill-treated, the applicant has not provided any information as to the nature of the alleged ill-treatment before the national authorities or indeed before the Court.

27. In view of the above, the Court is of the opinion that the applicant has not laid the basis of an arguable claim that he was subjected to ill-treatment whilst in police custody. It follows that this part of the application is unsubstantiated and must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

28. Relying on Article 6 § 1 and 3 (c) of the Convention the applicant complained that he had not been able to benefit from the assistance of a lawyer while he was detained in police custody or when he was taken to the café and the shops by the police officers. Under Article 6 § 1 of the Convention the applicant further complained that the observations which the public prosecutor had submitted to the Court of Cassation had not been forwarded to him. The provisions relied on by the applicant provide as follows:

Article 6

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

...”

29. The Government contested the applicant's arguments.

A. Admissibility

30. The Government considered that the applicant had failed to comply with the six-month time-limit. They submitted that the final decision in the applicant's case had been adopted by the Court of Cassation on 26 June 2002 but that the applicant had not introduced his application until 7 April 2003, that is more than six months later. The Government also argued that the applicant had failed to exhaust domestic remedies because he had not raised these complaints before the domestic courts.

31. Concerning the issue of exhaustion of domestic remedies, the Court notes that it has already examined and rejected the Government's

preliminary objections in similar cases (see, in particular, *Taşçıgil v. Turkey*, no. 16943/03, §§ 31-32, 3 March 2009 and the case cited therein). The Court finds no particular circumstances in the instant case which would require it to depart from its findings concerning the above-mentioned application.

32. As for the Government's submissions regarding the six-month issue, the Court observes that, at the time of the events, despite the wording of Article 33 of the Code of Criminal Procedure which stipulated that judgments and decisions of courts were to be served on the parties to the case, it was not the practice of the Criminal Divisions of the Court of Cassation to serve their decisions on defendants (see *Seher Karataş v. Turkey*, no. 33179/96, § 28, 9 July 2002). However, the accused and his or her lawyer had the opportunity to request a copy of the judgment as soon as the judgment of the Court of Cassation had been sent back to the registry of the first-instance court.

33. In the present case, the written judgment which contained detailed legal reasoning was at the disposal of the applicant and his lawyer from 16 December 2002, when it was sent to the registry of the first-instance court. The application was introduced less than six months thereafter, namely on 7 April 2003.

34. Consequently, the Court rejects the Government's above-mentioned two preliminary objections. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Complaint concerning the lack of legal assistance at the initial stages of the criminal proceedings

35. The Court reiterates the basic principles laid down in the case of *Salduz v. Turkey* [GC] (no. 36391/02, §§ 50-55, 27 November 2008). It will examine the present case in the light of those principles.

36. The Court repeats that in the present case the restriction imposed on the applicant's right of access to a lawyer was systematic and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts. Even though the applicant repeatedly denied his statements taken in the absence of a lawyer (see paragraphs 15 and 17 above), the Diyarbakır State Security Court used those statements when convicting him (see paragraph 16 above). Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer. Therefore, neither the assistance provided

subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred earlier.

37. In sum, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights.

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

2. Complaint concerning the non-communication of the prosecutor's written observations to the applicant

39. The Government stated that the applicant could have found out about the written observations of the prosecutor as all files pending before the Court of Cassation were accessible to the parties.

40. The Court notes that it has already examined the same grievance and found a violation of Article 6 § 1 of the Convention in its judgment in the case of *Göç v. Turkey* [GC] (no. 36590/97, §§ 53-58, ECHR 2002-V).

41. The Court has examined the complaint made by the applicant in the present application and finds no particular circumstances which would require it to depart from its findings in the aforementioned case.

42. There has accordingly been a violation of Article 6 § 1 of the Convention as regards the non-communication to the applicant of the prosecutor's written observations.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

43. Lastly, relying on Article 6 §§ 1 and 3 (a)-(b) of the Convention the applicant complained that he had not been given adequate time and facilities to defend himself and that he had been tried for the same offence twice. Under Article 13 of the Convention he maintained that he had not had an effective remedy in respect of these complaints.

44. Having regard to the facts of the case, the submissions of the parties and its finding of violations of Article 6 of the Convention, the Court considers that it has examined the main legal questions raised in the present application. It concludes therefore that there is no need to give a separate ruling on the applicant's remaining complaints under Articles 6 and 13 of the Convention (see, *mutatis mutandis*, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 4,500 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage.

47. The Government considered the applicant's claims to be excessive and unsubstantiated.

48. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 2,000 in respect of non-pecuniary damage.

49. The Court also reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded. Consequently, it considers that the most appropriate form of redress would be the retrial 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 and the cases cited therein).

B. Costs and expenses

50. The applicant also claimed EUR 3,923 for the costs and expenses incurred before the domestic courts as well as for those incurred before the Court. In calculating this amount the applicant took into account the recommended minimum fees by the Diyarbakır Bar Association.

51. The Government observed that the claim in respect of costs and expenses was not supported with any evidence, and invited the Court to reject the claim.

52. According to the Court's case-law, an applicant is entitled to 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 did not substantiate that he had actually incurred the costs claimed. In particular, in support of his claim for the fees of his lawyer he failed to submit documentary evidence, such as a contract, a fee agreement or a breakdown of the hours spent by his lawyer

on the case. Accordingly, the Court makes no award in respect of the claim for costs and expenses.

C. Default interest

53. 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 Article 6 of the Convention concerning the lack of legal assistance at the initial stages of the criminal proceedings as well as the non-communication of the prosecutor's written observations admissible and the complaint under Article 3 of the Convention inadmissible;
2. *Holds* that there is no need to examine separately the remaining complaints under Article 6 of the Convention as well as the complaint under Article 13 of the Convention;
3. *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 at the initial stages of the criminal proceedings;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the non-communication of the prosecutor's written observations to the applicant;
5. *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 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of the respondent Government 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;
6. *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