

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

SECOND SECTION

CASE OF AYMELEK v. TURKEY

(Application no. 15069/05)

JUDGMENT

STRASBOURG

30 January 2018

This judgment is final but it may be subject to editorial revision.



In the case of Aymelek v. Turkey,

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

Ledi Bianku, *President,*
Nebojša Vučinić,
Jon Fridrik Kjølbro, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 9 January 2018,

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

PROCEDURE

1. The case originated in an application (no. 15069/05) 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 Osman Aymelek ("the applicant"), on 25 February 2005.

2. The applicant was represented by Mr M. S. Liman, lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. On 11 February 2016 the complaints concerning the independence and the impartiality of the General Staff Military Court, and the lack of legal assistance during the preliminary investigation were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

4. The Government objected to the examination of the application by a Committee. After having considered the Government's objection, the Court rejects it (see *Yivli v. Turkey*, no. 12723/11, 14 November 2017).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960.

6. At the time of the events the applicant was serving in the Turkish Army as a lieutenant-colonel.

7. On 8 May, 10 May and 11 May 2000, the applicant was interrogated by the military prosecutor within the context of a criminal investigation initiated against him for embezzlement.

8. On 16 June 2000 an arrest warrant was issued in respect of the applicant on suspicion of embezzlement.

9. 19 June 2000 the applicant applied to the Military Prosecutor's Office. He was placed in detention on remand on the same day by the General Staff Military Court.

10. On the same day, the applicant gave a power of attorney to a lawyer.

11. On 22 June 2000 the applicant's brother Şükrü Aymelek, who was a lawyer, was also placed in detention on remand. On 10 April 2012 the applicant's brother was released.

12. On 26 June 2000 the General Staff Military Prosecutor filed a bill of indictment with the General Staff Military Court charging the applicant with embezzlement under Section 131 of Military Criminal Code, involving in trade activities as a soldier under Additional Section 1 of Military Criminal Code and breaching Article 13 of the Law No. 3628 (Law on Disclosure of Assets and Fight Against Bribery and Corruption). The siblings of the applicant, Şükrü Aymelek and Ulviye Toprakkıran were also charged with the same bill of indictment with embezzlement and breaching Article 13 of the Law No. 3628.

13. On 29 May 2001 the General Staff Military Prosecutor filed an additional bill of indictment and charged the accused with additional acts related to the crimes already stated in the first bill of indictment.

14. On 19 September 2001, the applicant submitted a petition with the prison authorities, complaining that he had not been able to see his brother Şükrü Aymelek, who was also detained in remand. The applicant stated that he regretted that his brother was also in prison because of him, and requested to see him.

15. On 19 September 2002 the applicant was found guilty and sentenced to imprisonment for embezzlement and being involved in trade activities as a soldier by the General Staff Military Court, composed of a military officer with no legal background and two military judges.

16. On 6 January 2003 the applicant appealed against the decision of the General Staff Military Court.

17. On 2 April 2003 the Military Court of Cassation quashed the judgment of 19 September 2002 on procedural grounds and on the merits.

18. On 17 December 2003 the General Staff Military Court found the applicant guilty for embezzlement and being involved in trade activities as a soldier, but reduced his prison sentence. The applicant appealed.

19. On 2 June 2004 the Military Court of Cassation upheld the decision of 17 December 2003.

20. On 13 January 2014 the applicant requested from the Military Court of Cassation to reopen the criminal proceedings alleging that a witness who had not been heard, was ready to give statements before the court. The applicant submitted that witness' written statements to the Military Court of Cassation as well.

21. On 19 February 2014 rejected the applicant's request for reopening of the criminal proceedings, on the grounds that the witness' statements did not have any evidential value, which could warrant a lesser sentence or the acquittal of the applicant.

II. RELEVANT DOMESTIC LAW

22. A description of the relevant domestic law concerning the composition and functioning of military courts at the material time may be found in *Gürkan v. Turkey* (no. 10987/10, §§ 7-8, 3 July 2012).[1]

23. Sections 83 and 85(1) of the Act Governing the Formation and Proceedings of Martial Law Courts (Law no. 353), which was in force at the time, provided as follows:

Section 83

"At the beginning of the interrogation, the accused shall be informed of the charges against him.

In the course of the interrogation the accused must not be prevented from bringing forward any evidence in his favour.

In the first interrogation, the identity and personal status of the accused shall be determined.

In cases where a person is accused of committing a crime punishable by a heavy penalty, he shall be interrogated by the military public prosecutor even if his statements had been taken previously."

Section 85 (1)

"The accused shall have access to legal assistance of one or more lawyers at any stage of the investigation."

24. Following a referendum held on 16 April 2017, Law no. 6771 was adopted; Articles 145 and 157 of the Constitution were repealed and the following paragraph was added to Article 142 of the Constitution:

"... No military courts shall be formed other than disciplinary courts. However, in a state of war, military courts may be formed with jurisdiction to try offences committed by military personnel in relation to their duties."

1. Since the amendment came into force on 30 June 2010 (Law no. 6000) concerning the Law no. 353 on the Composition and Functioning of Military Courts, the Military Criminal Courts are composed of three military professional judges.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

25. In their observations dated 21 October 2016, the Government argued that the applicant's observations had not been submitted in one of the official languages of the Court as required by Rule 34 § 1 of the Rules of Court and that there was nothing in the case file demonstrating that he had been granted leave to use the Turkish language in the proceedings before the Court. They invited the Court not to take into account the applicant's observations and claims for just satisfaction.

26. The Court notes that the President of the Section had decided, in accordance with Rule 34 § 3 of the Rules of Court, to grant him leave to use the Turkish language in the written proceedings before the Court. The Court further notes that it has already examined and dismissed a similar objection by the respondent Government (see *Atılgan and Others v. Turkey*, nos. 14495/11 and 10 others, § 12, 27 January 2015). The Court finds no reason to reach a different conclusion in the present case. The Government's arguments on this point should therefore be rejected.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. As to the independence and impartiality of the General Staff Military Court

27. The applicant maintained that the General Staff Military Court which had tried and convicted him had not been an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

1. Admissibility

28. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

29. The applicant complained that the General Staff Military Court which tried and convicted him had not been independent and impartial, as required by the Article 6 § 1 of the Convention, given that it was composed of two military judges and a military officer. The applicant further

complained under Article 6 § 1 of the Convention that the military prosecutor, who had conducted the investigation against the applicant, had subsequently been appointed as a judge and sat on the bench of the General Staff Military Court that tried and convicted the applicant. According to the applicant, that appointment hindered the domestic tribunal's independence and impartiality.

30. Referring to the Court's judgment in the case of *Gürkan* (cited above), the Government submitted that they were aware of the Court's case-law under Article 6 § 1 of the Convention.

31. The Court observes that it has already examined the same grievance in the case of *Gürkan v. Turkey* and found a violation of Article 6 § 1 of the Convention (cited above, §§ 13-20). In that judgment, the Court held that the military criminal court which had tried and convicted the applicant could not be considered to have been independent and impartial within the meaning of Article 6 of the Convention. Because the military officer sitting in the bench had been appointed by their hierarchical superiors and had not enjoyed same constitutional safeguards provided to the other two military judges.

32. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned *Gürkan v. Turkey* judgment (no. 10987/10, 3 July 2012).

33. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.

34. The Court further notes that by making such an assessment of independence and impartiality of the General Staff Military Court it also disposes of the applicant's further complaint concerning independence and impartiality of the same court under Article 6 § 1.

B. As regards the applicant's complaint under Article 6 §§ 1 and 3 (c) of the Convention

35. The applicant alleged that he had not been allowed to see his lawyer who was also his brother while they were both in detention within the context of the same criminal investigation. In that connection, he complained that his right to a fair trial and his right to defend himself through legal assistance had been violated.

36. The Government maintained that the complaint should be rejected for non-exhaustion of domestic remedies, as it was not invoked before the domestic authorities. They further argued that the complaint should be declared inadmissible for being manifestly ill-founded in any case, as the applicant had never mentioned his brother's capacity of lawyer nor his request for meeting him in terms of a relationship of lawyer and client.

37. The Court observes that the applicant submitted a letter of complaint dated 19 September 2001 to the prison authorities and complained of not

having been able to see his brother who was also detained within the context of the same criminal proceedings. The applicant stated that his request had not been accepted. However, the Court notes that there is nothing in the case file showing that the applicant requested to see his brother in his capacity as a lawyer. His handwritten letter also did not contain any such request (see paragraph 13). Moreover, he had never raised such a complaint before the domestic courts.

38. It further notes that there were no statutory restrictions on an accused's right of access to a lawyer at any stage of the criminal investigation by the judicial authorities of the army (see Section 85 (1) of Law no. 353, quoted in paragraph 22 above; and compare and contrast with *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008). The applicant was represented by lawyers of his own choosing during the criminal proceedings.

39. In the light of the foregoing, the Court finds that there is no indication in the case file showing that the applicant's right of access to a lawyer had been restricted at any stage of the proceedings. The Court therefore cannot conclude that the applicant was in fact denied legal assistance.

40. It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

41. In his observations dated 6 September 2016 the applicant submitted a number of new complaints under Article 6 and Article 1 of Protocol No. 1. He complained of a violation of his right to a fair trial in relation to proceedings for reopening of criminal proceedings, given that his request for reopening of the criminal proceedings was rejected although there was a new piece of evidence which would lead to his acquittal.

42. The Court notes that that complaint is incompatible *ratione materiae*, as Article 6 does not apply to proceedings for the reopening of criminal proceedings, given that someone who applies for his case to be reopened and whose sentence has become final is not "charged with a criminal offence" within the meaning of the said Article (see *Fischer v. Austria* (dec.), no. 27569/02, ECHR 2003-VI, and see, *mutatis mutandis*, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 60-72, ECHR 2017 (extracts)).

43. He further complained of the proceedings regarding the confiscation of his property following his conviction for embezzlement under Article 6 and Article 1 of Protocol No.1. The Court notes that the final decision of the domestic courts regarding the confiscation of the applicant's property was given on 17 September 2015 by the Military Court of Cassation, and the applicant's individual application regarding those complaints is currently

pending before the Constitutional Court. This complaint is premature and the Court must therefore reject it for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention (see, for example, *Mustafa Avci v. Turkey*, no. 39322/12, § 79, 23 May 2017).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. The applicant claimed 100,000 euros (EUR) in respect of pecuniary damage and EUR 50,000 non-pecuniary damage. Without providing any documents in support of his claims, the applicant further claimed legal fees without specifying the amount.

45. In their written submissions, the Government objected to the applicant's just satisfaction claims.

46. As regards pecuniary damage, the Court notes that it cannot speculate as to what the outcome of proceedings compatible with Article 6 of the Convention would have been. Accordingly, it makes no award under this head.

47. As regards non-pecuniary damage, taking into account the recent amendments in domestic law, and the possibility of a retrial before civil courts, the Court, deciding on an equitable basis, awards EUR 1,500 to the applicant (see *Taşçı v. Turkey*, no. 43868/06, § 18, 26 September 2017).

48. In accordance with 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 are reasonable as to quantum. In the present case, the applicant did not submit any receipts or other vouchers on the basis of which a specific amount could be established. Accordingly, the Court does not make any award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning independence and impartiality of the General Staff Military Court under Article 6 § 1 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months the amount EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into the 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 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Ledi Bianku
Deputy Registrar	President