

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

SECOND SECTION

CASE OF ÇAMLAR v. TURKEY

(Application no. 28226/04)

JUDGMENT

STRASBOURG

10 November 2015

FINAL

10/02/2016

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



In the case of Çamlar v. Turkey,

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

Paul Lemmens, *President,*
Işıl Karakaş,
Helen Keller,
Ksenija Turković,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 6 October 2015,

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

PROCEDURE

1. The case originated in an application (no. 28226/04) 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 Adnan Levent Çamlar ("the applicant"), on 4 August 2004.

2. The applicant was represented by Mr A. Cangı, a lawyer practising in İzmir. The Turkish Government ("the Government") were represented by their Agent.

3. On 24 June 2013 the complaints under Article 6 §§ 1 and 3(d) of the Convention concerning the independence and impartiality of the İzmir State Security Court and the applicant's inability to examine or have examined witnesses were communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1965 and lives in London.

A. Criminal proceedings against the applicant in the United Kingdom

5. On 29 April 1997 the applicant was arrested in London on suspicion of trafficking of illegal drugs.

6. On the same day he was placed in police custody, where he was informed that he would be charged with importation of a controlled drug, namely diamorphine.

7. In his statements before the British police, the applicant maintained that he had been importing clothing goods from Turkey and had not been aware of the trafficking of drugs by his partners.

8. On 15 September 1998, after having heard witness statements and evaluated all relevant evidence, the Crown Court acquitted the applicant of all charges and ordered his release.

B. Criminal proceedings against the applicant in Turkey

9. On 16 June 1997 the public prosecutor at the İzmir State Security Court filed an indictment with that court, accusing certain persons of trafficking of illegal drugs by establishing a criminal organisation pursuant to Article 403 of the former Criminal Code (Law no. 765). In that indictment, the public prosecutor indicated the involvement of the applicant in the alleged acts, without bringing any charges against him.

10. On 19 August 1997 the public prosecutor issued an indictment, accusing the applicant of the same offence as the others. The public prosecutor stated that the applicant had actively participated in the transfer of the illegal drugs from Turkey to the United Kingdom and noted that he was in detention on remand in the United Kingdom.

11. In a report dated 13 June 1997, the public prosecutor stated that the British authorities had provided him with the tapes of the applicant's police statements as well as other evidence on the alleged offence.

12. On an unspecified date in 1997, the Magistrates' Court ordered the applicant's detention on remand *in absentia*.

13. At a hearing on 24 February 1998 the İzmir State Security Court joined the proceedings against the applicant with the proceedings against the other persons involved in the same offence. At this hearing the domestic court also requested the case file of another set of related proceedings, which contained the statements of a certain F.A.

14. On 5 November 1998 one of the co-accused, B.Ö., gave his statements before the court, maintaining that he had been hired by the applicant for the receipt and storage of certain goods which he had not known to be drugs.

15. On 3 December 1998 the lawyer of one of the co-accused submitted to the national court the applicant's certificate of acquittal issued by the Crown Court.

16. On 15 July 1999 the military judge sitting on the İzmir State Security Court hearing the applicant's case was replaced by a civilian judge.

17. On 20 September 1999 the applicant went back to Turkey; he was placed in detention on remand the following day.

18. At the subsequent hearing on 30 September 1999, the applicant submitted his statements before the court and denied his involvement in the trafficking of illegal drugs. In particular, he contested the incriminating statements of B.Ö. and F.A. The applicant further requested to have certain witnesses, including his counsel in the United Kingdom, heard. The İzmir State Security Court rejected that request, finding that the statements of the witnesses called by the applicant would not contribute to the case in view of the information already available concerning the proceedings in the United Kingdom. The court went on to decide that the applicant should be released pending trial.

19. During the numerous hearings which followed, the court deferred the examination of the case to the subsequent hearings, awaiting information as regards certain accused in the United Kingdom.

20. At the hearing on 18 February 2003, the public prosecutor submitted his written opinion, requesting that the accused be found guilty as charged, mainly on the basis of the investigation conducted in the United Kingdom and the evidence obtained during another set of proceedings concerning the same offence.

21. On 21 March 2003 the applicant submitted his written defence to the court and requested his acquittal. He argued that he could not be found guilty on the basis of evidence which according to the British court was insufficient to prove his involvement in the alleged acts.

22. On 27 March 2003, on the basis of the investigation conducted by the British authorities, the statements of B.Ö. and those made by F.A., which had been taken in another set of proceedings, the İzmir State Security Court found the applicant guilty as charged and sentenced him to twenty four years' imprisonment and a fine.

23. On 31 March 2003 the applicant appealed against that judgment. During the appeal proceedings before the Court of Cassation the applicant submitted that the first instance court had based his conviction on evidence which he could not challenge, in particular the statements made in his absence by B.Ö. and F.A.

24. On 4 March 2004 the Court of Cassation upheld the judgment of the İzmir State Security Court. The higher court indicated that the offence at issue concerned the exportation of illegal drugs and accordingly the case differed from that concluded in the United Kingdom. The high court

dismissed the applicant's remaining grounds for appeal without further elaboration.

25. On an unspecified date the applicant went to the United Kingdom.

26. Following the entry into force of the new Criminal Code (Law no. 5237), in June 2005, the applicant requested the reassessment of his case and the application of the more favourable clauses in the new Code.

27. On 16 December 2005, after having examined the case file, the İzmir Assize Court reduced the applicant's sentence to twenty years' imprisonment and decreased the amount of the fine.

28. On 28 June 2006 the Court of Cassation quashed the judgment, stating that the first-instance court was to hold a hearing.

29. Following several hearings, which the applicant had not attended as he had not returned to Turkey, on 3 July 2008 the İzmir Assize Court sentenced the applicant to twenty years and ten months of imprisonment and a fine pursuant to Article 188 of the Criminal Code (Law no. 5237).

30. Following the applicant's appeal, on 9 April 2009 the Court of Cassation held a hearing and heard the submissions of the applicant's lawyer. Finally, the higher court upheld the judgment of the İzmir Assize Court with a minor procedural correction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. 29. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002), and *Öcalan v. Turkey* [GC] (no. 46221/99, §§ 52-54, ECHR 2005-IV).

32. By Law no. 5190 of 16 June 2004, published in the Official Journal on 30 June 2004, State Security Courts were abolished.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

33. The Government submitted that the applicant's representative was not duly authorised to introduce the application on behalf of the applicant before the Court and the application should therefore be declared inadmissible *ratione personae*. In particular, they indicated that the authority form of 15 July 2004 did not contain the representative's signature.

34. The applicant contested that argument. He noted that he had signed an authority form for Mr A. Cangı to represent his interests before the Court. He further maintained that Mr A. Cangı had been representing him

since the early stages of the proceedings and that he had not received any instructions from the Court concerning the validity of the submitted authority form.

35. The Court observes that on 4 August 2004 the applicant's representative signed and submitted a complete application form on behalf of the applicant along with a power of attorney filled in and signed by the applicant himself.

36. In these circumstances the Court considers that, by providing the Court with the power of attorney authorising Mr A. Cangı to represent him before the Court, the applicant has sufficiently demonstrated that he wished Mr A. Cangı to make an application to the Court on his behalf. It therefore finds that the present application cannot be rejected as incompatible *ratione personae* pursuant to Article 35 §§ 3 and 4 of the Convention, and dismisses the Government's objection.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

37. The applicant complained that he had not received a fair hearing by an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention on account of the presence of a military judge sitting on the bench of the İzmir State Security Court. He further alleged under Article 6 §§ 1 and 3 (d) of the Convention that the İzmir State Security Court had sentenced him on the basis of statements obtained in his absence, which he could not challenge during the proceedings against him and that, despite his requests, the court had not heard any witnesses in his favour.

Article 6 §§ 1 and 3 (d) of the Convention, insofar as relevant, provide:

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

A. Admissibility

38. The Court notes that the application 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.

B. Merits

1. Independence and impartiality of the State Security Court

39. The Government submitted that the applicant had been convicted by a State Security Court which had been composed of three civilian judges since the military judge had been replaced before the end of the proceedings. They further maintained that the majority of the proceedings had been conducted by civilian judges and the military judge had not been involved in important interlocutory decisions during the time he served on the bench. The Government finally argued that following the replacement of the military judge, at the hearing of 15 July 1999 the contents of the case-file had been read out to the applicant and the applicant had accordingly been provided with the opportunity to make additional defence submissions.

40. The applicant maintained his allegations. He argued, in particular, that the İzmir State Security Court had not repeated the acts in which the military judge had participated when the latter was replaced by a civilian judge.

41. The Court has consistently held that certain aspects of the status of military judges sitting as members of the state security courts rendered their independence from the executive questionable (see *İncal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 68; and *Çıraklar v. Turkey*, *Judgment* of 28 October 1998, *Reports* 1998-VII, § 39). The Court also found in the *Öcalan v. Turkey* case (cited above, §§ 114-115) that, when a military judge participated in one or more interlocutory decisions that continued to remain in effect in the criminal proceedings concerned, the military judge's replacement by a civilian judge in the course of those proceedings before the verdict was delivered, failed to dissipate the applicant's reasonably held concern about that trial court's independence and impartiality, unless it was established that the procedure subsequently followed in the state security court sufficiently allayed that concern.

42. In the instant case, the Court notes that before his replacement on 15 July 1999, the military judge was present at twelve hearings on the merits. During these hearings, the first-instance court received the statements of another co-accused concerning the applicant's involvement in the offence and admitted F.A.'s statements into the case file as evidence. The court also carried out some minor procedural acts.

43. After the replacement of the military judge by a civilian judge, the İzmir State Security Court held twenty-two more hearings on the merits within the course of four years, during which the final submissions of both the public prosecutor and the applicant were taken.

44. The Court acknowledges that the case was evaluated by three civilian judges for the most part. However, it also observes that the main

evidence, consisting of the statements of B.Ö. and those made by F.A. during another set of proceedings, was evaluated by the court during the initial stages of the proceedings, in the presence of the military judge. The bench composed of three civilian judges did not take any new decision as regards the admissibility of F.A.'s statements, nor did it order to a re-hearing of B.Ö.

45. In these circumstances, the Court considers that the replacement of the military judge before the end of the proceedings failed to dispose of the applicant's reasonably held concern about the trial court's independence and impartiality (see *Aslan and Şancı v. Turkey*, no. 58055/00, 5 December 2006).

46. There has accordingly been a violation of Article 6 § 1 of the Convention.

2. Alleged unfairness of the proceedings

47. Having regard to the facts of the case and its finding of a violation of Article 6 § 1 of the Convention above and referring to paragraph 52 below, the Court concludes that it is not necessary to make a separate ruling on the merits of the applicant's remaining complaint under Article 6 §§ 1 and 3 (d) of the Convention concerning his inability to challenge the statements obtained in his absence and to have any witnesses in his favour examined (see *Yiğitdoğan v. Turkey (no. 2)*, no. 72174/10, § 65, 3 June 2014).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

49. The applicant claimed 257,035 euros (EUR) in respect of pecuniary damage. The applicant further called on the Court to determine a reasonable sum in respect of non-pecuniary damage.

50. The Government contested these claims submitting that there was no causal link between the violation and the pecuniary damage alleged. The Government further requested the Court to dismiss the applicant's claim for non-pecuniary damage as he had failed to specify an amount.

51. The Court observes that the applicant did not submit any relevant documents to substantiate his claim for pecuniary damage. It therefore rejects that claim. The Court however finds that he must have suffered pain

and distress which cannot be compensated for solely by the Court's finding of a violation. Having regard to the nature of the violations found, the Court finds it appropriate to award him EUR 6,000 in respect of non-pecuniary damage.

52. The Court further considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 of the Convention, should he so request (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

B. Costs and expenses

53. The applicant also claimed EUR 3,700 for the costs and expenses incurred before the domestic courts and EUR 4,000 incurred before the Court, particularly in respect of lawyer's fees. He further requested EUR 421 for other costs and expenses, such as travel expenses, stationery, photocopying, translation and postage. The applicant submitted a breakdown of Mr A. Cangı's work, which listed the legal activities carried out by the latter and their corresponding fees.

54. The Government submitted that the requested sums were unsubstantiated.

55. According to 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 Court notes that the documents submitted by the applicant in support his claims do not contain any invoices in relation to the costs of travel, stationery, photocopying, translation and postage. As for the legal fees incurred before the domestic courts and the Court, the Court notes that in its previous judgments breakdowns of the hours spent by legal representatives were accepted by the Court as proof of the work carried out by them in representing the applicants (see *Benzer and Others v. Turkey*, no. 23502/06, § 249, 12 November 2013). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court as well as the domestic courts.

C. Default interest

56. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints under Article 6 § 1 taken alone and in conjunction with Article 6 § 3 (d) admissible;

2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of the lack of independence and impartiality of the İzmir State Security Court;

3. *Holds*, by four votes to three, that there is no need to examine the remaining complaint under Article 6 § 1 taken in conjunction with Article 6 § 3 (d) of the Convention;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amount, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 November 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Paul Lemmens
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Lemmens;

(b) Joint Statement of dissent of Judges Lemmens, Karakaş and Turković.

P.L.
A.C.

CONCURRING OPINION OF JUDGE LEMMENS

I have with some hesitation voted with my colleagues in favour of finding a violation of Article 6 § 1 of the Convention on account of the lack of independence and impartiality of the İzmir State Security Court.

The reasoning of my colleagues is based on the fact that one of the judges of the State Security Court was a military judge.

The wording used in the present judgment seems to suggest that whenever a civilian has to stand trial before a court that includes a military judge, he can legitimately fear that the court will be unduly influenced by considerations that have little or nothing to do with the nature of his case. I very much doubt that such a broad approach would be warranted.

I see a problem under Article 6 § 1 where the case raises issues touching upon the founding principles of the State or affecting national security. These were the sort of issues that had to be dealt with by the national security court in the case that gave rise to the first judgment of this Court in which the presence of a military judge was criticised (*Incal v. Turkey*, 9 June 1998, § 72, *Reports of Judgments and Decisions* 1998-IV).

In the present case, however, the applicant was charged with trafficking of illegal drugs. It is hard for me to see why he should have specific concerns about the independence and impartiality of the military judge.

Having said that, I note that in earlier cases the Court has explicitly stated that an applicant could have legitimate reasons to fear a lack of independence and impartiality on the part of a State security court because of the presence of a military judge, "even though [he] was appearing before [that court] for organised drug trafficking" (see *Canevi and Others v. Turkey*, no. 40395/98, § 34, 10 November 2004, and *Canpolat v. Turkey*, no. 63354/00, § 22, 15 February 2007).

Since it would not be fair to hold differently for the present applicant, who was in the same situation as the applicants in the other cases, I decided in the end to join my colleagues in their finding of a violation of Article 6 § 1 on this point.

JOINT PARTLY DISSENTING OPINION OF JUDGES LEMMENS, KARAKAŞ AND TURKOVIĆ

We cannot agree with the majority that there is no need to examine the remaining complaint under Article 6 § 1 taken in conjunction with Article 6 § 3 (d) of the Convention.

We think that the applicant's inability to challenge the statements obtained in his absence and the fact that he was sentenced on the basis of these statements should be also examined by the Court under Article 6 § 3 (d).