



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

1959 · 50 · 2009

SECOND SECTION

CASE OF BOLUKOÇ AND OTHERS v. TURKEY

(Application no. 35392/04)

JUDGMENT

STRASBOURG

10 November 2009

FINAL

10/02/2010

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 Bolukoç and Others 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 20 October 2009,

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

PROCEDURE

1. The case originated in an application (no. 35392/04) 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 three Turkish nationals, Mr Yunis Bolukoç, Mr Ferhat Kıyak and Mr Ayhan Ateş (“the applicants”), on 9 July 2004.

2. The applicants were represented by Mr M. Filorinali and Ms Y. Başara, lawyers practising in İstanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 16 September 2008 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the lack of legal assistance during detention in police custody, the length of the criminal proceedings against the first applicant, and the lack of independence and impartiality of the State Security Court which tried the first applicant. 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

4. The applicants were born in 1962, 1978 and 1980 respectively and were in Kandıra prison at the time of the lodging of the application.

5. On 11 March 1998 the first applicant, Mr Bolukoç was arrested and taken into police custody on suspicion of membership of an illegal armed

organisation, namely the DHKP-C (Revolutionary People's Liberation Party- Front).

6. According to a report drafted on 14 March 1998 by a police officer, the first applicant had stated that he was a member of DHKP-C and that, in line with that organisation's directives, he would not make statements to the police.

7. On 14 March 1998 the first applicant, Mr Bolukoç was brought before a judge at the Istanbul State Security Court (hereinafter "the ISSC"), who ordered his remand in custody.

8. On 30 March 1998 the prosecutor at the ISSC filed a bill of indictment accusing the applicant of membership of an illegal armed organisation. The charges were brought, *inter alia*, under Article 168 § 2 of the Criminal Code and Section 5 of Law no. 3713.

9. On 13 April 1998 criminal proceedings against the first applicant commenced before the 5th Chamber of the ISSC (no. 1998/128). At the next hearing, held on 28 July 1998, the court decided to join these proceedings to another case (no. 1997/543) pending before the 6th Chamber of the ISSC. In the course of these proceedings, the applicant was released pending trial.

10. On 11 July 2000 the first applicant was again arrested and taken into police custody on the same grounds as before, but in respect of acts which he had allegedly committed after he had been released pending trial.

11. On the same day, the second and the third applicants were arrested and taken into police custody on the same grounds as the first applicant.

12. On 14 July 2000 the third applicant was questioned by two police officers and made a number of statements incriminating both himself and others.

13. On 15 July 2000, following authorisation from the prosecutor, the second applicant met with his lawyer between 3 and 3.15 p.m. On the same day, the third applicant met with his lawyer between 3.30 and 3.45 p.m.

14. On the same day, the police showed photographs of suspected members of the organisation to the second applicant, who recognised one person who had procured for him guns and a photocopying machine. The second applicant was also questioned by two police officers and made a number of statements incriminating both himself and others.

15. On 16 July 2000 the second and the third applicant took part in a reconstruction of events where they admitted, *inter alia*, to throwing a Molotov cocktail at a building in Istiklal on 30 March 2000.

16. According to a verbatim record drafted by the police on 16 July 2000, the first applicant refused to make a statement to the police and stated that he was on hunger strike until his transfer to judicial authorities. According to another report drafted on 17 July 2000 by a police officer the first applicant had stated that he was a member of DHKP-C and that he would not make statements to the police or sign any documents.

17. On 17 July 2000 the applicants were brought before the prosecutor at the ISSC, where they denied the accusations against them. The second and the third applicants retracted their police statements. The first applicant stated that he had refused to make a statement to the police because he did not accept the accusations against him.

18. On the same day the applicants were brought before a judge at the ISSC where they reiterated the statements they had made to the prosecutor. The legal representative of the second and the third applicants was present at the hearing. The court ordered the applicants' continued detention.

19. On 24 July 2000 the prosecutor at the ISSC filed a bill of indictment accusing the applicants of membership of an illegal armed organisation. The second and the third applicants were also accused of throwing Molotov cocktails on various dates. The charges were brought, *inter alia*, under Articles 168 § 1 (for the first applicant), Article 168 § 2 and 264 (for the second and the third applicant) of the Criminal Code and section 5 of Law no. 3713.

20. On 1 August 2000 the criminal proceedings against the applicants commenced before the 2nd Chamber of the ISSC. The applicants were tried together with ten co-accused.

21. On 20 June 2001 the 6th Chamber of the ISSC heard the prosecutor's final observations on the merits. The accused, including the applicants, were given a time-limit to submit their final observations on the merits. On the same day, the court dismissed the 2nd Chamber of the ISSC's request for the proceedings to be joined before it, on the ground that the accusations were not related.

22. On 28 August 2001 the 2nd Chamber of the ISSC, after several requests by the first applicant, decided to join his case before the 6th Chamber (no. 1997/543) to the proceedings before it (no. 2000/207).

23. On 28 November 2002 the ISSC convicted the applicants as charged and sentenced them to twelve years and six months' imprisonment for membership of an illegal organisation. It further sentenced the second and the third applicants to five years, six months and twenty days' imprisonment and to a fine for throwing Molotov cocktails. In so doing, they took into account the evidence in the case file, including the verbatim records of the reconstruction of the events, the arrest and search protocols and the statements of the accused, particularly in police custody.

24. On 12 January 2004 the Court of Cassation held a hearing and upheld the judgment of the first-instance court in respect of the applicants.

25. Following the adoption of the new Criminal Code, the Istanbul Assize Court, by an additional judgment, reduced the applicants' original sentences to six years and three months' imprisonment on account of their membership of an illegal armed organisation and, for the second and the third applicants to two years and six months' imprisonment and a fine for throwing Molotov cocktails. According to the documents in the case file,

the case was still pending before the Court of Cassation on 10 November 2008.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. The relevant domestic law and practice in force at the material time as well as recent developments can be found in the following judgments: *Öcalan v. Turkey* ([GC], no. 46221/99, §§ 52-54, ECHR 2005-IV), *Aydoğan and Others v. Turkey* (no. 41967/02, § 17, 2 December 2008), and *Salduz v. Turkey* ([GC], no. 36391/02, §§ 27-31, 27 November 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicants complained that they had been denied the assistance of a lawyer while in police custody. The first applicant further complained that he had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge on the bench of the Istanbul State Security Court which had tried him and that the length of the criminal proceedings against him had been too long. They relied on Article 6 §§ 1 and 3 of the Convention, which, in so far as relevant, reads:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...

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...”

A. Admissibility

28. The Government asked the Court to dismiss the applicants' complaint of a lack of legal assistance during their time in police custody for failure to comply with the six-month rule (Article 35 § 1 of the Convention). In this connection, they argued that the applicants had failed to lodge their application within six months of the date on which the preliminary investigation was terminated.

29. The applicants disputed the Government's arguments.

30. The Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Çimen v. Turkey*, no. 19582/02, § 22, 3 February 2009). The Court finds no

particular circumstances in the instant case which would require it to depart from its findings concerning the above-mentioned application.

31. Consequently, the Court rejects the Government's preliminary objection.

32. As regards the applicants' complaint regarding the fairness of the proceedings and the first applicant's claim about the lack of independence and impartiality of the ISSC, the Court considers that they are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that these complaints are not inadmissible on any other grounds. They must therefore be declared admissible.

33. As to the length of the criminal proceedings, after examining the overall duration of the proceedings, which lasted five years and ten months, and taking into account that the case was of some complexity, the number of accused, the fact that the proceedings initially concerned two separate criminal cases against the first applicant and which were joined upon his request, that the case was dealt with at two levels of jurisdiction, with no significant delay at the appeal stage, and to the fact that the first applicant has not shown any substantial period of inactivity attributable to the judicial authorities for these periods, the Court does not consider that the length of the proceedings in respect of the first applicant in the present case was excessive (see, for example, *Aydoğan and Others v. Turkey*, no. 41967/02, § 29, 2 December 2008, and *Mehmet Yavuz v. Turkey*, no. 47043/99, §§ 46-58, 24 July 2007). It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 and 4 of the Convention.

B. Merits

34. As to the question of legal assistance, the Court reiterates 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 (cited above, §§ 56- 62). In that case, the Court found that the applicant's right of access to a lawyer had been 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 had not had access to a lawyer when he made his statements to the police. No justification had been given for denying the applicant access to a lawyer other than the fact that it was a requirement of the relevant legal provisions. This fell short of the guarantees of Article 6.

35. 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. In this connection, the Court considers that, in the absence of information from the Government on the manner in which the meetings took place, the fact that the second and third applicants

were able to meet with their lawyers for about fifteen minutes on the third and fourth day after their arrest, failed to ensure that their lawyers were able to give them effective assistance (see, for example, *Tağaç and Others v. Turkey*, no. 71864/01, §§ 35-36, 7 July 2009). In this respect, the Court reiterates that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective” (*ibid.* § 51).

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

37. Moreover, having regard to the facts of the case, the submissions of the parties and its preceding finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention, the Court considers that there is no need to make a separate ruling on the merits of the first applicant's complaint concerning the independence and impartiality of the State Security Court under this provision (see *Getiren v. Turkey*, no. 10301/03, § 132, 22 July 2008 and the cases referred to therein).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

38. In their observations on the admissibility and merits, the applicants further complained about the manner and the length in which the additional judgment had been given and about the fact that they were not notified of the principal public prosecutor's opinion at the Court of Cassation.

39. Even assuming that these complaints were duly raised, the Court finds that none of them disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols in the light of all the material in its possession, and in so far as the matters complained of are within its competence. Therefore, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

42. The Government contested the amount.

43. The Court, ruling on an equitable basis, awards the applicants EUR 1,000 each.

44. It further considers that the most appropriate form of redress would be the retrial of the applicants in accordance with the requirements of Article 6 of the Convention, should they so request (see *Salduz*, cited above, § 72).

B. Costs and expenses

45. The applicants also claimed EUR 5,500 for costs and expenses incurred before the Court. In support of their claims the applicants submitted a schedule of costs prepared by their lawyer.

46. The Government contested the amount.

47. 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, regard being had to the documents in its possession and the above criteria, the Court dismisses the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the applicants, jointly, the sum of EUR 1,000.

C. Default interest

48. 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 provided to the applicants while in police custody and the first applicant's complaint regarding the alleged lack of independence and impartiality of the Istanbul State Security Court admissible, and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention read in conjunction with Article 6 § 1;
3. *Holds* that there is no need to examine the first applicant's remaining complaint under Article 6 of the Convention;

4. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final according to 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) to each applicant, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) to the applicants jointly, EUR 1,000 (one thousand euros) plus any tax that may be chargeable to them, 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 November 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President