



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

SECOND SECTION

CASE OF AYHAN IŞIK v. TURKEY

(Application no. 33102/04)

JUDGMENT

STRASBOURG

30 March 2010

FINAL

30/06/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ayhan Işık v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

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

Having deliberated in private on 9 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 33102/04) 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 a Turkish national, Mr Ayhan Işık (“the applicant”), on 15 July 2004.

2. The applicant was represented by Ms H. Çekiç, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 16 December 2008 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints under Articles 6 and 13 of the Convention concerning the absence of legal assistance during the applicant's detention in police custody, the non-communication of the opinion of the Principal Public Prosecutor at the Court of Cassation, the length of the proceedings and the lack of remedies in that respect. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

5. On 27 January 1999 the applicant was arrested and taken into custody in Istanbul on suspicion of involvement in the activities of the PKK (the

Kurdistan Workers' Party, an illegal organisation). The applicant had a forged identity card in his possession when arrested. In his police statement, taken in the absence of a lawyer, the applicant accepted the charges against him.

6. On 3 February 1999 he was brought before the public prosecutor and subsequently the investigating judge at the Istanbul State Security Court, who ordered his pre-trial detention. In his statements before the public prosecutor and the judge, taken in the absence of a lawyer, the applicant denied that he had been involved in the activities of an illegal organisation.

7. On 11 February 1999 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicant and nine other persons. The applicant was charged with membership of an illegal organisation under Article 168 § 2 of the former Criminal Code.

8. On 18 June 1999 the Constitution was amended and the military judges sitting on the bench of State Security Courts were replaced by civilian judges.

9. On 21 December 2000 Law no. 4616 on Conditional Release, Deferral of Procedure and Punishments was promulgated. On 18 July 2001 the Constitutional Court annulled Section 1 § 4 of this Law.

10. Of the twenty hearings held between 30 April 1999 and 14 May 2003, six were adjourned at the applicant's request or at the request of other accused. Two hearings were adjourned at the public prosecutor's request. Seven witnesses were heard in the course of the proceedings.

11. Between 15 May 2002 and 24 July 2002, the court awaited the enactment of a new provision to replace the annulled Section 1 § 4 of Law no. 4616.

12. On 14 May 2003 the Istanbul State Security Court convicted the applicant as charged and sentenced him to twelve years and six months' imprisonment.

13. On 31 October 2003 the written opinion of the Principal Public Prosecutor submitted to the Court of Cassation was communicated to the applicant.

14. On 9 December 2003 the Court of Cassation upheld the judgment of the first-instance court.

15. On 28 April 2004 the applicant was served with the committal order (*müddetname*) concerning the execution of his sentence.

16. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, State Security Courts were abolished. The case against the applicant and his co-accused was transferred to the Istanbul Assize Court.

17. On 21 October 2004 the applicant was released.

18. On 1 June 2005 the new Criminal Code (Law no. 5237) entered into force.

19. On 14 June 2005 the Istanbul Assize Court reviewed the applicant's conviction in the light of the provisions of the new Criminal Code and

decided to reduce his sentence of imprisonment to six years and three months.

20. On 14 August 2005 the judgment became final as no appeal was made.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The relevant domestic law and practice in force at the material time are outlined in the *Göç v. Turkey* judgment ([GC], no. 36590/97, § 34, ECHR 2002-V).

22. On 2 January 2003 Article 316 of the Code of Criminal Procedure Law was amended to provide that the written opinion of the principal public prosecutor at the Court of Cassation be notified to the parties.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

A. As to the complaint concerning the length of the proceedings

23. The applicant complained under Articles 6 § 1 and 13 of the Convention that the length of the proceedings had been incompatible with the “reasonable time” requirement and that there had been no effective remedy remedies in domestic law in respect of his Convention grievances.

24. The Government argued that the applicant had failed to exhaust domestic remedies as he had not raised the substance of his complaints before the national authorities.

25. The Court does not find it necessary to determine whether or not the applicant complied with the requirements under Article 35 of the Convention as his complaints under Articles 6 § 1 and 13 are, in any event, manifestly ill-founded for the reasons stated below.

26. The Court observes that the period to be taken into consideration began on 27 January 1999 with the applicant's arrest and ended on 9 December 2003 when the Court of Cassation upheld the judgment of the Istanbul State Security Court. The period under consideration thus lasted some four years and ten months before two levels of jurisdiction.

27. The Court considers that the case had a certain degree of complexity since it involved the prosecution of ten persons for charges regarding their

activities on behalf of an illegal organisation. As regards the applicant's conduct, the Court observes that it does not appear that he contributed to the prolongation of the proceedings. In so far as the conduct of the judicial authorities is concerned, the Court notes that the case was examined by two levels of jurisdiction. Twenty hearings were held and seven witnesses were heard in the course of the proceedings. The Court notes that, between 15 May 2002 and 24 July 2002, the court awaited the enactment of a new provision to replace the annulled Section 1 § 4 of the Law no. 4616. The Court considers that such delays in the conduct of the hearing could have been minimised. However, the Court recalls that limited delays at some stage may be tolerated if the overall duration of the proceedings cannot be deemed excessive (see, *Çaplık v. Turkey*, no. 57019/00, § 38, 15 July 2005; *Özsoy v. Turkey*, no. 58397/00, § 33, 2 February 2006; *Aydoğan and Others v. Turkey*, no. 41967/02, § 29, 2 December 2008; *Karabulut v. Turkey*, no. 56015/00, § 45, 24 January 2008; *Fehmi Koç v. Turkey*, no. 71354/01, § 32, 27 March 2007).

28. The foregoing considerations lead the Court to conclude that the total duration of the proceedings of four years and ten months was not incompatible with the reasonable time requirement of Article 6 § 1 of the Convention. 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.

29. In view of its conclusion above, the Court considers that the applicant has no arguable claim of a violation of his right under Article 6 § 1 of the Convention which would have required a remedy within the meaning of Article 13 of the Convention. Consequently, this part of the application should also be declared inadmissible as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

B. As to the complaint concerning the lack of legal assistance

30. The applicant complained that he had been denied legal assistance during his detention in police custody, as well as before the public prosecutor, and the judge who had subsequently questioned him.

31. The Court notes 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. It must therefore be declared admissible.

32. The Government argued that the absence of legal assistance at the initial stages of the criminal proceedings did not affect the applicant's defence rights considering that he benefited from legal assistance at the subsequent stages of the trial.

33. 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.

34. 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.

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

C. As to the complaint concerning the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation to the applicant

36. The applicant complained that the written opinion of the Principal Public Prosecutor at the Court of Cassation was never served on him, thus depriving him of the opportunity to put forward his counter-arguments. The applicant relied on Article 6 §§ 1 and 3 (b) of the Convention.

37. The Government maintained that the applicant could not be considered to be a victim of such a violation since the written opinion of the Principal Public Prosecutor was indeed served on the applicant on 31 October 2003. In support of this argument, the Government submitted the notification document addressed to the applicant.

38. Having regard to the document demonstrating the notification of the written opinion of the chief public prosecutor to the applicant on 31 October 2003, the Court finds that the applicant has failed to substantiate his allegation that he was deprived of the opportunity to put forward his counter-arguments. It follows that this complaint 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

39. 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

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

41. The Government contested these claims.

42. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, deciding on an equitable basis, it awards the applicant EUR 1,800 in respect of non-pecuniary damage.

43. 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 he so request (see, *Salduz*, cited above, § 72).

B. Costs and expenses

44. The applicant also claimed EUR 500 for the costs and expenses incurred before the Court. He also claimed EUR 6,000 in respect of lawyer's fee.

45. The Government contested these claims.

46. 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 were reasonable as to quantum. In the present case, the Court observes that the applicant did not produce any document in support of his claims. Accordingly, the Court makes no award under this head (see *Karataş and Yıldız and Others v. Turkey*, nos. 4889/05, 4897/05, 24009/05, 33694/05, 37759/05, 42996/06, 43031/06, 43019/06, 43038/06 and 43054/06, § 30, 16 July 2009).

C. Default interest

47. 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 at the initial stages of the criminal proceedings 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;
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 1,800 (one thousand eight hundred euros) plus any tax that may be chargeable in respect of non-pecuniary damage, to be converted into national currency of the respondent State 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 30 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President