CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41588/98
by Remzi CAN
against Turkey

The European Court of Human Rights (Second Section), sitting on 23 March 2004 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr L. LOUCAIDES,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 24 March 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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

The applicant, Mr Remzi Can, is a Turkish national, who was born in 1956 and lives in Çanakkale.

A. The circumstances of the case

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

The applicant was the owner of a company, *Can Ticaret.* In 1991 the applicant bought carpets from a company called *Kervan Halıcılık Sanayi ve Ticaret A.Ş.* (Kervan Carpets Industry and Commercial Company: hereinafter "Kervan Carpets Company".).

On 24 July 1991, and in furtherance of this transaction, the applicant received for signature eight promissory notes (*bono)* which were to be paid between 20 September 1991 and 20 April 1992. According to the applicant, the promissory notes had been prepared for the applicant's signature by B.D. who allegedly worked for the Kervan Carpets Company at the material time. Having stamped and signed them, the applicant sent the promissory notes to the Kervan Carpets Company. The promissory notes met the legal requirements of the Commercial Code.

It subsequently transpired that the applicant's cousin, Ş.C., was named as the debtor on the promissory notes. However, the applicant maintains that he only stamped and signed the promissory notes when he received them and did not add any names to them. In the applicant's opinion, his cousin's name must have been added by B.D.

On an unknown date the Kervan Carpets Company applied to the Istanbul Execution Office *(icra müdürlüğü)* to have the promissory notes enforced against the applicant's cousin, Ş.C.

On 11 January 1995 Ş.C. applied to the public prosecutor's office in the Bayramiç district requesting that criminal proceedings be brought against the applicant. The applicant was subsequently charged with forgery under Article 342 of the Turkish Criminal Code.

On the same day, the Bayramiç public prosecutor issued a decision of lack of territorial jurisdiction *(yetkisizlik kararı)* and sent the case file to the public prosecutor's office in the Çanakkale province.

On 6 October 1995 the Çanakkale public prosecutor filed a bill of indictment with the Çanakkale Assize Court charging the applicant with forgery under Article 342 of the Criminal Code.

During the criminal proceedings against the applicant the Çanakkale Assize Court issued a summons requiring B.D. to give evidence. In the applicant's submission, B.D had fraudulently added Ş.C.'s signature to the promissory notes.

On 14 March 1996 Ş.C. withdrew his accusation against the applicant. However, the prosecution proceeded with the charges against the applicant.

On 9 May 1996 the Assize Court requested the Kervan Carpets Company to inform it whether B.D. had been employed by the firm at the time of the offence.

On 21 August 1996 the Kervan Carpets Company informed the court that no one of that name had ever worked for the company.

On 12 December 1996 the court abandoned the proposal to hear B.D. referring to the response given by the Kervan Carpets Company and observing that B.D. could not be found. Furthermore, the court did not find it necessary to request the Forensic Medicine Institute to carry out an analysis as to whether the applicant's handwriting matched the manner in which the name of Ş.C. was written on the promissory notes.

On the same day the Çanakkale Assize Court convicted the applicant of forgery under Article 342 § 1 of the Criminal Code and sentenced him to one year and eight months' imprisonment.

On 23 December 1996 the applicant appealed against the Çanakkale Assize Court's judgment on the ground that B.D. was not heard before the court and that a comparative analysis of his handwriting and the handwriting on the promissory notes had not been carried out.

On 3 November 1997 the Court of Cassation rejected the applicant's appeal and upheld the judgment of the Çanakkale Assize Court.

On 22 December 1997 the applicant lodged a petition with the Çanakkale Assize Court requesting that his case be re-opened.

On 26 December 1997 this request was dismissed.

On 7 January 1998 the applicant lodged an appeal with the Burhaniye Assize Court against the Çanakkale Assize Court's decision of 26 December 1997.

On 21 January 1998 this very last appeal of the applicant was dismissed by the Burhaniye Assize Court.

On 15 October 1998 the applicant started serving his prison sentence.

On 14 June 1999 he was released from prison on probation.

B. Relevant domestic law

1. Article 339 of the Criminal Code provides:

"A civil servant who prepares a partially or completely forged document or distorts an authentic document shall be imprisoned for between three to ten years if damage arises out of this forgery..."

2. Article 342 § 1 of the Criminal Code provides:

"A person who is not a civil servant and who forges an official document by way of the methods specified in Article 339 shall be imprisoned for between two to eight years..."

3. Article 238 of the Code on Criminal Procedure provides:

"... Admission of evidence can be rejected under the following circumstances:

...

c) If the fact to which the evidence is relevant does not have any effect on the decision...”

COMPLAINTS

The applicant alleges under Article 6 § 3 (d) of the Convention that the only witness for his defence was not heard since his attendance had not been secured by the court. The applicant further complains under the same provision that the Çanakkale Assize Court did not request the Forensic Medicine Institute to carry out a handwriting examination.

THE LAW

A. Government's preliminary objections

The Government submit that the applicant failed to comply with the six-month rule. They assert that the final decision in domestic law was taken on 12 February 1998, whereas the application was introduced with the Court on 24 March 2000.

The applicant contends in reply that he complied with the six-month rule. He observes that he lodged his application with the Commission on 24 March 1998.

The Court notes that the “final decision” within the meaning of Article 35 § 1 of the Convention was the decision taken by the Court of Cassation on 3 November 1997 dismissing the applicant's appeal against the decision of the Çanakkale Assize Court. The applicant filed his application with the Commission on 24 March 1998. Accordingly, the application was lodged within the six months' time-limit stipulated in Article 35 § 1 of the Convention.

As regards the proceedings taken by the applicant in an attempt to have his case re-opened, the Court would add that a final decision given on an application for the re-opening of proceedings cannot be regarded as a “final decision” within the meaning of Article 35 of the Convention, unless the proceedings are in fact re-opened and a new decision is given on the merits of the complaint which forms the object of the application under the Convention (see *Danis v. Turkey*, no. 24564/94, Commission decision of 9 April 1997). On that understanding, the negative rulings of 26 December 1997 and 21 January 1998 on the applicant's requests for

re-opening are to be discounted for the purposes of calculating the starting date for the six-month rule.

The Court concludes that the Government's preliminary objection that the applicant failed to comply with the requirements of Article 35 § 1 of the Convention must be dismissed.

B. Merits

The applicant alleges under Article 6 § 3 (d) of the Convention that the only witness for his defence was not heard by the Çanakkale Assize Court and that the court did not find it necessary to request a handwriting examination.

As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under Article 6 § 3 (d) taken together with Article 6 § 1 of the Convention (see, *inter alia*, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, § 67). The relevant parts of Article 6 of the Convention provide as follows:

> "1. In the determination of (...) any criminal charge against him, everyone is entitled to a fair ...hearing (...).
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him
>
> ..."

The Government assert that the domestic courts had a margin of appreciation as to whether a handwriting examination was necessary in the instant case. In their opinion, the Assize Court established that the appointment of an expert would not have shed any light on the case. As to the complaint concerning the non-examination of the witness B.D., the Government submit that the authorities made every effort to secure his attendance in court. They note in this connection that the authorities contacted the Kervan Carpets Company's lawyers, who replied that they did not know the person whom the applicant had accused. In addition, the company informed the authorities that no one with the name B.D. had ever worked for the company in 1991 and 1992. The Government further claim that B.D. could not be found despite the efforts of the police. With reference

to the Court's judgment in the case of *Bricmont v. Belgium* (judgment of 7 July 1989, Series A no. 158), the Government finally submit that it is at the national court's discretion to decide whether a witness was relevant in a specific case. In their view, B.D.'s evidence would not have been useful since the applicant had accused him of committing the offence in question and therefore he could not have been expected to incriminate himself.

For these reasons, the Government assert that there was no violation of Articles 6 § 1 and 6 § 3 (d) of the Convention.

The applicant maintains his complaints. He claims that he did not write Şükrü Can's name on the promissory notes and that a handwriting examination would have proved this. He further argues that the national court did not make the necessary efforts to find B.D. He avers that, following his conviction, he located the witness and informed the domestic courts of this. However, the courts refused to re-open his case with a view to examining the witness.

The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The task of the Court is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, amongst other authorities, *Perna v. Italy* [GC], no. 48898/99, § 29, ECHR 2003-...). The Court further draws attention to the fact that Article 6 § 3 (d) does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (see *Perna* cited above, *ibidem*); its essential aim, as indicated by the words "under the same conditions", is a full equality of arms in the matter (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, § 91).

As to the applicant's complaint concerning the non-attendance of B.D. as a witness, the Court observes that the only prosecution witness heard by the Çanakkale Assize Court was Ş.C., who, it is to be noted, later withdrew his accusation against the applicant during the domestic proceedings. It has not been disputed by the applicant that he had the right to cross-examine Ş.C., to discredit the latter's testimony and to give evidence in support of his plea of innocence. Nor has it been contested that it would have been open to the applicant to emphasise at the trial that the prosecution case must be considered to have been undermined owing to Ş.C.'s decision to withdraw his accusation. The Court does not consider that the non-appearance of B.D. as a witness vitiated the fairness of the trial, it being reiterated that regard must be had to the fairness of the proceedings seen as a whole (see, for example, *Barberà, Messegué et Jabardo v. Spain,* judgment of 6 December 1988, Series A no. 146 p. 31, § 67). It notes in this connection that the authorities made reasonable if unsuccessful efforts to locate B.D.

and the trial court was able to give consideration to the applicant's plea that B. D. was the guilty party.

It is not for the Court to gainsay the decision reached by the Çanakkale Assize Court on the basis of the evidence before it, in particular any conclusions which it may have drawn as to the applicant's credibility and the strength of his defence arguments. The Çanakkale Assize Court heard the case for the defence and had the inestimable advantage of observing the applicant's demeanour and his response to the prosecution case under adversarial conditions. It would add that it has not been suggested that the prosecution did not disclose to the defence all material evidence in its possession for or against the applicant (on this point, see, for example, *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, p. 354, § 36).

As to the complaint that the Çanakkale Assize Court refused to order a handwriting examination, the Court notes that the Assize Court considered that the evidence which the applicant wanted to adduce was of no relevance. That assessment was for the domestic court to make and the Court cannot find that the Çanakkale Assize Court acted arbitrarily and disregarded evidence which would have been vital for the determination of the charges laid against the applicant.

It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President