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

SECOND SECTION

DECISION

Application no. 26364/04
Cem KALABALIK
against Turkey

The European Court of Human Rights (Second Section), sitting on 2 February 2016 as a Chamber composed of:

Julia Laffranque, *President,*
Işıl Karakaş,
Nebojša Vučinić,
Paul Lemmens,
Ksenija Turković,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Abel Campos, *Deputy Section Registrar*,

Having regard to the above application lodged on 23 June 2004,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Cem Kalabalık, is a Turkish national, who was born in 1971 and lives in Edremit. He is represented before the Court by Ms G.G. Günal, a lawyer practising in Ankara.

2. The Turkish Government ("the Government") are represented by their Agent.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. At the time of the events, the applicant was a first lieutenant in the Turkish Armed Forces. In 2002 the military public prosecutor initiated an investigation against the applicant for embezzlement.

5. On 14 June 2002 the applicant was questioned by the military public prosecutor and the military judge respectively, without the presence of his lawyer. Before both authorities the applicant admitted to having committed the offence. The same day, he was remanded in custody.

6. On 18 June 2002 the applicant's representative objected to the decision ordering his detention on remand. The objection was dismissed by the Military Court of the Gendarmerie Command on 19 June 2002.

7. On 21 June 2002 the military public prosecutor filed a bill of indictment with the General Staff Land Forces Military Court ("military court") and charged the applicant with embezzlement. He asked the court to sentence the applicant to five years' imprisonment and to remove him from his post, pursuant to Sections 131 and 30/B of the Military Criminal Code.

8. It appears from the documents in the case-file that in the course of the proceedings before the military court the applicant retracted his statement of 14 June 2002, claiming that they had been made when he was in a fragile psychological state. However, throughout the proceedings a number of witnesses were heard before the trial court whose statements supported the applicant's initial confession. In addition, an expert psychiatrist expressed the view that the applicant had acted with criminal intent.

9. On 20 December 2002 the military court rendered its judgment. On the basis of the applicant's statements of 14 June 2002 and other supporting evidence, particularly the witness testimonies, the court found the applicant guilty of embezzlement, pursuant to Section 131 of the Military Criminal Code. However, it qualified it as a minor act of embezzlement (*az vahim hal zimmet*), since the amount in question was considered insignificant. The applicant was accordingly sentenced to six months' imprisonment. This sentence was subsequently converted into a fine. The court also decided that the applicant should be removed from his post, pursuant to Section 30/B of the Military Criminal Code.

10. The applicant appealed against the judgment. In his petition, he argued that, as he had been convicted of a "minor" act of embezzlement, he should not be removed from his post, according to Section 50 of the Code on the Armed Forces Personnel (Law no. 926).

11. On 15 April 2003 the Military Court of Cassation, referring to a previous decision of its Assembly on the Unification of Conflicting Case-Law dated 28 April 1967, held that administrative laws could not take precedence over criminal-law provisions. It therefore decided that the applicant could be removed from his post, notwithstanding the fact that he had been found guilty of only a minor act of embezzlement. The court, however, quashed the decision of the first-instance court for procedural reasons.

12. On an unspecified date the applicant requested the annulment of the aforementioned decision of 28 April 1967. On 24 October 2003 the Assembly on the Unification of Conflicting Case-Law of the Military Court of Cassation dismissed the applicant's request and held, in accordance with its former decision, that in the absence of a law explicitly amending the provisions of the Military Criminal Code, changes in laws governing the administrative status of members of the armed forces could not be regarded as amending or repealing the Military Criminal Code.

13. Meanwhile, on 3 July 2003 the military court had once again found the applicant guilty of minor embezzlement, sentenced him to a fine and decided to remove him from his post in the armed forces.

14. On 3 December 2003 the Military Court of Cassation rejected the applicant's appeal.

15. According to the applicant, the final decision was not served on him. He learned of the decision on 20 February 2004 when he received the order to pay the fine to which he had been sentenced.

16. On 14 May 2004 the applicant was removed from his post.

B. Relevant domestic law and practice

17. 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."

18. Section 131 of the Military Criminal Code (Act of Parliament dated 22 March 2000) makes it a military offence, punishable by up to five years' imprisonment, for a member of the armed forces to embezzle or convert for his own use money or other property entrusted to him or under his custody, control or responsibility by virtue of his office. This provision sets the upper limit of the punishment for those who are found guilty of committing a

minor act of embezzlement (*az vahim hal zimmet*) at three years of imprisonment.

19. Section 30/B of the Military Criminal Code states that those who are convicted of shameful offences such as simple embezzlement, aggravated embezzlement, dishonesty, bribery, theft, fraud, forgery, abuse of religious belief, fraudulent bankruptcy, offences of smuggling other than for manufacturing, supply or consumption, or improper interference in official competitive tender procedures, procurements and sales, will be removed from their posts in the armed forces.

Section 50 (d) of the Code on the Armed Forces Personnel (Act of Parliament dated 28 June 2001) states that those who are convicted of simple (*basit zimmet*) and aggravated embezzlement (*nitelikli zimmet*), pursuant to Section 131 of the Military Criminal Code, will be removed from their posts in the Armed Forces. However, those who are found guilty of committing a minor act of embezzlement (*az vahim hal zimmet*) are not affected by this provision.

20. According to Section 16 of the Law on the Military Court of Cassation (Law no. 1600), which sets out its duties and powers, the court has the authority to harmonise the implementation of different provisions of military law and to unify the conflicting decisions rendered by different chambers of the Military Court of Cassation.

Section 30 of Law No. 1600 further stipulates that if a conflict or a dispute arises between the decisions of chambers and the Assembly of Chambers of the Military Court of Cassation, rendered either by the same organ or by different organs, the Assembly on the Unification of Conflicting Case-Law must examine the matter and decide on the harmonisation of the conflicting judgments upon referral by the President of the Military Court of Cassation.

Section 32 of Law No. 1600 provides that decisions of the Assembly on the Unification of Conflicting Case-Law of the Military Court of Cassation shall be binding on the chambers and the Assembly of Chambers of the Military Court of Cassation as well as on the Military Courts and Military Disciplinary Courts in similar cases.

21. In its decision dated 28 April 1967, the Assembly on the Unification of Conflicting Case-Law of the Military Court of Cassation held that in the absence of a law explicitly amending the provisions of the Military Criminal Code, changes in laws governing the administrative status of military personnel could not be regarded as amending or repealing the Military Criminal Code.

COMPLAINTS

22. The applicant complained under Article 6 §§ 1 and 3 (c) of the Convention that his right to a fair trial and his right to defend himself through legal assistance of his own choosing had been violated. The applicant further maintained that he had been convicted on the basis of self-incriminating statements made in the absence of his lawyer.

23. The applicant further complained that his discharge from office had been based on an unforeseeable application of the law, resulting in a heavier sentence than the one prescribed by domestic law at the material time, in breach of Article 7 of the Convention.

THE LAW

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

24. The Government considered that there had been no violation of Article 6 §§ 1 and 3 (c). They maintained that the authorities had fully complied with Section 83 of the Act Governing the Formation and Proceedings of Martial Law Courts (Law no. 353) which was in force at the time and which did not provide access to legal assistance in the investigation of military offences. In this connection, they emphasised that this provision had been abolished on 5 July 2006 and as of that date Article 150 of the Criminal Procedure Code (Law no. 5271), which provided the right of access to a lawyer during the preliminary investigation, had become applicable to persons accused of offences falling within the jurisdiction of the Military Criminal Courts. They further argued that the applicant's conviction had not been based solely upon his statements taken by the military public prosecutor and the military judge. Finally, the Government stated that the applicant had been able to challenge the detention order via his representative and had enjoyed legal representation throughout the criminal proceedings against him.

25. The applicant submitted that he had been denied legal assistance during his interrogations by the military public prosecutor and the military judge. He further claimed that his defence rights had been breached as the domestic courts took account of his self-incriminating statements made during the said interrogations in finding him guilty of embezzlement.

26. The Court recalls that in its *Salduz v. Turkey* judgment ([GC], no. 36391/02, §§ 54-55, ECHR 2008), it held that Article 6 § 1 required, as a rule, access to a lawyer as from the first questioning of a suspect by the police, unless it was demonstrated in the particular circumstances of the

case that there were compelling reasons to restrict this right. In that case, the restriction concerning access to a lawyer was systematic, pursuant to domestic legislation in force at the time.

27. The Court notes that the present case differs from *Salduz*. In the instant case, the Court notes that, despite the Government's submissions to the contrary, at the material time there were no statutory restrictions in respect of legal assistance 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 17 above).

28. As to the alleged denial of legal assistance during the applicant's interrogations, the Court observes that, even though the applicant retracted his initial statements, there is no indication in the case file that he ever raised the issue of lack of legal assistance before the domestic courts. The Court therefore cannot conclude that the applicant was in fact denied legal assistance.

29. 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.

B. As regards the applicant's complaint under Article 7 of the Convention

30. The Government submitted that the applicant's removal from his post was based on Section 30/B of the Military Criminal Code. They argued that the Armed Forces Personnel Code could not be regarded as a complementary source of criminal law as its main purpose was to regulate the concrete aspects of personnel policy and as it was applied *ex officio* by the administration; hence, it could not take precedence over criminal-law provisions. They emphasised that the domestic courts had applied the criminal law in force at the time of commission of the offence, which took precedence over the Armed Forces Personnel Code.

31. The applicant argued that the domestic courts had arbitrarily refrained from applying Section 50 (d) of the Armed Forces Personnel Code. He maintained that this provision constituted a *lex posterior* compared to Section 30/B of Military Criminal Code, and therefore should be considered as replacing the latter.

32. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013; and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 153, 20 October 2015).

33. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty. While it prohibits in particular extending the

scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see *Del Río Prada*, cited above, §§ 78-80; see also *Vasiliauskas*, cited above, § 154).

34. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (see *Del Río Prada*, cited above, § 91; see also *Vasiliauskas*, cited above, § 154).

35. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. The progressive development of criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Del Río Prada*, cited above, §§ 92-93; see also *Vasiliauskas*, cited above, § 155). Accordingly, the question must be examined on the basis not only of the wording of the provisions in question, but also of the relevant case-law.

36. In the instant case, it is common ground that the punishment imposed on the applicant was based on Section 30/B of the Military Criminal Code. This provision provided for the removal from their posts of those who were convicted of certain crimes, including simple embezzlement and aggravated embezzlement. The Court observes that the wording of that provision does not make a distinction between minor and more serious acts of embezzlement.

37. The applicant argues, however, that Section 50 (d) of the Armed Forces Personnel Code limited the scope of Section 30/B of the Military Criminal Code. The Court accepts that the wording of Section 50 (d) of the Armed Forces Personnel Code could be read in the sense that those who are convicted of minor acts of embezzlement are not removed from their posts.

38. There was thus a question of overlapping provisions in two different areas of law, namely criminal and administrative. Such overlap can lead to

an ambiguity as to the interpretation of each one of these provisions in light of the other. In such a situation it is for the courts to clarify the relationship between both provisions. There is no issue under Article 7 as long as the interpretation adopted can reasonably be foreseen (see paragraph 35, above).

39. In its decision of 15 April 2003, the Military Court of Cassation held that administrative laws could not take precedence over criminal-law provisions. It thus settled the issue of the relationship between Section 30/B of the Military Criminal Code and Section 50 (d) of the Armed Forces Personnel Code, and consequently decided that the applicant could be removed from his post, notwithstanding the fact that he had been found guilty of only a minor act of embezzlement (see paragraph 11, above).

40. The Military Court of Cassation referred to a decision of its Assembly on the Unification of Conflicting Case-Law of 28 April 1967. That decision made it clear that personnel laws governing members of the armed forces could not take precedence over provisions of the Military Criminal Code; thus, amendments introduced in personnel codes would not affect the Military Criminal Code (see paragraph 21 above).

41. The decision of 28 April 1967 was accessible to all citizens, as it had been published in the Official Gazette of 5 July 1967. Moreover, according to Section 32 of Law no. 1600 on the Military Court of Cassation, it was also binding upon the military courts. Therefore, the Court finds that a person in the position of the applicant could, with appropriate legal advice, foresee the consequences of a criminal conviction for any act of embezzlement. The relevant penalties were thus sufficiently clearly defined by law.

42. In light of the foregoing, the Court finds no basis on which to conclude that the Military Court of Cassation's decision of 15 April 2003 was affected by any element of arbitrariness or that it was otherwise manifestly unreasonable (see, *mutatis mutandis*, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 86, ECHR 2007-I).

43. 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.

For these reasons, the Court, unanimously,

Declares inadmissible the application.

Done in English and notified in writing on 25 February 2016.

Abel Campos
Deputy Registrar

Julia Laffranque
President