



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

1959 · 50 · 2009

SECOND SECTION

CASE OF ÖZCAN KORKMAZ AND OTHERS v. TURKEY

(Applications nos. 44058/04, 19807/05 and 26384/05)

JUDGMENT

STRASBOURG

1 December 2009

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 Özcan Korkmaz 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 Sally Dollé, *Section Registrar*,

Having deliberated in private on 10 November 2009,

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

PROCEDURE

1. The case originated in three applications (nos. 44058/04, 19807/05 and 26384/05) 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 Özcan Korkmaz, Mr Serkan Yazar and Mr Murat İslam (“the applicants”), on 1 November 2004, 23 May 2005 and 27 June 2005 respectively. The applicants were represented, respectively, by Ms T. Çelikyürek, Mr C. Çalış and Mr A. L. Koçer, lawyers practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

2. On 23 September 2008 the Court declared the applications partly inadmissible and decided to communicate to the Government the complaints concerning the applicants' lack of access to the classified documents submitted by the Ministry of Defence to the Supreme Military Administrative Court (applications nos. 19807/05 and 26384/05) and the non-communication to the applicants of the principal public prosecutor's written opinion (all applications), as well as the submissions of the reporting judge, during the proceedings before the Supreme Military Administrative Court (application no. 44058/04). It also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASES

3. The applicants were all former members of the Turkish Armed Forces, who had been discharged for disciplinary reasons.

4. The applicants brought separate proceedings before the Supreme Military Administrative Court, requesting the annulment of their discharge.

5. The Supreme Military Administrative Court held, after hearing the parties (except in application no. 44058/04 where no hearing was held) and examining the confidential documents submitted by the Ministry of Defence by virtue of Article 52 (4) of Law no. 1602, that the applicants' discharges had been in conformity with the applicable laws. Consequently, it rejected their annulment requests. Neither the written opinion of the principal public prosecutor submitted to the Supreme Military Administrative Court prior to the hearings, nor the comments of the reporting judge which were entertained during the deliberations, were communicated to the applicants.

6. The applicants subsequently requested the rectification of the Supreme Military Administrative Court's decisions. Their requests were rejected on the following days:

- application no. 44058/04: 20 April 2004 (decision served on the applicant on 3 May 2004)
- application no. 19807/05: 26 April 2005
- application no. 26384/05: 2 February 2005

II. RELEVANT DOMESTIC LAW

7. A description of the relevant domestic law can be found in the decision of *Karayığit v. Turkey* ((dec.), no. 45874/05, 23 September 2008). In particular, Article 79 of Law no. 1602 on the Supreme Military Administrative Court provides as follows:

“Prosecutors shall examine the files assigned to them on behalf of the Principal Prosecutor and shall give their written reasoned opinions on [his or her] behalf within thirty days at the latest in proceedings [on the merits] ... [They] shall perform other tasks assigned by the President and the Principal Prosecutor...

Prosecutors may demand, through the President, all types of information and files from the relevant authorities.

Where deemed necessary by the Chambers and Assembly of Chambers, prosecutors may [be asked to] express their opinions orally...”

8. Provisional Article 2 of Law no. 1602 provides as follows in respect of the functions of the reporting judge:

“...Rapporteurs shall duly examine the cases assigned to them by the Presidents of the Chamber[s] and shall provide the Chamber or the Assembly of Chambers with the necessary explanations.

[The rapporteurs] shall give their opinion[s] and conclusions orally and in writing, shall write draft judgments, [and] draw up the necessary minutes. [They] shall perform other tasks assigned by the President or the President of the Chamber[s].”

THE LAW

I. AS REGARDS THE APPLICANT MURAT İSLAM (APPLICATION NO. 26384/05)

9. The applicant complained that he had been denied access to the classified documents presented by the Ministry of Defence to the Supreme Military Administrative Court and that the written opinion of the principal public prosecutor submitted to this court had not been communicated to him.

10. The Court considers that it is no longer required to examine the application lodged by Murat İslam, for the reasons elaborated below.

11. By letter dated 6 April 2009, the Government's observations were sent to the applicant's representative, who was requested to submit any comments, together with any claims for just satisfaction, by 18 May 2009. The applicant's representative did not submit any observations.

12. By letter dated 23 June 2009, sent by registered post, the applicant's representative was notified that the period allowed for submission of the applicant's observations had expired on 18 May 2009 and that no extension of time had been requested. The attention of the applicant's representative was drawn to Article 37 § 1 (a) of the Convention, which provides that the Court may strike a case out of its list of cases where the circumstances lead to the conclusion that the applicant does not intend to pursue the application. No response has been received to date.

13. The Court considers that, in these circumstances, the applicant may be regarded as no longer wishing to pursue his application, within the meaning of Article 37 § 1 (a) of the Convention. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case. In view of the above, it is appropriate to disjoin it from the present group of applications and to strike it out of the list.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

14. The applicants complained that the written opinion of the principal public prosecutor submitted to the Supreme Military Administrative Court had not been communicated to them in breach of the equality of arms principle safeguarded under Article 6 § 1 of the Convention. Özcan Korkmaz (application no. 44058/04) also complained of the non-communication of the submissions of the reporting judge. Lastly, Serkan Yazar (application no. 19807/05) complained of his lack of access to the classified documents and information submitted by the Ministry of Defence to the Supreme Military Administrative Court.

A. Admissibility

15. The Court notes, as regards the complaint concerning the non-communication of the submissions of the reporting judge (application no. 44058/04), that no violation of Article 6 § 1 of the Convention was found regarding a similar complaint in the case of *Meral v. Turkey* (no. 33446/02, §§ 40-43, 27 November 2007), where the role of the reporting judge before the Supreme Administrative Court was examined at length in comparison with that of the public prosecutor. The Court found in *Meral* that unlike a public prosecutor, who was in charge of the preparation of the case for trial and who was in a position to influence the bench's decision through his or her opinion - without there being an opportunity for the parties to challenge it -, the role of the reporting judge was limited to carrying out the judicial tasks assigned by the President of the Chamber and could thus hardly be distinguished from the role of the judges hearing the appeal. In this connection, the reporting judge did not as a general rule order investigative measures but merely formed an opinion on the basis of a file which had already been investigated.

16. Bearing in mind that the functions of a reporting judge before the Supreme Military Administrative Court are virtually the same as those before the Supreme Administrative Court, the Court sees no reason to depart from its findings in the *Meral* case. It follows that this complaint should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

17. As regards the applicants' remaining complaints, the Court notes that they 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. Non-communication of the principal public prosecutor's written opinion (applications nos. 44058/04 and 19807/05)

18. The Government contended that, unlike in criminal proceedings, the principal public prosecutor in administrative proceedings was not a party to the case, and his or her opinion had no influence on the decision of the administrative court. The Government also argued that the principle of equality of arms had not been infringed in the instant cases as the applicants had had the option of examining their case files, which included the written opinion of the principal public prosecutor, at any time. They maintained that the applicant Serkan Yazar had had the further opportunity of replying to this opinion during the hearing held on 22 February 2005.

19. The Court observes that it has already examined and dismissed similar objections by the Government in previous cases and found a violation of Article 6 § 1 of the Convention (see *Meral*, cited above, §§ 32-39; *Miran v. Turkey*, no. 43980/04, §§ 15-18, 21 April 2009). The Court finds no particular circumstances in the instant cases which would require it to depart from this jurisprudence.

20. There has accordingly been a violation of Article 6 § 1 of the Convention on account of the non-communication of the written opinion of the principal public prosecutor to the applicants.

2. Lack of access to classified documents (application no. 19807/05)

21. The Government argued that maintaining certain information and documents as confidential was necessitated by the nature of the functions performed by the armed forces. Furthermore, the Supreme Military Administrative Court was not bound by the classification of the documents submitted to it as “confidential” by the administration; it made its independent assessment as to whether the confidentiality of the documents was justified on the facts of each case and disclosed any information which it deemed appropriate. The Government contended that, in keeping with this principle, the underlying grounds regarding the measure imposed on the applicant Serkan Yazar had been stated in the Supreme Military Administrative Court's judgment in the instant case. The documents submitted to that court, however, had remained unavailable to the applicant in the interest of safeguarding the secrecy of information collection methods.

22. 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; *Miran*, cited above, §§ 13 and 14; *Topal v. Turkey*, no. 3055/04, §§ 16 and 17, 21 April 2009). It

considers that the Government have not put forward any fact or argument in the instant case which would require it to depart from its previous findings and which would justify the encroachment on the applicant's right to adversarial proceedings. The Court particularly notes that although in certain circumstances it may be justifiable to withhold evidence from an opposing party for public interest reasons, the Government have failed to show that such measure was strictly necessary in the instant case (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 58, *Reports of Judgments and Decisions* 1997-III).

23. There has accordingly been a violation of Article 6 § 1 of the Convention on account of this applicant's lack of access to the classified documents submitted by the Ministry of Defence to the Supreme Military Administrative Court in support of its decision to discharge him from the armed forces.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

24. The applicants did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award them any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to disjoin application no. 26384/05, lodged by Murat İslam, from the present group of cases and strike it out of the list;
2. *Declares* admissible the complaints concerning the non-communication of the written opinion of the principal public prosecutor to the applicants during the proceedings before the Supreme Military Administrative Court in respect of applications nos. 44058/04 and 19807/05 and the applicant's inability to access the classified documents submitted by the Ministry of Defence to that court in respect of application no. 19807/05;
3. *Declares* the remainder of the applications inadmissible;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 1 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President