

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

SECOND SECTION

CASE OF ÇETİNKAYA v. TÜRKİYE

(Application no. 76619/11)

JUDGMENT

STRASBOURG

16 January 2024

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Çetinkaya v. Türkiye,

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

Pauliine Koskelo*, President*,
Lorraine Schembri Orland,
Davor Derenčinović*, judges*,

and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 76619/11) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 2 December 2011 by a Turkish national, Mr Namet Çetinkaya ("the applicant"), who was born in 1990, is imprisoned in İzmir and was represented by Mr E. Şenses, a lawyer practising in Batman;

the decision to give notice of the complaints concerning the alleged unfairness of criminal proceedings and an alleged breach of the presumption of innocence to the Turkish Government ("the Government"), represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye, and to declare inadmissible the remainder of the application;

the decision to reject the Government's objection to the examination of the application by a Committee;

the parties' observations;

Having deliberated in private on 12 December 2023,

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

SUBJECT MATTER OF THE CASE

1. The application mainly concerns the domestic courts' alleged failure to discharge their duty under Article 6 § 1 of the Convention to adduce reasons for their decision to convict the applicant. In the same vein, it further pertains to an alleged breach of the principle of equality of arms in respect of the domestic courts' stance *vis-à-vis* the admission and assessment of evidence and their refusal to take further evidence. Lastly, the application concerns an alleged breach of Article 6 § 2 of the Convention owing to the applicant's contention that the domestic courts' interpretation and application of Article 220 § 6 of the Criminal Code ("the CC") had amounted to a legal presumption of guilt.

2. The applicant was arrested on 2 December 2009 for, amongst other things, allegedly participating in a public demonstration called by the PKK (Workers' Party of Kurdistan) and throwing a Molotov cocktail at the police; he denied the allegations.

3. On 14 December 2010 the Sixth Division of the Diyarbakır Assize Court ("the trial court") delivered its reasoned judgment in which the applicant was found guilty, *inter alia*, of the following offences and was sentenced as indicated:

(i) six years and three months' imprisonment for committing an offence on behalf of an armed terrorist organisation of which he was not a member, on the grounds that he had taken part in the impugned demonstration in response to calls issued by the PKK, under Article 220 § 6 of the CC;

(ii) four years and two months' imprisonment and a fine of 120 Turkish liras (TRY) for illegal possession of dangerous materials under Article 174 of the CC, on the basis that he had had a Molotov cocktail in his possession (when throwing it at the police).

4. In its reasoned judgment, the trial court first summarised the bill of indictment, the public prosecutor's opinion on the merits of the case, the statements given by the applicant, police officers and the applicant's employer during the proceedings, and briefly indicated that it regarded the PKK as an armed terrorist organisation. The trial court then described the incident as it considered it to have taken place. In that connection, it held that in line with instructions issued by the PKK to protest against the reportedly deteriorating health condition of its leader, which had been published in certain media outlets and websites associated with the organisation, a group of twenty-five or thirty people mainly consisting of minors had burned tyres on 2 December 2009 at approximately 7 p.m. on Göçerler Street (in Batman), had started chanting illegal slogans and had resisted the police by throwing Molotov cocktails and letting off fireworks. Relying on witness statements and an incident report written by the police, the trial court took the view that the applicant had taken part in the illegal demonstration in question, which had been held in parallel with other illegal demonstrations organised throughout the country for the same purpose. By the same token, the trial court emphasised its finding that the applicant had chanted illegal slogans and thrown a Molotov cocktail at an armoured police vehicle and that he had been arrested after a hot pursuit.

5. The trial court went on to carry out a separate assessment in respect of each offence imputed to the applicant. In that connection, it held that he had committed the offence of illegal possession of dangerous materials in the context of the activities of a terrorist organisation established to commit crimes, as demonstrated by the manner in which the offence had been committed and the evidence gathered. As regards the offence of committing an offence on behalf of an armed terrorist organisation without being a member thereof (Article 220 § 6 of the CC), the trial court reiterated its line of reasoning concerning the manner in which the incident had taken place to conclude that the applicant had committed the offences in question with the knowledge and upon the instructions of the PKK.

6. Throughout the criminal proceedings, the applicant's main defence submissions were firstly that even though he had allegedly been caught in the act of throwing Molotov cocktails at the police, a forensic report drawn up by the police had found no traces of fire-lighting or petroleum products on him or on his clothes; and secondly that his right arm had been injured at work before the incident, and that it had not been possible for him to throw a Molotov cocktail in that condition, as attested by statements he had made to the doctor who had examined him immediately after his arrest and by testimony offered by his employer during the trial.

7. The trial court's reasoned judgment contained no assessment of the forensic report or the applicant's defence submissions, nor did it outline any reasons as to why it decided to base its decision on the statements made by certain police officers at a certain stage of the proceedings.

8. The applicant appealed against his conviction. In his full statement of appeal dated 7 January 2011, he maintained that the trial court had turned a blind eye to his first argument at the criminal proceedings, which related to the lack of traces of fire-lighting or petroleum products on him, and which, in his view, also belied the contention of the police officers that he had been seen throwing a Molotov cocktail and then almost immediately arrested after a hot pursuit. Accordingly, by relying only on the police statements the trial court's judgment had contravened the provisions of the Turkish Constitution and the Convention, which enshrined, *inter alia*, his right to a fair trial.

9. On 22 June 2011 the Court of Cassation upheld with final effect the trial court's judgment in respect of, *inter* alia, the above-mentioned points (i) and (ii).

10. On 10 September 2012 the Sixth Division of Diyarbakır Assize Court reviewed, of its own motion, the applicant's conviction in accordance with Law no. 6352, but it decided not to amend his sentence under Article 220 § 6 of the CC. On 6 March 2013 the Seventh Division of Diyarbakır Assize Court dismissed an objection which the applicant had lodged against the above-mentioned decision, which thus became final.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE DOMESTIC COURTS' FAILURE TO DELIVER A REASONED JUDGMENT IN RESPECT OF THE APPLICANT'S CONVICTION UNDER ARTICLES 174 AND 220 § 6 OF THE CC

A. Admissibility

11. The Government submitted that the applicant had not exhausted the domestic remedies available to him, since he had failed to raise the complaints

he had lodged with the Court in his appeal to the Court of Cassation. Secondly, the applicant had also failed to lodge an individual application with the Constitutional Court after the domestic courts' decisions to review his sentence pursuant to Law no. 6352, which became final on 6 March 2013, and thus fell within the Constitutional Court's jurisdiction *ratione temporis*.

12. The applicant contested the Government's submissions.

13. The Court dismisses the first limb of the Government's preliminary objection in view of the content of the applicant's appeal, which demonstrated that he had raised the essence of his complaint under the present head in his appeal (see paragraph 8 above). The Court also dismisses the second limb of the Government's preliminary objection in view of its established case-law (see, among other authorities, *Öner and Türk v. Turkey*, no. 51962/12, §§ 14-18, 31 March 2015).

14. In view of the above, the applicant's complaint under the present head is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

15. The applicant alleged that his right to a reasoned judgment had been infringed because the trial court had not given any details as to why it had accepted the police's version of events and had convicted him, despite his defence submissions (see paragraphs 6 and 8).

16. The Government submitted that the domestic courts had not only established the relevant evidence in respect of each offence imputed to the applicant, but had also thoroughly examined the legal elements of each offence and had found them to be made out. In determining the circumstances in which the incident had occurred, the domestic courts had mainly relied on the fact that the applicant had been seen throwing Molotov cocktails at the police vehicles and that he had been arrested following a hot pursuit. As the applicant had committed the offences attributed to him following the call made by the media organs of the PKK, the domestic courts had taken the view that he had done so with the knowledge and upon the instructions of that organisation and that he had therefore to be convicted for having committed an offence "on behalf of the PKK without being a member thereof".

17. As regards the domestic courts' alleged failure to examine the applicant's defence submissions, the Government asserted that Molotov cocktails did not leave any residue on the body of the person throwing them, since they did not explode in one's hands like a pistol, but rather burst into flames on impact with the target. As regards the applicant's purported inability to throw a Molotov cocktail owing to the injury he had sustained to his right arm while at work, the Government submitted that when the

applicant had mentioned that issue to the police, he had undergone a detailed medical examination and an X-ray of the relevant part of his body which had shown an absence of bone pathology. In the light of the above, the Government considered that there had been no violation of the applicant's right to a reasoned judgment in the present case.

2. The Court's assessment

18. The general principles concerning the right to a reasoned judgment have been summarized in *Moreira Ferreira v. Portugal (no. 2)* ([GC], no. 19867/12, § 84, 11 July 2017) and in *Ayetullah Ay v. Turkey*, (nos. 29084/07 and 1191/08, § 128, 27 October 2020). Without requiring a detailed answer to every argument advanced by the complainant, the duty to give reasons presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (ibid.).

19. The Court notes that the applicant stated in his defence submissions that the forensic report demonstrated that no traces of fire-lighting or petroleum products had been found on his clothes or in the samples taken from his hands and feet, despite the police officers' testimony that he had thrown Molotov cocktails at them and that they had arrested him in the act of doing so. The Government, on the other hand, argued that throwing a Molotov cocktail left no such traces.

20. Furthermore, the applicant raised, as early as his first medical examination, which took place immediately after his arrest, the fact that his right arm had been injured at his workplace and that he had thus been unable to throw any object, let alone a Molotov cocktail. The Government, for their part, pointed out that the detailed medical examination conducted on the applicant had revealed no bone pathology in his right arm. Be that as it may, the Court cannot but observe that the medical report referred to by the Government did note some tenderness on the applicant's right arm.

21. The Court takes due note of the parties' differing observations regarding the well-foundedness of the applicant's defence submissions to the domestic courts. That being said, it is not the Court's task to decide whether the above-mentioned arguments (see paragraphs 19 and 20) were well-founded, as it falls to the national courts to determine questions of that nature. It suffices for the Court to note that the arguments in question were clearly relevant, because had the courts found them to be well-founded, they might have decided upon the applicant's acquittal or a more favourable outcome for him. It was therefore incumbent on the domestic courts, in keeping with their obligation to deliver a reasoned judgment under Article 6 § 1 of the Convention to, at the very least, address the above-mentioned submissions.

22. Nevertheless, the domestic court's decisions were silent in respect of those submissions, notwithstanding the fact that they concerned the central

aspect of the criminal case against the applicant, namely whether or not he had thrown Molotov cocktails at the police. In the absence of a specific and express reply, it is impossible to ascertain whether those courts simply neglected to deal with the above-mentioned submissions or whether they intended to dismiss them and, if that was their intention, what their reasons were for so deciding (compare also *Ruiz Torija v. Spain*, 9 December 1994, § 30 *in fine*, Series A no. 303-A).

23. What is more, the Court observes that in convicting the applicant under Article 220 § 6 of the Criminal Code of committing an offence "on behalf of" an armed terrorist organisation without being a member of it, the trial court based itself on the PKK's instructions to protest against the reportedly deteriorating health condition of its leader, which had been published in certain media outlets and websites associated with the organisation. However, the trial court failed to establish whether the applicant had been aware of those instructions or had acted in accordance with any specific instructions given by the PKK (compare also *Gülcü v. Turkey*, no. 17526/10, § 112, 19 January 2016). That being so, the trial court failed to discharge its duty to deliver a reasoned judgment in respect of its finding that the applicant had acted on behalf of a terrorist organisation. The higher courts also failed to remedy that shortcoming.

24. Accordingly, there has been a violation of Article 6 § 1 of the Convention owing to the domestic courts' failure to discharge their duty to deliver a reasoned judgment in respect of the applicant's conviction under Article 174 and Article 220 § 6 of the CC.

II. REMAINING COMPLAINTS

25. Having regard to the facts of the case, the submissions of the parties and its findings above, the Court considers that it has dealt with the main legal questions raised by the case and that there is no need to examine the remaining complaints under Article 6 § 1 of the Convention concerning the right to a reasoned judgment in respect of the remainder of the applicant's convictions, the principle of equality of arms as regards the admission and assessment of evidence by the courts and an alleged breach of his presumption of innocence under Article 6 § 2 of the Convention (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

26. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,845 in respect of costs and expenses incurred before the Court. In support of his claims, the applicant submitted a

time-sheet which included a breakdown of the tasks undertaken by his lawyer, the time spent and the expenses incurred in connection therewith.

27. The Government submitted that his claims were excessive and that they had not been supported by any documentary evidence such as a proof of payment.

28. The Court awards the applicant EUR 7,800 in respect of non-pecuniary damage, plus any tax that may be chargeable. The Court further reiterates that the most appropriate form of redress would be a retrial in accordance with the requirements of Article 6 of the Convention, should the applicant so request (see *Süleyman v. Turkey*, no. 59453/10, § 110, 17 November 2020).

29. Having regard to the documents in its possession, the Court considers it reasonable to award the sum of EUR 3,000 in respect of costs and expenses, plus any tax that may be chargeable to the applicant (see for the relevant principles *Ataykaya v. Turkey*, no. 50275/08, § 81, 22 July 2014).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* admissible the complaints concerning the right to a reasoned judgment in respect of the applicant's conviction for illegal possession of dangerous materials and for committing an offence on behalf of the PKK without being a member thereof;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the domestic courts' failure to deliver a reasoned judgment in respect of the above-mentioned convictions;

3. *Holds* that there is no need to examine the admissibility and merits of the remaining complaints under Article 6 §§ 1 and 2 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three 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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 January 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Pauliine Koskelo President