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

SECOND SECTION

DECISION

Application no. 31226/09
Ayhan AYKAÇ against Turkey

The European Court of Human Rights (Second Section), sitting on 30 April 2019 as a Committee composed of:

Julia Laffranque, *President,*
Stéphanie Mourou-Vikström,
Arnfinn Bårdsen, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to the above application lodged on 16 April 2009,

Having regard to the declaration submitted by the respondent Government on 6 September 2018 requesting the Court to strike the application out of the list of cases and the applicant's reply to that declaration,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

1. The applicant, Mr Ayhan Aykaç, is a Turkish national, who was born in 1964 and is detained in Mardin. He was represented before the Court by Ms R. Yalçındağ Baydemir, a lawyer practising in Diyarbakır.

2. The Turkish Government ("the Government") were represented by their Agent

3. The applicant complained under Article 6 § 1 of the Convention that he had been denied the assistance of a lawyer during the initial stages of the criminal proceedings, and that his conviction was based on the statements he had made to the police in the absence of a lawyer. Relying on the same provision, the applicant further maintained that he had been unable to examine the witnesses during the criminal proceedings.

4. The application had been communicated to the Government under Article 6 §§ 1 and 3 of the Convention.

THE LAW

5. After the failure of attempts to reach a friendly settlement, by a letter of 6 September 2018 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issue raised by the application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

6. The declaration provided as follows:

> "The Government of Turkey acknowledge that in the present case there has been a violation of the applicants' rights under Articles 6 §§ 1 and 3 of the Convention in the light of the well-established case-law of the Court.
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> The Government also recalls that Law no. 4928 on 15 July 2003 repealed the provision concerning the systemic restriction on the right of access to a lawyer.
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> The Government further emphasises that Article 311 § 1 (f) of the Code on Criminal Procedure, as amended by Law no. 7145 of 31 July 2018, now requires reopening of criminal proceedings in cases where the European Court of Human Rights decides to strike an application out of its list of cases following a friendly settlement or a unilateral declaration. The Government considers that the aforementioned remedy is capable of providing redress in respect of the applicants' complaints under Article 6 of the Convention.
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> The Government thus offer to pay the applicant Ayhan AYKAÇ, EUR 500 (five hundred euros) to cover any pecuniary and non-pecuniary damage as well as costs and expenses, plus any tax that may be chargeable to the applicant with a view to resolving the above-mentioned case pending before the European Court of Human Rights.
>
> This sum will be converted into Turkish liras at the rate applicable on the date of payment, and will be payable within three months from the date of notification of the decision by the Court pursuant to Article 37 § 1 of the European Convention on Human Rights. In the event of failure to pay this sum within the said three-month period, the Government undertake to pay simple interest on it, from expiry of that period until settlement, at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points. The payment will constitute the final resolution of the case."

7. By a letter of 9 October 2018, the applicant indicated that he was not satisfied with the terms of the unilateral declaration.

8. The Court reiterates that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified, under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

9. It also reiterates that in certain circumstances, it may strike out an application under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

10. To this end, the Court has examined the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (*Tahsin Acar v. Turkey* (preliminary objections) [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI; *WAZA Sp. z o.o. v. Poland* (dec.), no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.), no. 28953/03, 18 September 2007).

11. The Court has established in a number of cases, including cases brought against Turkey, its practice concerning complaints of systemic denial of legal assistance and the use of evidence obtained in the absence of a lawyer to convict applicants (see, among other authorities, *Mehmet Duman v. Turkey*, no. 38740/09, 23 October 2018; *Ömer Güner v. Turkey*, no. 28338/07, 4 September 2018; *Girişen v. Turkey*, no. 53567/07, 13 March 2018; *Canşad and Others v. Turkey*, no. 7851/05, 13 March 2018; *İzzet Çelik v. Turkey*, no. 15185/05, 23 January 2018; and *Bayram Koç v. Turkey*, no. 38907/09, 5 September 2017).

12. In the above-mentioned cases, the Court, without examining whether the systemic nature of the restriction on the applicant's right of access to a lawyer was, in itself, sufficient to find a violation of Article 6 §§ 1 and 3 (c) of the Convention, held that the use of the applicant's statements to the police by the trial court, without examining the question of their admissibility and the Court of Cassation's subsequent failure to remedy that shortcoming, had constituted a violation of that Article. Moreover, in all of the above cases, the Court considered that the finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention constituted sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

13. Furthermore, the Court has also established in a number of cases, including those brought against Turkey, its practice concerning complaints about applicants' inability to examine witnesses during the criminal proceedings against them (see, among other authorities, *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015; *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011; 10 July 2018; and *Daştan v. Turkey*, no. 37272/08, 10 October 2017).

14. The Court further observes that the Government have explicitly acknowledged in their unilateral declaration a violation of Article 6 §§ 1 and 3 of the Convention.

15. It is also important to note that the legal provisions from which the issue of systemic restriction on the right to a lawyer stemmed were repealed by Law no. 4928 of 15 July 2003 (see further, *Salduz v. Turkey* [GC],

no. 36391/02, §§ 27-31, ECHR 2008) and that a new Code of Criminal Procedure (Law no. 5271) entered into force on 1 June 2005 in which there is no systemic restriction on the right of access to a lawyer.

16. The Court further notes that, until 31 July 2018, Article 311 § 1 (f) of the Code of Criminal Procedure provided applicants with a remedy entailing the possibility of reopening criminal proceedings solely on the basis of a judgment of the Court finding a violation of the Convention or the Protocols thereto. However, following the entry into force of Law no. 7145 on 31 July 2018, applicants are now entitled to lodge an application for the reopening of criminal proceedings following a decision by the Court to strike their case out of its list of cases on the basis of a friendly settlement or a unilateral declaration, as these two situations are now exhaustively listed in Article 311 § 1 (f) of the Code of Criminal Procedure as grounds for the reopening of criminal proceedings. Thus, the Court is satisfied that the domestic law provides for a remedy whereby the applicants are able to request the reopening of proceedings following a decision or judgment striking out an application on the basis of a friendly settlement or a unilateral declaration (contrast, *Igranov and Others v. Russia*, nos. 42399/13 and 8 others, § 26, 20 March 2018, with further references therein, and compare *Sroka v. Poland* (dec.), no. 42801/07, 6 March 2012).

17. In that connection, it further points out that in accordance with the Court's case-law and practice, reopening of the domestic proceedings is the most appropriate way to provide an effective solution to an alleged breach of Article 6 of the Convention, should the applicant so request. Thus, it is considered that the aforementioned remedy is capable of providing redress in respect of the applicant's complaints under Article 6 of the Convention. Bearing in mind the Court's subsidiary role in protecting the rights and freedoms guaranteed by the Convention and its Protocols, the Court notes that it falls, in the first place, to the national authorities to redress any violation of the Convention.

18. Having regard to the nature of the admissions contained in the Government's declaration, as well as the amount of compensation proposed – which is consistent with the amounts awarded in similar cases – the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)). That decision is without prejudice to the possibility for the applicant to exercise any other available remedies in order to obtain redress (see *Jeronovičs v. Latvia* [GC], no. 44898/10, §§ 116-118, 5 July 2016).

19. Moreover, in light of the above considerations, and in particular given the clear and extensive case-law on the topic, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine*).

20. Finally, the Court emphasises that, should the Government fail to comply with the terms of their unilateral declaration, the application could be restored to the list in accordance with Article 37 § 2 of the Convention (*Josipović v. Serbia* (dec.), no. 18369/07, 4 March 2008).

21. In view of the above, it is appropriate to strike the case out of the list.

For these reasons, the Court, unanimously,

Takes note of the terms of the respondent Government's declaration under Article 6 §§ 1 and 3 of the Convention and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention.

Done in English and notified in writing on 23 May 2019.

Hasan Bakırcı Deputy Registrar	Julia Laffranque President