

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

SECOND SECTION

CASE OF YEŞİL v. TÜRKİYE

(Application no. 7155/12)

JUDGMENT

STRASBOURG

22 November 2022

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Yeşil v. Türkiye,

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

Egidijus Kūris*, President*,
Pauliine Koskelo,
Gilberto Felici*, judges*,

and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 7155/12) 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 12 January 2012 by a Turkish national, Mr Hıdır Yeşil ("the applicant"), born in 1972 and living in Istanbul, who was represented before the Court by Ms F. Kılıçgün Yeşil, a lawyer practising in Istanbul;

the decision to give notice of the complaints concerning an alleged breach of the right to a fair trial 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 the remainder of the application inadmissible;

the parties' observations;

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

Having deliberated in private on 18 October 2022,

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

SUBJECT MATTER OF THE CASE

1. The application concerns the alleged unfairness of criminal proceedings due to the systemic restriction imposed on the applicant's right of access to a lawyer during the pre-trial stage in accordance with Law no. 3842 and the subsequent use by the trial court of evidence he had given in the absence of a lawyer in convicting him. The application further pertains to an alleged breach of the principle of equality of arms owing mainly to the trial court's refusal to commission an alternative expert examination.

2. The applicant was arrested in the context of an operation targeting the members of an illegal organisation, namely the MLKP (Marxist-Leninist Communist Party), and was held in police custody from 9 to 18 September 1996.

3. The Court has already found a violation of Articles 3 and 13 of the Convention in respect of the applicant, finding it established that he had been subjected to torture while in police custody (see *Yeşil and Sevim v. Turkey*, no. 34738/04, 5 June 2007).

4. A police criminal laboratory report dated 16 September 1996 ("the police report") concluded that the handwriting sample obtained from the

applicant while he was in police custody matched that found on a document entitled "Activity Report" (*5 ile işaretli faaliyet raporu*), which had been found and seized during the search of the house of another suspect, E.K.

5. Throughout the proceedings, the applicant adamantly denied having written the Activity Report and asked the national courts to obtain handwriting samples from him with a view to transmitting them to the Forensic Medicine Institute for a graphological examination. The trial court initially rejected that request, referring to the police report. Nevertheless, at a certain stage of the proceedings the trial court changed its approach, obtained handwriting samples from the applicant, and decided to collect additional handwriting samples from the university and the high school he had attended, as well as from the prisons in which he had been detained. After obtaining those documents, the trial court decided not to refer the matter to the Forensic Medicine Institute for further examination, once again referring to the police report.

6. On 25 December 2009 the Istanbul Assize Court convicted the applicant of membership of an armed terrorist organisation and sentenced him to six years and three months' imprisonment. In doing so, the trial court relied on the police report, a handwritten document by N.K. in which the applicant was described as the MLKP's regional coordinator, fake identification found on the applicant, and evidence given by O.P., which purportedly showed that the applicant had provided two members with guns which had later been used to kill two police officers, despite the fact that he had not given any order to kill.

7. On 13 July 2011 the Court of Cassation upheld the trial court's judgment.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (C) OF THE CONVENTION

8. The Government raised a plea of non-exhaustion of domestic remedies in respect of the complaint concerning the systemic restriction on the right of access to a lawyer, arguing that the applicant had not raised it in his appeal. The Government further contended that the application was manifestly ill-founded, submitting that the applicant's complaint had essentially been aimed at challenging the assessment of the evidence. The Court dismisses the Government's preliminary objections (compare *Halil Kaya v. Turkey*, no. 22922/03, §§ 13-14, 22 September 2009).

9. The Court notes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

10. The applicant complained of the unfairness of the criminal proceedings arising from the restriction of his right of access to a lawyer

during the pre-trial stage and the subsequent use by the trial court of evidence he had given in the absence of a lawyer in convicting him. He also complained of the trial court's refusal to commission an alternative expert examination. He complained in particular that the national courts had restricted his defence rights under Article 6 §§ 1 and 3 (c) owing to their failure to take into account his submissions that he had not written the activity report on which the trial court had relied in convicting him. The applicant further contested the veracity of the findings of the police report, questioning the methods employed by the police officers, arguing that he had written the document in question under torture and in the absence of a lawyer, and that it had not been included in the case file although the police criminal laboratory report on which the trial court relied in its judgment had been based on that document.

11. The Government provided the Court with the document which the applicant had written by hand while in police custody and on which the police report had been based. The Government argued that the document could not be regarded as a statement. In any event, the overall fairness of the proceedings had been ensured, given that the applicant had made no self-incriminating statements during the period when he had not been assisted by a lawyer. Similarly, the applicant had admitted having given samples of his handwriting to the police in his statements to the public prosecutor. He had also failed to make a reasoned request before the trial court as to why a second expert examination was necessary.

12. The Court notes that the question whether the overall fairness of the criminal proceedings against the applicant was prejudiced by the systemic restriction imposed on his right of access to a lawyer is linked to his second complaint concerning the trial court's refusal to commission an alternative expert examination of his handwriting, in view of the fact that the only expert report relied on for his conviction was based on the handwriting sample he had provided to the police while in police custody, when he had not had access to a lawyer and had been subjected to torture (see *Yeşil and Sevim*, cited above, §§ 30-33).

13. The general principles with regard to the right of access to a lawyer may be found in *Beuze v. Belgium* ([GC], no. 71409/10, §§ 119-50, 9 November 2018) and those with regard to the taking and examination of expert evidence may be found in *Khodorkovskiy and Lebedev v. Russia (no. 2)* (nos. 51111/07 and 42757/07, §§ 474-78, 14 January 2020) and *Gülağacı v. Turkey* ((dec.), no. 40259/07, §§ 35-38, 13 April 2021).

14. The applicant's access to a lawyer was restricted pursuant to Law no. 3842 and this constituted a systemic restriction applicable at the time of his arrest. The Court has already held that a systemic statutory restriction could not satisfy the requirement of "compelling reasons" to restrict the right to be assisted by a lawyer (see *Beuze*, cited above, § 138, and *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, § 55, 28 January 2020). There was therefore no compelling reason to restrict the applicant's right to a lawyer; accordingly,

the Court must apply a very strict scrutiny to the overall fairness of the proceedings.

15. In this regard, it is common ground that the police criminal laboratory report, which played an integral role in the applicant's conviction, was based on the handwriting samples that the applicant had given while he was in police custody, during which he had not only been subjected to torture but had also been denied the legal assistance of a lawyer. It is therefore immaterial whether his handwriting can be characterised as a "statement", given that it was clearly a piece of evidence used by the domestic courts to convict him (compare *Zličić v. Serbia*, nos. 73313/17 and 20143/19, § 121, 26 January 2021).

16. Despite the applicant's repeated objections concerning, in particular, the reliability, objectivity and quality of the police report, the trial court failed to examine either the admissibility of the report or the circumstances in which the handwriting sample had been given (compare also *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, § 42, 5 April 2007; *Beuze*, cited above, § 193; compare also *Mehmet Duman v. Turkey*, no. 38740/09, § 42, 23 October 2018; *Aydın Çetinkaya v. Turkey*, no. 2082/05, § 104, 2 February 2016; *Özcan Çolak v. Turkey*, no. 30235/03, § 43, 6 October 2009; *Örs and Others v. Turkey*, no. 46213/99, § 60, 20 June 2006; and *Kolu v. Turkey*, no. 35811/97, § 54, 2 August 2005). Furthermore, although the trial court collected the applicant's handwriting samples, it rejected, without any adequate reason, his request to have them sent to the Forensic Medicine Institute for further examination (see paragraph 5 above). The Court of Cassation likewise failed to remedy those shortcomings in its judgment of 13 July 2011. The Court therefore finds that the domestic courts failed to subject this matter to comprehensive scrutiny.

17. In view of the above, the Court concludes that the overall fairness of the criminal proceedings against the applicant was undermined by (i) the domestic courts' failure to examine the admissibility of the police report and (ii) the manner in which they handled and used the police report in the ensuing criminal proceedings, despite the fact that the document forming the basis of the police report had been handwritten by the applicant at a time when he had been deprived of the assistance of a lawyer and had been subjected to torture.

18. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

19. Having regard to the conclusion above, the Court considers that there is no need to examine separately the complaint under Article 6 § 1 concerning the principle of equality of arms.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

20. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage, 16,500 Turkish liras (TRY – approximately EUR 1,765 on the basis of the exchange rate at the time) in respect of legal fees and TRY 485 (approximately EUR 52 on the basis of the exchange rate at the time) in respect of the costs and expenses incurred before the Court.

21. The Government contested those claims, arguing, in particular, that insufficient documentary proof had been submitted in respect of costs and expenses.

22. Ruling on an equitable basis, the Court awards the applicant EUR 6,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount. It further notes that Article 311 of the Code of Criminal Procedure allows for the reopening of domestic proceedings in the event that the Court finds a violation of the Convention. Lastly, the Court dismisses the applicant's claims as regards costs and expenses owing to his failure to submit documentary proof in support of them (compare *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 370-72, 28 November 2017).

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 on account of the systemic restriction imposed on the applicant's right of access to a lawyer and the use by the domestic courts of the evidence he had given without a lawyer being present;

3. *Holds* that it is not necessary to examine separately the other complaint concerning equality of arms under Article 6 § 1 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, 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;

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

Done in English, and notified in writing on 22 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Egidijus Kūris President