CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 30452/96
by Yüksel TAKAK
against Turkey

The European Court of Human Rights (First Section) sitting on 18 May 1999 as a Chamber composed of

Mr J. Casadevall, *President*,
Mr Gaukur Jörundsson,
Mr C. Bîrsan,
Mr B. Zupančič,
Mr T. Pantiru,
Mr R. Maruste, *Judges*,
Mr F. Gölcüklü, *ad hoc Judge*,

with Mr M. O'Boyle, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 15 November 1995 by Yüksel TAKAK against Turkey and registered on 14 March 1996 under file no. 30452/96;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 22 May 1998 and the observations in reply submitted by the applicant on 24 July 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1966, is a Turkish citizen and resident in İzmir. She is represented before the Court by Mrs Bengül Ekler Kavak and Mr İsmail Kavak, lawyers practising in İzmir.

A. Particular circumstances of the case

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

On 11 March 1994 members of the Anti-Terror branch of the İzmir Security Directorate arrested the applicant. They accused her of assisting and giving shelter to members of the PKK.

On 17 March 1994 the applicant was brought before the judge at the İzmir State Security Court. Before the court she pleaded not guilty and maintained that she did not accept the statements she had made at the Security Directorate. She further denied the testimony of A.A. against her. Thereafter, the court ordered her release on account of insufficient evidence to remand her in custody.

On 7 April 1994 the Public Prosecutor attached to the İzmir State Security Court filed an indictment with the court accusing the applicant of having assisted and given shelter to members of the PKK. He requested that she be punished under section 169 of the Turkish Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991).

On 24 November 1994 the İzmir State Security Court convicted the applicant and sentenced her to three years and nine months' imprisonment and debarred her from public service for three years. The court based its judgment on the following evidence: some ammunition found by the police, various weapons and the ballistics reports confirming the applicant's use thereof, invoices, a notebook used for recording expenditures of the PKK, photos of the applicant taken with some PKK militants, the statements made by the applicant at the police station, the statements made by S.A., A.A., M.T. and F.A. at the police station, the Public Prosecutor's office and before the court and finally the testimonies of T.T., N.F., A.O., H.K. and B.O., who were being tried by the same court for charges with other offences.

On 25 September 1995 the Court of Cassation upheld the İzmir State Security Court's judgment of 24 November 1994.

On 1 November 1995 the Chief Public Prosecutor of İzmir suspended the execution of the applicant's sentence until 28 April 1996 as she had given birth.

B. Relevant domestic law and practice

i) Section 169 of the Turkish Criminal Code provides:

<Translation>

"Any person, who knowing that such an armed gang or organisation is illegal, assists it, harbours its members, provides it with food, weapons and ammunition or clothes or facilitates its operations in any manner whatsoever shall be sentenced to not less than three and not more than five years' imprisonment..."

ii) The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991):

Under section 4 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), the offence defined in section 169 of the Criminal Code is classified in the category of "acts committed to further the purposes of terrorism".

Pursuant to section 5 of Law no. 3713, penalties laid down in the Criminal Code as punishment for the offences defined in sections ... and 4 of the Act are increased by one half.

COMPLAINTS

1. The applicant complains under Article 6 § 1 of the Convention that she was not tried by an impartial and independent tribunal as the jurisdiction of the State Security Court is not limited to political offences and organised crime and one of its members is a military judge.

2. The applicant alleges under the same provision that her right to a fair trial was breached in the procedure before the İzmir State Security Court. In particular, she alleges that the court based its judgment on her statements, which she had withdrawn, and that there was no other evidence sufficient to convict her.

3. The applicant contends under Article 6 § 3 (d) of the Convention that she was not allowed to question the witness against her, A.A., whose statements were taken into account in convicting her, although she had requested permission to confront him.

PROCEEDINGS BEFORE THE COURT

The application was introduced on 15 November 1995 and registered on 14 March 1996.

On 22 October 1997, the Commission decided to communicate the applicant's complaint concerning the independence and impartiality of the State Security Court, the fairness of the procedure before that court and the refusal of the applicant's request to examine a witness against her to the respondent Government and to declare the remainder of the application inadmissible.

The Government's written observations were submitted on 22 May 1997, after an extension of the time-limit fixed for that purpose. The applicant replied on 24 July 1998.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

The applicant raises a number of complaints under Article 6 of the Convention. She complains firstly that owing to the composition and limited jurisdiction of the State Security Court which dealt with her case, she was not given a fair hearing by an independent and impartial tribunal. She also complains that, contrary to Article 6 § 1 of the Convention, the court based its judgment solely on her statements which she had withdrawn. The applicant finally submits under Article 6 § 3 (d) of the Convention, the court refused her request for leave to question the witness, A.A., against her.

The respondent Government submit firstly that the applicant failed to exhaust domestic remedies under Article 35 of the Convention. They argue that the applicant could have lodged an application with the Public Prosecutor attached to the Court of Cassation requesting him to apply for rectification of the Court of Cassation's decision of 25 September 1995.

The applicant contests this argument on the ground that an application for rectification of the decision is not an effective remedy under Article 35 of the Convention.

The Court recalls that under Turkish Criminal Law, an application for rectification of a decision is not a legal remedy directly available to the applicant. Parties cannot themselves lodge such an application with the Court of Cassation; they must submit an application for that purpose to the Chief Public Prosecutor at the Court of Cassation, who decides in his discretion whether or not to bring the case before that court (see Eur. Court H.R., Çıraklar v. Turkey judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998 - VII., § 32). The Court therefore considers that the applicant cannot be criticised for failing to exhaust this legal remedy and that the Government's plea of inadmissibility cannot be upheld.

As regards the merits of the complaints, the Government primarily submit that State Security Courts are special Courts and that the Constitution guarantees that their members, including military judges, are impartial and independent from the Executive. The Government argue further that the proceedings before the İzmir State Security Court complied with all the requirements of Article 6 of the Convention.

The Government maintain that, in convicting the applicant, the İzmir State Security Court based its judgment not only on the applicant's statements which she had withdrawn but also on the testimonies of S.B., A.A., N.F. and T.T.

The Government further observe that the applicant did not appear at the hearing of 14 July 1994 during which the witness A.A. was questioned. They maintain that the applicant A.A. was already confronted on 14 March 1994 at the Anti-Terror branch of the İzmir Security Directorate.

The Government finally submit that under Turkish criminal procedure there is no right of an accused to question a witness against him.

The applicant contests the Government's arguments. She emphasises in particular that military judges are first and foremost army officers who cannot act with full independence. She maintains that she was not tried by a civilian court due to the fact that a military judge participated in the criminal proceedings against her in a case not involving the internal order of the armed forces.

The applicant also counters the Government's argument that under Turkish criminal procedure there is no right of an accused to question a witness against him. She submits that this argument could not be accepted since States are under an obligation to organise their judicial system in such a way that their courts can meet the Convention's requirements. She contends further that, contrary to the Government's argument, she was not properly summoned to the hearing of 14 July 1994 during which the witness A.A. was questioned.

The Court considers, in the light of the parties' submissions, that this part of the case raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that this part of the application is not manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Michael O'Boyle
Registrar

Josep Casadevall
President