



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

SECOND SECTION

CASE OF ALKES v. TURKEY (No. 2)

(Application no. 16047/04)

JUDGMENT

STRASBOURG

8 June 2010

FINAL

22/11/2010

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

In the case of Alkes v. Turkey (no. 2),

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos,

Guido Raimondi, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 11 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 16047/04) 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 Ali Ümit Alkes (“the applicant”), on 5 April 2004.

2. The applicant was represented by Mr B. Kurt, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 5 February 2009 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

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant, who was born in 1980, currently resides in Switzerland.

5. On 28 March 1998 the applicant was taken into police custody on suspicion of membership of an illegal organisation. On 2 April 1998 he was placed in detention on remand.

6. On 15 April 1998 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicant, charging him under

Articles 168 (2), 497 (2), 522, 55 (3), 33 and 40 of the former Criminal Code with membership of an illegal organisation and armed robbery.

7. On 28 March 2001 the Istanbul State Security Court convicted the applicant under Articles 168 (2) and 497 (2) of the former Criminal Code, and sentenced him to eight years and four months' imprisonment for the former offence and to eleven years and eight months' imprisonment for the latter offence. The State Security Court further stated that the provisions of Law no. 4616, which governed conditional release, the suspension of proceedings and the execution of sentences in respect of certain offences committed before 23 April 1999, had to be taken into account in the execution of the sentence in relation to the offence under Article 497 (2).

8. On an unspecified date the applicant appealed against the judgment of the Istanbul State Security Court. The public prosecutor did not lodge an appeal.

9. On 29 April 2002 the Court of Cassation quashed the judgment of the Istanbul State Security Court, finding that the classification of the applicant's offence had been erroneous. The Court of Cassation further held that the applicant's acquired rights in his former conviction by the decision dated 28 March 2001 had to be safeguarded in the new judgment which would be rendered by the Istanbul State Security Court.

10. The applicant was consequently tried afresh before the Istanbul State Security Court. On 24 January 2003 the Istanbul State Security Court convicted the applicant under Article 146 (1) of the former Criminal Code for attempting to undermine the constitutional order and sentenced him to sixteen years and eight months' imprisonment. The State Security Court stated in its judgment that the applicant's acquired rights had been observed because in the first judgment the applicant had been sentenced to a total of twenty years' imprisonment, whereas in the new judgment the sentence was reduced.

11. On 22 October 2003 the applicant appealed against this judgment arguing, *inter alia*, that his acquired rights had not been protected. He maintained that, although the sentence imposed by the Istanbul State Security Court in its second judgment had been lower than that originally imposed, under the latter he would have been conditionally released pursuant to Law no. 4616 after ten years, thus actually serving a shorter sentence.

12. On 2 December 2003 the Court of Cassation upheld the reasoning in the judgment of the Istanbul State Security Court, and dismissed the appeal.

13. Following the entry into force of the new Criminal Code on 1 June 2005, the Istanbul Assize Court reopened the proceedings against the applicant in order to review his sentence, pursuant to the provisions of the new Criminal Code. As an interim measure, on 11 October 2005 the applicant was conditionally released pending the outcome of the proceedings. On 22 December 2006 the Istanbul Assize Court found that the

provisions of the former criminal code were more favourable to the applicant and therefore decided not to apply the provisions of the new Criminal Code. On 13 November 2007 the Court of Cassation rejected the applicant's appeal. In the meantime, following his release, the applicant fled to Switzerland, where he currently resides.

II. RELEVANT DOMESTIC LAW

1. Law no. 4616 on the conditional release, the suspension of proceedings and the execution of sentences in respect of certain offences committed before 23 April 1999 (dated 21 December 2000)

14. Section 1 (2) of Law no. 4616, stipulates, *inter alia*, that persons who were serving their prison sentences following a conviction in respect of crimes committed before 23 April 1999 were entitled to a ten year reduction in their total sentence under the relevant execution regulations.

Section 1 (5) of this Law states that the provisions of Article 1 are not applicable to, *inter alia*, Articles 146 and 168 of the former Criminal Code.

2. Article 326 of the former Code of Criminal Procedure

15. Article 326 (4) of the former Code of Criminal Procedure stipulates that, upon an appeal lodged solely by the accused, or by the prosecutor for the benefit of the accused, the new judgment may not impose a sentence which is more severe than that which was imposed originally.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained under Articles 1, 6 and 7 of the Convention that the domestic courts had failed to respect the prohibition of *reformatio in peius*, a principle established by Article 326 of the former Code of Criminal Procedure, when deciding his appeal to his detriment. In his view, had he not appealed against the first judgment, he would have been released from prison by June 2004 pursuant to Law no. 4616. He also maintained that the additional term of imprisonment which had been imposed on him by the second judgment of the Istanbul State Security Court amounted to an unjustified deprivation of liberty and thus violated Article 5 of the Convention.

17. The Government contested the allegations, stating that the applicant had not been sentenced to a longer sentence of imprisonment by the second judgment.

18. The Court considers that these complaints should be examined solely under Article 6 of the Convention (see, *Puchol Oliver v. Spain* (dec.), no. 17823/03, 25 January 2005, and *Conde Conde v. Spain* (dec.), no. 45249/99, 23 March 2000). It notes that the application 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.

19. The Court reiterates in the first place that it is not its function to deal with errors of fact or law allegedly made by a national court, unless and insofar as they may have infringed rights and freedoms protected by the Convention (*García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). In any event, it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of national legislation. This applies in particular to the interpretation by the courts of rules of a procedural nature (*Pekinel v. Turkey*, no. 9939/02, § 53, 18 March 2008). The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention in general and with the principle of legal certainty, guaranteed by Article 6 in particular.

20. Turning to the facts of the present case, the Court observes that, while the criminal proceedings against the applicant were pending before the Istanbul State Security Court, on 21 December 2000 Law No. 4616 came into force. According to this new law, also known as the amnesty law, an accused who was sentenced to a term of imprisonment of more than ten years became entitled to conditional release after a reduction of ten years from his or her total sentence. The applicant was convicted under Articles 168 and 497 of the Criminal Code and sentenced to a total of twenty years' imprisonment, to which this partial amnesty would have applied. However, the applicant appealed. After his retrial, he was convicted under Article 146 of the Criminal Code, a provision which was excluded from the benefit of Law no. 4616. When the Istanbul State Security Court delivered its new judgment on 24 January 2003, it noted that the acquired rights of the applicant had nevertheless been observed, as a lesser sentence had been imposed of sixteen years and eight months' imprisonment.

21. The Court observes that the main complaint of the applicant relates to his inability to benefit from conditional release under Law no. 4616 and the interpretation of Article 326 of the Criminal Procedure Code governing the principle of *reformatio in peius* (see paragraphs 14-15 above). However, as stated above, the domestic courts are in a better position to interpret domestic legislation, in particular laws relating to procedural matters, as in the present case. The Court takes note of the fact that the allegations of the applicant were thoroughly examined by the domestic courts at two levels of

jurisdiction and, in its judgment, the Istanbul State Security Court explicitly stated that the second judgment was more favourable to the applicant than the former, as he was finally sentenced to sixteen years and eight months' imprisonment instead of twenty years. Concerning the question of conditional release, the Court cannot substitute its own view for that of the domestic courts' findings in this specific case. The Court finds that the applicant was able to submit his arguments to the courts, which addressed those arguments in decisions which were duly reasoned and disclose no elements of arbitrariness (notably *Puchol Oliver v. Spain*, cited above).

22. In the light of the above, the Court finds that there has been no violation of Article 6 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 8 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President