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

SECOND SECTION

DECISION

Application no. 67423/11
Serkan BOZKAYA
against Turkey

The European Court of Human Rights (Second Section), sitting on 3 November 2020 as a Committee composed of:

Aleš Pejchal, *President,*
Egidijus Kūris,
Carlo Ranzoni, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to the above application lodged on 13 September 2011,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Serkan Bozkaya, is a Turkish national, who was born in 1982 and lives in Afyonkarahisar. He was represented before the Court by Mr K.T. Sağocak, a lawyer practising in Istanbul.

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

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. At the time of the events giving rise to the application, the applicant was an officer with the rank of "specialised sergeant" in the Turkish Armed Forces ("the army"). He had been serving in the army since 2005.

5. On 25 February 2009, he became a suspect in a military criminal investigation concerning, *inter alia*, his alleged participation in the sale of

smuggled goods and abusing his authority by means of using those under his command for his personal gain.

6. On 5 July 2010, the applicant's compulsory early retirement was ordered on disciplinary grounds, citing incompatible conduct that breached military discipline.

7. On 14 July 2010 the applicant brought proceedings before the Supreme Military Administrative Court, challenging his compulsory retirement. He requested a stay of execution of the decision ordering his retirement because criminal proceedings were still pending against him.

8. The applicant's request for the stay of proceedings was rejected on 26 October 2010.

9. On 22 February 2011, the court also dismissed the applicant's request for his compulsory retirement to be quashed on the following grounds:

> "With respect to the applicant's compulsory retirement, the court will have regard to whether the applicant breached military discipline and whether he was unable to correct his behaviour despite the warnings and sanctions he received, and whether he acted contrary to the moral standards established by the military.
>
> In the light of the applicant's personnel records, the court notes that the applicant started his career with the military on 30 August 2005 and was promoted to the post of senior sergeant on 30 August 2007. His appraisals indicated his performance as good, very good and excellent, respectively. In one appraisal cycle, he has received poor comments from one of his superiors. Overall he has 16 commendations (takdir) and has not received any warnings or sanctions during his term. When he was serving in the Van Başkale Gelincik ... Unit, he was arrested on 1 March and released on 6 March 2009. He was arrested again on 9 March and released on 6 May 2009 ... the Van Military Prosecutor's indictment charged the applicant with "... hiding and then turning a blind eye to the selling of petroleum and horses confiscated in connection with various military operations ... using the conscript soldiers in his command to dig for treasure for his personal gain [... therefore] the applicant was charged with storing and selling smuggled goods, allowing crimes to be committed (*suç yapılmasına göz yumma*k), ordering conscript soldiers under his command to commit an offence ...
>
> It goes without saying that the State has authority to take precautions to ensure the efficient workings of public service. For this reason the State seeks certain qualifications in employing state agents who are capable of serving the public interest. However, there is nothing more natural for the State to dismiss an agent who no longer serves the public interest and whose conduct is of a nature to harm the workings of the public service.
>
> In the light of the foregoing, the court takes the view that the applicant has been dismissed on the basis of conduct as explained above, which constitutes breach of discipline. There is no obligation to suspend the proceedings and wait for the outcome of the criminal proceedings. It is also of no consequence that the criminal proceedings in respect of the offences against the applicant are pending or whether they can subsequently be characterized as neglect of duty because the characterisation of the conduct [which is the subject matter of the criminal proceedings] constitutes breach of discipline and is incompatible with the moral standards and the irreproachability associated with the Turkish Armed Forces and is a loss of public servant status. To continue to employ the applicant in the military forces would be contrary to the public interest. Therefore having regard to the fact that the applicant's discharge was ordered

> in accordance with Section 94/b of the Turkish Armed Forces Act and Sections 60 and 61 of the Regulation on the Personnel Records of Non-Commissioned Officers, the court concludes that the decision to order the applicant's compulsory retirement is not unlawful."

10. The applicant's request for the judgment of 22 February 2011 to be rectified was rejected on 21 June 2011.

11. On 18 July 2012, the Van Military Court declared that it lacked jurisdiction in respect of the offences of storing and selling smuggled goods for the applicant and other former military personnel. Having regard to the fact that they had lost their military status during the proceedings and that the offence with which they were charged also constituted a civilian offence, the Van Military Court referred the case to the Çaldıran Assize Court. It further acquitted the applicant in respect of the charge concerning giving orders to those under his command to commit offences as well as using those under his command for his personal gain.

12. On an unspecified date the Çaldıran Assize Court declared itself incompetent to examine the case and referred it to the Başkale Assize Court.

13. According to the latest information available to the Court, the applicant was acquitted of the charges in the first-instance proceedings before the Başkale Assize Court on 8 May 2018.

B. Relevant domestic law

14. Article 125 of the Constitution as in force at the material time provided that:

> "All acts or decisions of the administration are subject to judicial review.
>
> Decisions of the President of the Republic concerning matters within his sole jurisdiction and decisions of the Supreme Military Council shall not be subject to judicial review."

15. Article 129 §§ 2, 3 and 4 of the Turkish Constitution provided at the time that civil servants other than members of the armed forces could not be subjected to disciplinary penalties unless they were granted the right to defend themselves. It further provided that disciplinary penalties other than warnings and reprimands were subject to judicial review. Provisions concerning members of the armed forces were reserved.

16. Section 94 (b) of the Military Personnel Act (Law no. 926) provided at the material time:

> "Discharge for breaches of discipline and immoral behaviour
>
> Irrespective of the length of their service, non-commissioned officers whose continued presence in the armed forces is judged to be inappropriate on account of breaches of discipline and immoral behaviour shall be subject to the provisions of the Turkish Pensions Act.
>
> The Regulations on assessment of non-commissioned officers shall lay down which authorities have jurisdiction to commence proceedings, to examine, monitor and draw

conclusions from personnel assessment files and to carry out any other act or formality in such proceedings. A decision of the Supreme Military Council is required to discharge an officer whose case has been submitted to it by the Chief of Staff."

17. Relevant domestic law in force at the material time concerning the compulsory retirement of army officers for reasons of discipline were set out in Section 60 of the Regulation on the Personnel Records of Non-Commissioned Officers (*Astsubay Sicil Yönetmeliği*), relevant parts of which read:

"Irrespective of the length of their service, non-commissioned officers whose continued presence in the armed forces is judged to be inappropriate on account of breaches of discipline and immoral behaviour shall be subject to the provisions of the Turkish Pensions Act. The following acts shall be considered to justify a discharge for breaches of discipline and immoral behaviour:

a. Disrupting discipline and continue to act in breach of discipline despite warnings and sanctions;

b. Inability to act in accordance with the standards required by the armed forces despite being warned;

...

e. Immoral conduct or behaviour that is incompatible with the reputation of the armed forces;

f. Conduct or behaviour that attests to holding unlawful, subversive, separatist, fundamentalist and ideological political opinions or having taken an active part in the propagation of such opinions.

An officer can be discharged from the armed forces on disciplinary or moral grounds at any time ... Appraisal officers shall carry out an assessment based on the grounds set out in this section and note their comments on the officer's personnel file ...after the assessment note is signed by other appraisal officers, the recommendation to discharge the officer is dispatched to the related Central Personnel Directorate of the Force Command, Gendarmerie or Coast Guard.

...

The Central Personnel Directorate shall examine the officer's personnel record and the related assessment note and refer the case file with all related documents to the Commission, which is convened under the presidency of the Lieutenant General, and is composed of the heads of intelligence, operations and staff unit, head of the advancement unit, other officers as necessary, including managers from the management of staff and the legal department. The Commission shall examine whether the assessment is in accordance with the applicable law and regulations, and whether the validity and supporting documents are sufficient. The Commission may request separate oral or written assessment from appraisal officers, or more documents. After its examination, it shall submit its conclusion to the related commander and proceed with the final decision of the latter. In cases where the commander does not approve the decision of the Commission, the officer shall be transferred to a different duty location. In cases where the decision to discharge the officer is approved, the case is referred to the Office of the Chief of the Army General Staff which shall make a decision to recommend the case to be referred to the Supreme Military Council. The cases which are referred to the Supreme Military Council by the Chief of the Army General Staff shall be subject to the final decision

of the Supreme Military Council in its first meeting. The cases which have not been referred to the Supreme Military Council [by the decision of the Chief of the Army General Staff] shall be remitted to their respective unit and the prior decision of the commander unit shall be executed.

..."

COMPLAINT

18. The applicant complained under Article 6 § 2 of the Convention that his compulsory early retirement from the army in the absence of a conviction for the acts of which he stood accused in criminal proceedings amounted to an infringement of his right to the presumption of innocence.

THE LAW

19. The applicant complained about a breach of the presumption of innocence as guaranteed by Article 6 § 2 of the Convention, which reads:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. The parties' submissions

20. The Government argued that there was no requirement under Article 6 § 2 of the Convention for the authorities to stay disciplinary action pending the final outcome of criminal proceedings. In the present case the Government contended that the fact that the applicant had been the subject of criminal prosecution on the basis of allegations allegedly committed in the scope of his military duties had been sufficient for the authorities to sever his ties from the army. The Government argued that the voicing of doubts before the finalisation of criminal proceedings was not considered to be incompatible with Article 6 § 2 of the Convention. Therefore, in their view, the fact that the authorities had decided for the applicant's compulsory early retirement on account of the fact that he was prosecuted for an offence did not offend that provision.

21. The applicant argued that there had not been a separate and independent disciplinary investigation concerning the events giving rise to his criminal prosecution. According to him, the authorities had decided to order his early retirement solely because criminal proceedings had been lodged against him. Such a severe consequence that was attached to the fact of him being prosecuted and in the absence of a conviction could not be compatible with the principle of presumption of innocence.

B. The Court's assessment

22. The Court notes that Article 6 § 2 applies to persons "charged with a criminal offence and safeguards the right to be "presumed innocent until proved guilty according to law". The Court reiterates that the presumption of innocence enshrined in Article 6 § 2 will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law (see, inter alia, *Allenet de Ribemont v. France*, no. 15175/89, § 35, Series A no. 308; *Daktaras v. Lithuania*, no. 42095/98, § 41, ECHR 2000‑X; *A.L. v. Germany*, no. 72758/01, § 31, 28 April 2005; and *Caraian v. Romania*, no. 34456/07, § 74, 23 June 2015). Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof, legal presumptions of fact and law, the privilege against self‑incrimination, pre-trial publicity and premature expressions, by the trial court or by other public officials, of a defendant's guilt (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 93, ECHR 2013, with references). In that respect the presumption of innocence may be infringed not only in the context of the criminal proceedings, but also in separate civil, disciplinary or other proceedings that are conducted simultaneously with the criminal proceedings (see *Kemal Coşkun v. Turkey*, no. 45028/07, § 41, 28 March 2017).

23. In previous cases similar to the present one, the Court has held that it is neither the purpose nor the effect of the provisions of Article 6 § 2 to prevent the authorities vested with disciplinary power from imposing sanctions on a civil servant for acts with which he has been charged in criminal proceedings, where such misconduct has been duly established (see *Allen*, cited above, § 124 and the cases cited therein). The Court reiterates that the Convention does not preclude that an act may give rise to both criminal and disciplinary proceedings, or that two sets of proceedings may be pursued in parallel. The Court reiterates that even exoneration from criminal responsibility does not, as such, preclude the establishment of civil or other forms of liability arising out of the same facts on the basis of a less strict burden of proof (see, *Urat v. Turkey*, nos. 53561/09 and 13952/11, § 53, 27 November 2018, with further references). However, there would be an issue under Article 6 § 2 if, in the absence of a final criminal conviction, there was a statement imputing criminal liability to an applicant for the misconduct alleged against him in disciplinary proceedings (see *Kemal Coşkun*, cited above, § 53 and the cases cited therein).

24. In determining the compliance with the principle of the presumption of innocence in cases where there is a link between the dismissal and criminal proceedings, the Court does not concern itself with the question whether the outcome of the dismissal proceedings is as such compatible

with the guarantees enshrined in Article 6 § 2 of the Convention. Its examination is confined solely to the grounds relied on by domestic authorities and the language they used in justifying the dismissal (ibid., § 56).

25. In the case at hand, the Court must therefore determine, in the light of the above principles, whether the reasoning of the Supreme Military Administrative Court in upholding the applicant's early retirement from the army reflected an opinion that the applicant was guilty of the offences for which he stood accused before the final decision in the criminal proceedings.

26. In that respect the Court notes that the first paragraph of the Supreme Military Administrative Court's judgment contains only a recapitulation of the factual and legal background of the case and does not reflect an opinion or contain a statement to the effect that the applicant had committed the offences for which he stood accused in the criminal proceedings. The subsequent paragraph briefly states that the State has the authority to dismiss state agents whose conduct it considers to be incompatible with the requirements of public service. The final paragraph which contains the court's actual reasoning for upholding the applicant's early retirement refers, from the perspective of military discipline, that the applicant's implication in the events giving rise to the criminal accusations had been incompatible with the irreproachable conduct required from military staff. It is therefore clear that the authorities dismissed the applicant on account of the sole fact that he had been prosecuted in a criminal investigation, which they considered to be incompatible with the requirements of military service and the post the applicant held. For the Court, this conclusion does not reveal any indication of a violation of the applicant's right under Article 6 § 2 of the Convention. It recalls in that respect a distinction should be drawn between decisions which describe a "state of suspicion" and decisions which contain a "finding of guilt"; only the second category is incompatible with Article 6 § 2 of the Convention (see, *inter alia*, *Kádár and Others v. Hungary* (dec.), nos. 84052/17 and 3 others, § 14, 26 March 2019 and the cases cited therein).

27. In view of the above, the Court considers that the reasoning and the language used by the Supreme Military Administrative Court was not tantamount to a premature "finding of guilt" on the part of the applicant for the offences he was being accused of in the criminal proceedings (see, *mutatis mutandis*, *Orak v. Turkey* (dec.), no. 48997/09, 28 January 2020).

28. It therefore follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 26 November 2020.

Hasan Bakırcı Deputy Registrar	Aleš Pejchal President