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

SECOND SECTION

DECISION

Application no. 59241/10
Mehmet Emin YILDIZ
against Turkey

The European Court of Human Rights (Second Section), sitting on 1 March 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 26 August 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Mehmet Emin Yıldız, is a Turkish national, who was born in 1978 and lives in Siirt. He is represented before the Court by Ms N. Paşa Bayraktar and Mr Mehmet Bayraktar, lawyers practising in İzmir.

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

3. On 24 March 2007 the Antalya public prosecutor ordered the search of a construction site within the scope a criminal investigation into an illegal organisation, namely PKK-KONGRA/GEL[1], pursuant to Article 119 § 1 of the Code of Criminal Procedure (Law no. 5271).

1. The Kurdistan Worker's Party/The Kurdistan People's Congress.

4. On 25 March 2007 at around 3 a.m. the applicant was arrested, along with two other suspects, on suspicion of membership of PKK-KONGRA/GEL in the vicinity of the construction site where the search was being carried out. His mobile phone and two memory cards were seized as evidence. According to the arrest report, which was signed by the applicant, the applicant fell while he was trying to escape during his arrest and he sustained injuries to his face as a result.

5. On the same day the applicant was taken to Antalya Hospital, where he was examined by a doctor at 4.40 a.m. In his report, the doctor stated that the applicant had two minor skin erosions on the left side of his upper lip and on the outer edge of his lips and indicated that his overall health condition was good.

6. Following the medical examination, the applicant was taken to the anti-terrorism branch of the Antalya Security Directorate. It appears from the documents in the case file that the applicant was reminded of his rights in accordance with Article 135 of the Code of Criminal Procedure, which also included the right to a lawyer. He was, however, informed that the Antalya Bar Association had stopped the appointment of *ex officio* lawyers due to being on strike. The applicant refused to give statements at the police station.

7. On the same day the Antalya Magistrates' Court upheld the decision of the public prosecutor ordering the search of the building site and the seizure of the applicant's belongings.

8. According to the applicant's submissions, on 26 March 2007, upon the request of the Antalya Security Directorate, the public prosecutor extended the applicant's detention in police custody until 27 March 2007 at 2 p.m. The relevant document has not been submitted to the Court.

9. It transpires from the case file that on 26 March 2007 at 6.50 p.m. the applicant was examined by a doctor. The report drawn up following that examination indicated that the applicant had no new lesions.

10. On 27 March 2007 at 1.40 p.m. the applicant once again underwent a medical examination. The doctor who carried out the examination stated that no signs of ill-treatment were observed on his body.

11. On the same day the applicant was brought before the Antalya public prosecutor and subsequently the investigating judge, both of whom repeated the Antalya Bar Association's decision to stop the appointment of *ex officio* lawyers. In his statements before both authorities, the applicant denied all connection with the organisation. The investigating judge remanded the applicant in detention.

12. On 16 April 2007 the Antalya public prosecutor referred the investigation file to the İzmir public prosecutor on the ground of lack of jurisdiction.

13. On 29 April 2007 and 24 May 2007 the İzmir Assize Court rendered decisions prolonging the applicant's detention.

14. On 18 June 2007 the İzmir public prosecutor filed an indictment accusing the applicant and four others of membership of an illegal organisation and possession of explosive devices.

15. On 29 June 2007 criminal proceedings against the applicant were instituted before the İzmir Assize Court.

16. On 25 July 2007, 22 August 2007 and 20 September 2007 the İzmir Assize Court examined the applicant's detention of its own motion and on each occasion the court ordered the applicant's continued detention.

17. On 8 October 2007 the İzmir Assize Court held its first hearing. At this hearing, the applicant affirmed that the injuries as recorded in the medical report drawn up on 25 March 2007 had been caused during his arrest when a police officer twisted his arm and wrestled him to the ground in order to apprehend him.

18. On 5 November 2007, 5 December 2007 and 4 January 2008 the İzmir Assize Court examined the applicant's detention of its own motion and on each occasion the court ordered the applicant's continued detention.

19. On 23 January 2008 the İzmir Assize Court held its second hearing. According to the minutes of this hearing, the applicant had a legal representative at that stage of the proceedings.

20. In the course of the proceedings, on 28 January, 18 March and 28 March 2008 witness statements were taken on commission by the Antalya Assize Court at the request of the trial court. As it transpires from the hearing records in the case-file, at the hearing on 18 March 2008 the court heard police officer Mr C.T., who had effected the applicant's arrest. In his statement C.T. repeated his account of the applicant's arrest and maintained that the applicant and the two other suspects who were arrested along with the applicant had tried to escape at the time. The applicant's lawyer did not attend this hearing; however, the minutes of the hearing reveal that the legal counsel of the two other co-accused was present and put questions to the witness.

21. On 26 December 2008 the İzmir Assize Court acquitted the applicant of the charges listed in the indictment; however, it convicted him of aiding and abetting an illegal organisation and sentenced him to six years and three months' imprisonment.

22. On 18 February 2010 the Court of Cassation upheld the judgment of the first-instance court. According to information obtained from the official website of the Court of Cassation by the Registry, on 2 March 2010 the case file was sent to the registry of the first-instance court.

COMPLAINTS

23. The applicant alleges that at the time of his arrest on 25 March 2007 he was subjected to treatment that violated his rights under Article 3 of the Convention. He maintains under the same head that he was kept in police custody for two days, during which he claims to have been physically and psychologically ill-treated. He further complains about the bias of the doctors who conducted the medical examination following his arrest.

24. The applicant complains under Article 5 of the Convention that his arrest and subsequent detention were unlawful and that the authorities failed to inform him about the reasons for his arrest. He further claims that the length of his detention on remand was excessive. The applicant finally maintains under the same head that the court when dismissing his objection against the decision to detain him did not hold a hearing.

25. The applicant invokes Article 6 § 1 complaining about the non-communication of the indictment, the independence and impartiality of the special assize courts, the lack of a public hearing before the Court of Cassation and the overall unfairness of the proceedings before the domestic courts and the Court of Cassation. He further complains under this head that his access to the Court of Cassation in order to lodge an objection was restricted due to the non-notification of the final decision.

26. Relying on Article 6 §§ 1 and 3 (c) of the Convention, the applicant contends that he was denied legal assistance during his time in police custody.

27. He further submits, under Article 6 § 1 in conjunction with Article 6 § 3 (d), that the domestic court failed to provide him with the opportunity to cross-examine the witnesses whose statements had been taken on commission.

28. The applicant maintains under Article 8 of the Convention that the search carried out in the vicinity of his place of arrest and the subsequent seizure of his belongings was unlawful.

29. Relying on Article 13 of the Convention and Article 2 of Protocol No. 7 the applicant alleges that no effective remedy was available to him to have the decisions of first instance courts' reviewed by a higher tribunal.

30. The applicant finally invokes Articles 1, 14 and 17 of the Convention and Article 2 of Protocol No. 1 without substantiating his complaints.

THE LAW

A. Alleged violation of Article 3 of the Convention

31. The applicant complains under Article 3 of the Convention that he was subjected to ill-treatment during his arrest and his detention in police custody. The applicant further alleges that the medical examination failed to comply with the standards set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "the Istanbul Protocol". Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

32. The Court notes that on the day of applicant's arrest, a medical report was drawn up which noted two minor skin erosions on the left side of the applicant's upper lip and on the outer edge of his lips and indicated that his overall health condition was good. The medical report drawn up after the police custody did not depart from the findings of the first report.

33. The Court further observes that the applicant failed to indicate the details of the kind of ill-treatment to which he was allegedly subjected. He did not describe the alleged ill-treatment before the domestic courts either, except for mentioning that a police officer had twisted his arm and wrestled him to the ground in order to apprehend him during his arrest. The applicant also failed to raise the complaint about the bias of the doctors before the domestic authorities. In this respect the Court considers that such superficial injuries as noted in the aforementioned medical reports can be considered to be consistent with the force used during the arrest.

34. In the light of the foregoing, the Court considers that under the substantive limb of Article 3 the material submitted by the applicant is not sufficient to establish the existence of ill-treatment. As for the procedural aspect, the Court notes that the applicant failed to furnish the authorities with a reliable starting point for the inquiries in that he did not provide any details of his allegations of ill-treatment (see *Yıldırım v. Turkey* (dec.), no. 33396/02, 30 August 2007). The complaint must therefore be declared inadmissible for being manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Alleged violation of Article 5 of the Convention

35. The applicant complains under Article 5 of the Convention about the alleged unlawfulness of his arrest and his subsequent pre-trial detention, the authorities' alleged failure to inform him about the reasons for his arrest and the length of his detention on remand. The applicant further submits that the

manner in which the domestic courts reviewed his detention breached the Convention. He maintains in this respect that the courts delivered their decisions solely on the basis of the case file without holding a hearing.

36. The Court observes that the applicant's custody period ended on 27 March 2007 and his detention on remand ended on 26 December 2008 when the İzmir Assize Court delivered its judgment, whereas the application was lodged on 26 August 2010. It follows that this part of the application was introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

C. Alleged violation of Article 6 § 1 of the Convention

1. In respect of the complaint concerning access to court

37. The applicant complains under Article 6 § 1 of the Convention that that the non-communication of the final decision of the Court of Cassation to the parties hindered the effective exercise of his right to access to court in order to file an objection to the final decision under Article 308 of the Criminal Procedure Code (Law no. 5271) and to lodge an application with the Court.

38. The Court notes at the outset that the applicant was able to lodge his application with the Court within the six-month time limit.

39. As for the applicant's complaint concerning access to the Court of Cassation in order to resort to the extraordinary remedy of rectification, the Court recalls that objection is not a domestic remedy directly accessible to persons tried by the criminal courts. It therefore does not constitute an effective remedy for the purposes of the Convention (see *Akçiçek v. Turkey* (dec.) no. 40965/10, 18 October 2011), casting doubt on the applicability of Article 6 in the present case.

40. However, even assuming that Article 6 is applicable to the proceedings in hand, in *Yavuz and Others v. Turkey* ((dec.), no. 48064/99, 1 February 2005) the Court held that the date on which the final domestic decision was with the registry of the first instance court should be taken as the starting-point for calculation of the six-month time-limit, being the date on which the applicants were definitively able to find out about the content of the final decision at the latest. The Court sees no indication that the applicant was unable to file an objection after the deposition of the decision of the Court of Cassation.

41. In light of the foregoing, the complaint concerning access to court must therefore be declared inadmissible for being manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

2. In respect of the applicant's remaining complaints under Article 6 § 1 of the Convention

42. Invoking Article 6 § 1 of the Convention the applicant argues that the non-communication of indictments to the defendant in the Turkish criminal system infringes the principle of equality of arms and the right to adversarial proceedings.

The Court notes at the outset that under Turkish law, indictments prepared by public prosecutors are served on defendants after being admitted by courts and that admission of an indictment by a court does not have an impact on the applicant's right to be presumed innocent. The Court recalls in this regard that this complaint was previously examined by the Court and it was declared inadmissible for being manifestly ill-founded (see *Ökten v. Turkey* (dec.), no. 22347/07, §§ 51–53, 3 November 2011).

43. The applicant maintains that the special assize courts are not independent and impartial within the meaning of Article 6 § 1 of the Convention.

The Court notes that similar complaints concerning the composition, independence and impartiality of assize courts were declared inadmissible in the Court's decision in the case of *Uğur and Others v. Turkey* ((dec.), nos. 49651/06, 6840/08 and 8076/08, 21 September 2010) for being manifestly ill-founded.

44. The applicant further alleges under Articles 6 and 7 that his conviction was unfair and that his sentence was excessive. The Court considers that the applicant's complaints under this head should be assessed from the standpoint of Article 6 § 1 as they essentially concern the unfavourable outcome of the proceedings; thus, they are of a fourth-instance nature. These complaints must therefore be declared inadmissible for being manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

45. The applicant finally complains under Articles 6 § 1 and 13 of the Convention that he was not afforded a public hearing before the Court of Cassation and that the Court of Cassation failed to carry out an effective examination of his appeal.

The Court recalls that on a number of occasions the Court has previously held that, provided that there has been a public hearing at first instance, the absence of "public hearings" before a second or third instance may be justified by the special features of the proceedings at issue. Accordingly, proceedings which concern solely the interpretation of law and not the establishment of facts may comply with the requirements of Article 6, even if the appellant is not given an opportunity of being heard in person by the appeal or cassation court (see, *Han v. Turkey*, no. 50997/99, 13 September 2005). It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Alleged violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention

46. The applicant complains that he did not benefit from legal assistance during his police custody, as well as before the public prosecutor and the investigating judge. The applicant relies on Article 6 §§ 1 and 3 (c) of the Convention, the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ..."

47. The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

E. Alleged violation of Article 6 § 1 in conjunction with Article 6 § 3 (d) of the Convention

48. The applicant alleged that that he could not cross-examine the witnesses who had testified against him before another court, namely the Antalya Assize Court. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

49. The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

F. Alleged violation of Article 8 of the Convention

50. The applicant complains under Article 8 about the unlawfulness of the search of 25 March 2007 and the subsequent seizure of his belongings, arguing in particular that the search was conducted upon the written order of the public prosecutor and without a prior court decision.

51. The Court notes that the applicant did not object to the decision of the Antalya Magistrates' Court, dated 25 March 2007, upholding the lawfulness of this search and seizure, and has not explained why he did not do so. The Court thus holds that his part of the application must be declared inadmissible for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

G. Other alleged violations of the Convention

52. The Court observes that the applicant did not substantiate his complaints under Articles 1, 13, 14 and 17 and Article 2 of Protocol No. 1. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

53. As for the applicant's complaint under Article 2 of Protocol No. 7, the Court notes that Turkey has not ratified Protocol No. 7, therefore this part of the application is incompatible *ratione personae* with the provisions of the Convention and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to adjourn the examination of the applicant's complaints concerning, the lack of legal assistance available to the applicant during his time in police custody and the applicant's inability to cross-examine the witnesses against him;

Declares the remainder of the application inadmissible.

Done in English and notified in writing on 24 March 2016.

Abel Campos
Deputy Registrar

Julia Laffranque
President