

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

SECOND SECTION

# CASE OF KAPLAN v. TURKEY

*(Application no. 13807/08)*

JUDGMENT

STRASBOURG

30 January 2018

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



**In the case of Kaplan 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. 13807/08) 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 Cihan Kaplan ("the applicant"), on 19 February 2008.

2. The applicant was represented by Ms S. Epçeli Arslan and Ms D. Kaya, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 15 October 2014 the complaints concerning restriction on access to a lawyer and the use by the trial court of his statements taken in the absence of a lawyer to convict him 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. On 12 October 2016 the Vice-President of the Second Section invited the Government to submit further observations, if they so wish, following the judgment in *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, ECHR 2016).

5. 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

6. The applicant was born in 1975 and is detained in Tekirdağ.

7. On 9 September 1995 the applicant was arrested and taken into police custody on suspicion of membership of an illegal organisation.

8. On the same day the public prosecutor at the Istanbul State Security Court prolonged the applicant's detention in police custody for a period of up to 15 days.

9. On 13 September 1995 the applicant's statements were taken by the police in the absence of a lawyer. The applicant confessed to being a member of an illegal organisation and having been involved in a murder.

10. On 14 September 1995 the applicant participated in a reconstruction of the events (*yer gösterme*) with another suspect K.A., organised by the police in the absence of a lawyer. According to a report, drafted by police officers and signed by the applicant and K.A., both of the accused gave the details of the murder which they had committed.

11. On 22 September 1995 the applicant was examined by a doctor from the Istanbul Forensic Institute. A collective medical report was drawn up in respect of the applicant and five other suspects. According to the report, there were no traces of ill-treatment on the applicant's body.

12. On 22 September 1995 the applicant was heard by a public prosecutor and an investigating judge respectively. In his statements to the public prosecutor and the investigating judge, the applicant denied his police statements alleging that they had been taken under duress. Following his questioning, the investigating judge ordered the applicant's detention on remand.

13. On 9 October 1995 a public prosecutor at the Istanbul State Security Court filed an indictment with that court, charging the applicant with attempting to undermine the constitutional order, an offence prescribed by Article 146 § 1 of the former Criminal Code.

14. On 7 December 1995 the applicant was heard by the trial court during the first hearing in the presence of his lawyer. The applicant denied all the charges against him and stated that his statements at the police had been taken under duress.

15. In the meantime, State Security Courts were abolished by Law no. 5190 of 16 June 2004. Accordingly, the case was transferred to Istanbul Assize Court.

16. On 13 September 2007, relying on, inter alia, the applicant's and his co-accused K. A.'s statements to the police, the Istanbul Assize Court held that the applicant had committed the offence under Article 146 § 1 of the Criminal Code and sentenced him to life-imprisonment.

17. On an unknown date the applicant's lawyer appealed against the judgment of 13 September 2007.

18. On 1 December 2008 the Court of Cassation upheld the above judgment.

## II. RELEVANT DOMESTIC LAW

19. A description of the relevant domestic law concerning the right of access to a lawyer may be found in *Salduz v. Turkey* ([GC] no. 36391/02, §§ 27-31, ECHR 2008).

20. On 15 July 2003 Law no. 4928 repealed Section 31 of Law no. 3842, thus the restriction on an accused's right of access to a lawyer in proceedings before the State Security Courts was lifted.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (c) OF THE CONVENTION

21. The applicant complained under 6 §§ 1 and 3 (c) that his defence rights had been violated as he had been denied access to a lawyer during the preliminary investigation stage and that his statements to the police, allegedly taken under duress, had been used in convicting him by the first-instance court. The applicant further complained of a violation of Article 6 § 2 of the Convention in that his detention on remand and conviction had been solely based on his statements taken by the police.

22. The Court decides to examine those complaints solely under Article 6 §§ 1 and 3 (c) of the Convention, the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> ..."

### A. Admissibility

23. 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

24. The applicant complained that he had been deprived of legal assistance pursuant to section 31 of Law no. 3842, as he was accused of committing an offence that fell within the jurisdiction of the State Security Courts and that his statements taken by the police in the absence of a lawyer were used for his conviction.

25. Referring to the Court's judgment in the case of *Salduz v. Turkey* ([GC] no. 36391/02, ECHR 2008), and *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, ECHR 2016), the Government suggested in a broad manner that there were compelling reasons for delaying access to legal assistance arising from the potential loss of life on a large scale and the urgent need to obtain information on possible planned attacks as well as the severe practical constraints under which the police were operating. However, the Government did not refer to any specific circumstances of the case.

26. The Court notes that the applicant's access to a lawyer was restricted by virtue of Law No. 3842 and was as such a systemic restriction applicable at the time of the applicant's arrest (*Salduz*, cited above, § 56). The Court does not consider it necessary to examine whether the systematic nature of the restriction on the applicant's right of access to a lawyer was, in itself, sufficient to find a violation of Article 6 §§ 1 and 3 (c) of the Convention. In this connection, the Court notes that the Government have not offered any compelling reasons specific to the circumstances of the case for the restriction or demonstrated that the absence of legal assistance at the initial stage of the investigation did not irretrievably prejudice the applicant's defence rights (*Salduz*, cited above, § 58, and *Ibrahim and Others*, cited above, § 274). In particular, in convicting the applicant, the first-instance court relied on his statements to the police. Moreover, it did not examine the admissibility of evidence at the trial. Likewise, the Court of Cassation dealt with this issue in a formalistic manner and failed to remedy this shortcoming (*Bayram Koç v. Turkey*, no. 38907/09, § 23, 5 September 2017).

27. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. The applicant claimed 50,000 euros (EUR) in respect of pecuniary damage and EUR 50,000 non-pecuniary damage. He also claimed EUR 5,200 for lawyer fees. In support of his claim the applicant submitted the Istanbul Bar Association's scale of fees. However, he did not submit any receipts or other relevant document.

29. The Government contested the applicant's just satisfaction claims as well as his claims for legal fees, submitting that they were excessive and unsubstantiated.

30. The Court observes that it has found a violation of Article 6 §§ 1 and 3 (c) of the Convention in the present case. It cannot speculate as to the outcome of the proceedings against the applicant if there had been no breach of the Convention (see *Ibrahim and Others*, cited above, § 315).

31 The Court notes that Article 311 of the Code of Criminal Procedure allows the possibility to reopen proceedings. It 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 *Salduz*, cited above, § 72, and *Abdulgafur Batmaz v. Turkey*, no. 44023/09, § 58 *in fine*, 24 May 2016). It further considers that the finding of a violation constitutes in itself sufficient just satisfaction.

32. 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, regard being had to the documents in its possession and its case-law, the Court considers it reasonable to award the sum of EUR 850 for costs incurred in the proceedings before the Court (see *Bayram Koç*, cited above, § 30-32).

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months the following amount, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 850 (eight hundred and fifty 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 amount 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 30 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Hasan Bakırcı | Ledi Bianku |
| Deputy Registrar | President |