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

FOURTH SECTION

CASE OF BUDAK AND OTHERS v. TURKEY

(Application no. 57345/00)

JUDGMENT

STRASBOURG

10 January 2006

FINAL

10/04/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Budak and Others v. Turkey,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr R. TÜRMEN,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 8 December 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 57345/00) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Turkish nationals, Mr Vahdettin Budak, Mr Mehmet Emin Yalçın, Ms Songül Karatağna and Mr Tayyip Ölmez ("the applicants"), on 21 April 2000.

2. The applicants were represented by Ms T. Aslan, a lawyer practising in İzmir. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. On 7 September 2004 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the applicants' right to a fair hearing by an independent and impartial tribunal to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

4. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). The case was assigned to the newly composed Fourth Section.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1977, 1976, 1974 and 1968 respectively and were serving their prison sentences in Nazilli at the time of their applications to the Court.

7. The police officers at the Anti-Terror branch of the Antalya Security Directorate arrested Tayyip Ölmez, Vahdettin Budak, Songül Karatağna and Mehmet Emin Yalçın and placed them in custody on 22 February, 13 March, 12 April and 24 April 1998 respectively.

8. The Antalya Magistrates' Court ordered the remand in custody of Tayyip Ölmez, Vahdettin Budak, Songül Karatağna and Mehmet Emin Yalçın on 27 February, 22 March, 21 April and 29 April 1998 respectively.

9. By indictments dated 24 March, 8 May, 17 May and 22 May 1998 the public prosecutor at the İzmir State Security Court accused Vahdettin Budak, Songül Karatağna and Mehmet Emin Yalçın of membership of an illegal organisation and Tayyip Ölmez of aiding and abetting an illegal organisation. He requested that Vahdettin Budak be convicted and sentenced under Article 125 of Criminal Code. In respect of Songül Karatağna and Mehmet Emin Yalçin, the public prosecutor requested that they be convicted and sentenced under Article 168 §2 of Criminal Code and Article 5 of Law no. 3713. As for Tayyip Ölmez, the public prosecutor requested that he be convicted and sentenced under Article 169 of Criminal Code and Article 5 of Law no. 3713.

10. On 11 November 1998 the İzmir State Security Court convicted the applicants as charged and sentenced Vahdettin Budak to life, Songül Karatağna and Mehmet Emin Yalçın to twelve years and six months and Tayyip Ölmez to five years' imprisonment.

11. On 11 October 1999 the Court of Cassation upheld the judgment of the İzmir State Security Court. On 2 November 1999 the judgment of the Court of Cassation was deposited with the registry of the İzmir State Security Court.

12. On 29 March 2005 the applicants' representative informed the Court that all the applicants, except for Mr Vahdettin Budak, were released from prison.

II. THE RELEVANT DOMESTIC LAW

13. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Özel v. Turkey* (no. 42739/98,

§§ 20-21, 7 November 2002) and *Gençel v. Turkey* (no. 53431/99, §§ 11-12, 23 October 2003).

14. By Law no. 5190 of 16 June 2004, published in the Official journal on 30 June 2004, the State Security Courts have been abolished.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

15. 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 İzmir State Security Court which tried and convicted them. They further submitted that they were convicted on the basis of their statements in police custody which were taken under duress and that the court refused their demands for a supplementary investigation. They maintained that they were denied the assistance of a lawyer during the initial stages of the criminal proceedings and that the written opinion of the principal public prosecutor at the Court of Cassation was never served on them, thus depriving them of the opportunity to put forward their counter-arguments.

16. They relied on Article 6 of the Convention, which in so far as relevant reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (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."

A. Admissibility

17. The Government argued under Article 35 of the Convention that the applicants' complaints in respect of the independence and impartiality of the İzmir State Security Court must be rejected for non-exhaustion of domestic remedies and for failure to comply with the six-month rule. In this regard, they maintained that the applicants have not invoked this complaint before the domestic courts. They further argued that the applicants should have

lodged their application with the Court within six months of the date on which the State Security Court rendered its judgment.

18. The Court reiterates that it has already examined and rejected the Government's similar preliminary objections (see *Vural v. Turkey*, no. 56007/00, § 22, 21 December 2004, *Çolak v. Turkey (no. 1)*, no. 52898/99, §§ 24-27, 15 July 2004, and *Özdemir v. Turkey*, no. 59659/00, § 26, 6 February 2003). The Court finds no particular circumstances, in the instant case, which would require it to depart from its findings in the above-mentioned cases. In view of the above, the Court rejects the Government's preliminary objections under this head.

19. In the light of its established case law (see, amongst many authorities, *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VII) and in view of the materials submitted to it, the Court considers that the applicants' complaints raise complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits. The Court therefore concludes 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.

B. Merits

1. Independence and impartiality of the State Security Court

20. The Court has examined a large number of cases raising similar issues to those in the present case and found a violation of Article 6 § 1 of the Convention (see *Özel*, cited above, §§ 33-34, and *Özdemir*, cited above, §§ 35-36).

21. As to the instant case, the Court considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion. It considers it understandable that the applicants – prosecuted in a State Security Court for offences relating to "national security" – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service. On that account they could legitimately fear that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. Consequently, the applicants' doubts about that court's independence and impartiality may be regarded as objectively justified (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1568, § 72, *in fine*).

22. In conclusion, the Court considers that the State Security Court which tried and convicted the applicants was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. Accordingly, there has been a violation of this provision.

2. Fairness of the proceedings

23. Having regard to its finding of a violation of applicants' right to a fair hearing by an independent and impartial tribunal, the Court considers that it is not necessary to examine the other complaints under Article 6 of the Convention relating to the fairness of the proceedings before the domestic courts (see, among other authorities, *Incal*, cited above, § 74 and *Ükünç and Güneş v. Turkey*, no. 42775/98, § 26, 18 December 2003).

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

24. The applicants complained in their submissions of 29 March 2005 that the Court of Cassation's decision was not reasoned. They also complained that due to the fact that they were detained three hundred kilometres away from İzmir, their representative did not have the possibility to visit them regularly during the criminal proceedings with a view to preparing their defence. They relied on Article 6 of the Convention.

25. The Court observes that, in the instant case, the final domestic decision was given on 11 October 1999 when the Court of Cassation upheld the judgment of the first-instance court. This decision was deposited with the registry of the State Security Court on 2 November 1999 whereas these complaints were introduced to the Court on 29 March 2005.

26. It follows that these complaints have been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

28. The applicants claimed, in total, 50,000 euros (EUR) in respect of non-pecuniary damage. The applicants further requested a retrial by an independent and impartial court and the annulment of the exceptions foreseen by Law no. 4793.

29. The Government contested the amounts requested by the applicants.

30. The Court considers that the finding of a violation of Article 6 constitutes in itself sufficient compensation for any non-pecuniary damage

suffered by the applicants in this respect (see *Incal*, cited above, p. 1575, § 82, and *Çıraklar*, cited above, § 45).

31. The Court considers that where an individual, as in the instant case, has been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents, in principle an appropriate way of redressing the violation (see *Öcalan v. Turkey*, no. 46221/99 [GC], § 210, *in fine*, ECHR 2005 - ...).

B. Costs and expenses

32. The applicants also claimed EUR 5,000 for the costs and expenses incurred both before the domestic courts and before the Court. The applicants did not submit any receipt or documents in support of their claim.

33. The Government contested the amounts requested by the applicants.

34. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,000 for the proceedings before the Court.

C. Default interest

35. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* admissible the complaints concerning the alleged denial of a fair hearing on account of the lack of independence and impartiality of the İzmir State Security Court, convictions allegedly based on the statements taken under duress, the refusal of supplementary investigation, the lack of access to a lawyer and non-communication of the principal public prosecutor's written opinion at the Court of Cassation and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the complaint relating to the independence and impartiality of the İzmir State Security Court;

3. *Holds* that it is not necessary to consider the applicants' other complaints under Article 6 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

5. *Holds*
(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of costs and expenses, to be converted into New Turkish Liras at the rate applicable at the date of the settlement and free of any taxes or charges that may be payable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President