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

SECOND SECTION

DECISION

Application no. 9510/06
Tonguç OK and others
against Turkey

The European Court of Human Rights (Second Section), sitting on 5 December 2017 as a Committee composed of:

Ledi Bianku, *President,*
Valeriu Griţco,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to the above application lodged on 24 February 2006,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicants Mr Tonguç Ok, Mr Necip Baysal and Mr Dursun Yaman are three Turkish nationals. They were born in 1974, 1975 and 1970 respectively. They were represented before the Court by Mr Z. Çelik, a lawyer practicing in Istanbul.

2. The Turkish Government ("the Government") were 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. The applicants were placed in police custody on 22 January 1997, 14 April 1997 and 26 June 1995 respectively. Subsequently, they were charged with being members of a terrorist organisation, and criminal

proceedings were initiated against them before the Istanbul State Security Court. The cases against the applicants were joined. The applicants did not attend to most of the hearings that took place before the State Security Court.

5. Meanwhile, on 18 June 1999 Article 143 of the Constitution was amended, excluding military judges from the bench of the state security courts. Following similar amendments made on 22 June 1999 to the Law on the State Security Courts, the military judge sitting on the bench of the Istanbul State Security Court hearing the applicants' case was replaced by a civilian judge. After this date, the judges heard evidence from witnesses, took the applicants' defence statements and examined the submissions of the public prosecutor.

6. Under Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, State Security Courts were abolished. The case against the applicants was therefore transferred to the Istanbul Assize Court.

7. On 30 May 2008 the Istanbul Assize Court convicted the applicants as charged and sentenced them to life imprisonment.

8. On 11 March 2009 the judgment of the Istanbul Assize Court was upheld by the Court of Cassation.

B. Relevant domestic law

9. A description of the relevant domestic law and practice can be found in *Öcalan v. Turkey* ([GC], no. 46221/99, §§ 52-54, ECHR 2005-IV); *Şefik Demir v. Turkey* ((dec.), no. 51770/07, §§ 29-33, 16 October 2012); and *Müdür Turgut and others v. Turkey* ((dec.), no. 4860/09, §§ 19-26, 26 March 2013).

COMPLAINTS

10. The applicants complained under Article 5 § 3 of the Convention that the length of their detention on remand had been excessive.

11. Relying on Article 6 of the Convention, the applicants alleged that they were tried and convicted by a court which did not meet the requirements of independence and impartiality on account of the presence of a military judge on the bench. Moreover, the applicants complained about the excessive length of the criminal proceedings.

THE LAW

A. Article 5 § 3 of the convention

12. The applicants complained that the length of their detention on remand had been excessive.

13. Referring to the possibility of claiming compensation for unlawful detention under Article 141 of the Code on Criminal Procedure ("CCP"), the Government asked the Court to reject this part of the application for non-exhaustion of domestic remedies.

14. The Court observes that the domestic remedy in application of Article 141 of the CPP with regard to length of detention on remand was examined in the decision *Demir v. Turkey* (no. 51770/07, §§ 17-35, 16 October 2012). The Court concluded in that decision that the domestic remedy provided for in Article 141 of the CPP had to be exhausted by the applicants whose convictions became final.

15. In the instant case, the Court notes that the applicants' conviction became final on 11 March 2009. From that date onwards the applicants were entitled to seek compensation under Article 141 of the CPP (see *Demir*, cited above, § 35), but failed to do so.

16. The Court reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, as the Court has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *İçyer v. Turkey* (dec.), no. 18888/02, § 72, ECHR 2006‑I). The Court has previously departed from this rule in cases concerning the above-mentioned remedy in respect of the length of detention, which became applicable after the final decision on the criminal proceedings (see also, among others, *Tutal and Others v. Turkey* (dec.), no. 11929/12, 28 January 2014). The Court takes the view that the exception should be applied in the present case as well.

17. As a result, taking into account the Government's objection, the Court concludes that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Article 6 of the convention

1. Independence and Impartiality of the Istanbul State Security Court

18. The applicants complained that they had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge on the bench of the Istanbul State Security Court which tried them.

19. The Government maintained that the applicants had been convicted by the Istanbul Assize Court, which was composed of three civilian judges, and the military judge who had taken part in the proceedings before the Istanbul State Security Court had been replaced long before the end of the proceedings.

20. 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 *Incal v. Turkey*, 9 June 1998, § 68, *Reports of Judgments and Decisions* 1998-IV, and *Çıraklar v. Turkey*, 28 October 1998, § 39, *Reports of Judgments and Decisions* 1998-VII). The Court also found in *Öcalan v. Turkey* ([GC], no. 46221/99, §§ 114-115, ECHR 2005-IV) that when a military judge participated in one or more interlocutory decisions that remained in effect during the criminal proceedings in question, 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.

21. In the instant case, the Court notes that when the applicants' trial commenced before the Istanbul State Security Court, its composition included a military judge. While the proceedings were still pending before the Istanbul State Security Court, in June 1999, the Constitution was amended and the military judge sitting on the bench of the Istanbul State Security Court was replaced by a civilian judge. The Court observes that it is clear from the documents in the file that during the hearings, in which a military judge was present, the Istanbul State Security Court took no interlocutory decisions of importance, in particular concerning the defence rights of the applicants. After the military judge was replaced by a civilian judge, the proceedings before the new court continued for another nine years, during which the court held several hearings on the merits and heard from witnesses, and the defence statements of the applicants; and the applicants were found guilty by the Istanbul Assize Court, which was composed of three civilian judges. Therefore, the Court finds that, in the particular circumstances of the case, the replacement of the military judge long before the end of the proceedings disposed of the applicants' reasonably held concern about the trial court's independence and impartiality (see *Sevgi Yılmaz v. Turkey* (dec.), no. 62330/00, 20 September 2005, and *Yılmaz and Others v. Turkey* (dec.), no. 38370/02, 19 September 2006).

22. In the light of the foregoing, the Court concludes that the applicants' complaint concerning the independence and impartiality of the Istanbul State Security Court should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Length of criminal proceedings

23. The applicants maintained under Article 6 § 1 of the Convention that they had not been tried within a reasonable time.

24. The Court observes that a new domestic remedy has been established in Turkey after the application of the pilot judgment procedure in the case of *Ümmühan Kaplan v. Turkey* (no. 24240/07, 20 March 2012). The Court recalls that in its decision in the case of *Turgut and Others v. Turkey* ((dec.), no. 4860/09, §§ 19-26, 26 March 2013), it declared a new application inadmissible on the ground that the applicants had failed to exhaust the domestic remedies as a new domestic remedy had been envisaged. In so doing, the Court in particular considered that this new remedy was, *a priori*, accessible and capable of offering a reasonable prospect of redress for complaints concerning the length of proceedings.

25. The Court further recalls that in its judgment in the case of *Ümmühan Kaplan v. Turkey* (cited above, § 77) it stressed that it could pursue the examination of applications of this type which were already communicated to the Government.

26. The Government requested the Court to declare this part of the application inadmissible for non-exhaustion of domestic remedies, referring to Law no. 6384 of 9 January 2013 which provides for a remedy capable of redressing the Convention grievances of persons who complain about the length of proceedings.

27. In the light of its ruling in the case of *Turgut and Others*, cited above, the Court considers that there are no exceptional circumstances capable of exempting the present applicant from the obligation to exhaust domestic remedies. Accordingly, the applicants should avail themselves of the new remedy offered by Law no. 6384 of 9 January 2013.

28. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 11 January 2018.

Hasan Bakırcı
Deputy Registrar

Ledi Bianku
President