CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 31881/96
by Fikri TAMKOÇ
against Turkey

The European Court of Human Rights (First Section) sitting on 11 January 2000 as a Chamber composed of

Mrs E. Palm, *President*,
Mr L. Ferrari Bravo,
Mr Gaukur Jörundsson,
Mr B. Zupančič,
Mr T. Panţîru,
Mr R. Maruste, *judges*,
Mr F. Gölcüklü, *ad hoc judge,*

and 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 21 May 1996 by Fikri Tamkoç against Turkey and registered on 13 June 1996 under file no. 31881/96;

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 26 January 1998 and the observations in reply submitted by the applicant on 29 April 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish national, born in 1952 and living in Ankara. He is represented before the Court by Mrs Oya Ersoy Ataman, a lawyer practising in Ankara.

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

On 2 March 1981 the applicant was taken into custody by police officers from the Ankara Security Directorate on suspicion of his membership of an illegal organisation, the Dev-Yol (Revolutionary Way). He was questioned by the police officers and confessed that he had been involved in the illegal activities of the Dev-Yol and the killing of G.Ş. The applicant also guided the police officers to find the hideouts of the militants where weapons were kept.

On 21 April 1981 the Ankara Martial Law Court (*Sıkıyönetim Mahkemesi*) ordered the applicant's detention on remand. In his questioning by the investigating judge he denied the allegations against him. He stated that he had not been involved in the Dev-Yol and the killing of G.Ş.

On 29 May 1981 the applicant was brought to the Ankara Military Public Prosecutor's office where he alleged that his statements were taken under duress by the police. He denied the allegations against him and stated that he had not been involved in the Dev-Yol.

On 26 February 1982 the Military Public Prosecutor filed a bill of indictment with the Ankara Martial Law Court against the applicant and 723 other defendants. The Public Prosecutor accused the applicant of membership of the Dev-Yol, killing G.Ş., wounding I.A., opening gunfire on K.Ü. and F.Ş.'s houses, setting K.Ü.'s house and A.Y.'s grocery shop on fire.

After martial law was lifted on 19 July 1987, the Ankara Martial Law Court took the name of the Martial Law Court attached to the 4th Army Corps.

In 1989 the Martial Law Court convicted the applicant on account of his membership of the Dev-Yol and his involvement in the killing of G.Ş. The court acquitted the applicant of 5 other crimes with which he had been charged. The court sentenced the applicant under Article 168 § 2 of the Turkish Criminal Code to 9 years and 4 months' imprisonment and permanently debarred him from employment in public service. The court also decided to deduct from his sentence the length of time he had spent in detention pending trial. The court held that the applicant's own confessions and those of other defendants, expertise and ballistics reports and weapons found in his possession grounded his conviction.

The applicant lodged an appeal with the Military Court of Cassation.

On 24 March 1986 the applicant was conditionally released pending trial.

Following promulgation of the Law of 27 December 1993, which abolished the jurisdiction of the martial law courts, the Court of Cassation (*Yargıtay*) acquired jurisdiction over the case and the case file was sent to it.

On 27 December 1995 the Court of Cassation upheld the applicant's conviction.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention that the criminal proceedings brought against him were not concluded within a "reasonable time" and that his right to a fair hearing was breached as he was tried by the Martial Law Court which lacked independence and impartiality.

The applicant also complains under Article 6 § 1 of the Convention that his conviction was based on statements he had made to the police under duress.

PROCEDURE

The application was introduced on 21 May 1996 and registered on 13 June 1996.

On 2 July 1997 the Commission decided to communicate to the respondent Government the applicant's complaints concerning the length and fairness of the criminal proceedings instituted against him and the independence and impartiality of the Martial Law Court and to declare the remainder of the application inadmissible.

The Government's written observations were submitted on 26 January 1998. The applicant replied on 5 May 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

1. The applicant complains that the criminal proceedings brought against him were not concluded within a "reasonable time" and that his right to a fair hearing was breached as he was tried by the Martial Law Court, which lacked independence and impartiality. He invokes Article 6 § 1 of the Convention, which provides, in so far as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal..."

The Government point out that pursuant to former Article 25 of the Convention Turkey has accepted the competence of the Commission to examine individual petitions only in respect of facts or events that have occurred since 28 January 1987. On that account this part of the application should be declared inadmissible.

It is to be noted at the outset that 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. It further notes in this respect that the Commission's competence *ratione temporis* began on 28 January 1987, the date on which Turkey's

declaration accepting the right of individual petition came into force. Turkey accepted the former Court's jurisdiction *ratione temporis* as of 22 January 1990. The question therefore arises whether the Court should be considered to be competent as from 28 January 1987 or 22 January 1990 to deal with each of the complaints submitted. The Court considers it appropriate in the circumstances of the present case to join this question to the merits as the parties have not had an opportunity to address it in their observations.

As regards the merits of the case, the Government submit that the length of the criminal proceedings brought against the applicant could not be considered to be unreasonably long owing to the difficulties in the examination of thousands of files. They further highlight the complexity of the case and the nature of the offences with which the applicant was charged. They maintain that the courts dealt with a trial involving 723 defendants, including the applicant, whose activities and connections with other defendants had to be established. The Government also point out that the applicant was charged with grave crimes and that he was convicted on account of his membership of an illegal organisation and his involvement in the killing of several persons. The Government claim that these circumstances explained the length of the proceedings and that no negligence or delay was imputable to the judicial authorities.

The applicant maintains in reply that he was charged with 5 crimes but convicted of only one of them. He argues that the fact that he was tried for grave crimes cannot justify the length of the criminal proceedings against him. He submits that his case was referred to the Court of Cassation five years after the Martial Law Court had delivered its judgment and that it took the Court of Cassation six years to deliver its final judgment.

The applicant asserts that the criminal proceedings against him lasted for 15 years and that during this time the courts were unable to deliver a final judgment on his case. The complexity of the case and the large number of defendants cannot justify the length of the proceedings which lasted fifteen years. The applicant further alleges that during this period he suffered pecuniary and non-pecuniary damage.

The applicant also submits that his right to a fair hearing by an independent and impartial tribunal was breached as he was tried by the Martial Law Court composed of two military judges, two civilian judges and an army officer. The army officer who has no legal training is accountable to the commander of the state of martial law. The two military judges on the bench are servicemen who belong to the army and take orders from the executive. They are subject to military discipline and assessment reports are compiled on them by the army for that purpose.

The respondent Government submit in reply that the two military judges and the two civilian judges sitting on the Martial Law Court enjoy the guarantees of judicial independence and immunity laid down in the Constitution. The sole task of the army officer on the bench is to ensure the proper functioning of the hearing and he has no other judicial power.

The Government further submit that the procedure for the appointment and assessment of the military judges sitting on the Martial Law Courts and the safeguards they enjoy in the performance of their judicial duties perfectly satisfy the criteria laid down by the Court's case-law on the subject.

The Court considers, in the light of the parties' submissions, that this part of the application raises complex issues of law and 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.

2. The applicant alleges under Article 6 § 1 of the Convention that his right to a fair trial was breached since the courts convicted him on the basis of statements he had made to the police under duress.

The Government refute the applicant's allegation. They claim that the statements made by the applicant during his pre-trial detention were not the sole ground for his conviction. They maintain that the courts relied on the evidence given by several witnesses as well as the applicant's statements before the courts and the weapons found in his possession.

The applicant contends in reply that he was acquitted of most of the crimes with which he had been charged. He submits that there was no evidence to ground his conviction other than the statements he had made to the police under duress.

The Court points out that the Convention does not lay down rules on evidence as such. The admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them (see the Kostovski v. the Netherlands judgment of 20 November 1989, Series A no. 166, p. 19, § 39). However, an issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention even if the admission of such evidence was not decisive in securing the conviction.

In the instant case, the Court notes that in the proceedings before the Martial Law Court the applicant confined himself to challenging the admissibility of his statements to the police officers. However, apart from the allegation that his statements were taken under duress he did not at any stage give any any indication of the sort of ill-treatment which he allegedly suffered. The Court further observes that the applicant did not specifically set out in his application form to the Commission the details of the alleged duress during his pre-trial detention. It is also to be noted that he has not adduced any concrete evidence of having been subjected to duress as alleged. In this regard, the Court is of the opinion that the applicant has not laid the basis of an arguable claim that his statements during his pre-trial detention were taken under duress.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECIDES TO JOIN TO THE MERITS the question concerning its jurisdiction *ratione temporis*;

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints concerning his right to a fair hearing within a reasonable time by an independent and impartial tribunal;

DECLARES INADMISSIBLE the remainder of the application.

Michael O'Boyle
Registrar

Elisabeth Palm
President