APPLICATION N° 19601/92

Cengiz ÇIRAKLAR v/TURKEY

DECISION of 19 January 1995 on the admissibility of the application

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Article 5, paragraph 1 (c) of the Convention *There can be no requirement in order to justify arrest and detention on remand that the existence and nature of the offence of which the person concerned is suspected be established since that is the aim of the investigation the proper conduct of which is facilitated by the detention*

Article 5, paragraph 3 and Article 26 of the Convention *When an act of a public authority is not open to any effective remedy, the six month period runs from the date on which the act took place Lack of remedy at the material time against length of detention in police custody*

Article 6, paragraph 1 of the Convention *Question whether the State Security Court (Turkey) is an independent and impartial tribunal and whether the proceedings conducted before that court were fair (Complaint declared admissible)*

Article 6, paragraph 2 of the Convention *The principle of the presumption of innocence is not limited to procedural guarantees, it requires that no representative of the State declare that a person is guilty of having committed an offence, before that guilt is established by a court*

The police authorities did not violate this provision by informing the applicant's parents of his arrest, since they made no statement regarding his guilt

Article 8, paragraph 2 of the Convention *Assuming that the action by the police in informing the parents of their child's arrest constitutes an interference with the detainee's right to respect for his private life, this measure prescribed by law is in the instant case considered necessary in a democratic society for the prevention of crime and for the protection of the rights and freedoms of others and proportionate to the aims pursued*

Articles 9 and 10 of the Convention *In the case of a demonstration by way of procession, freedom of thought and freedom of expression are subsidiary to freedom of assembly and do not require separate examination*

Article 11, paragraph 1 of the Convention

a) Those who participate in a violent demonstration cannot rely on freedom of peaceful assembly

b) A requirement for authorization of meetings on the public highway does not as such, constitute an interference with the right to freedom of assembly

Article 11, paragraph 2 of the Convention *A conviction, following an unauthorised demonstration for violently resisting police orders to disperse is, in the instant case, a proportionate measure prescribed by law and necessary in a democratic society for the prevention of disorder*

Article 26 of the Convention

a) Under Turkish criminal law, an application for amendment of a judgment is not a remedy directly accessible to the applicant and does not therefore have to be used

b) In order to exhaust domestic remedies, the person concerned must have raised before the national authorities, at least in substance, the complaint he submits to the Commission

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THE FACTS

The applicant is a Turkish citizen He was born in 1966 and lives in Izmir (Turkey) He is a student at the University of the Aegean

He is represented in the proceedings before the Commission by Mr Sibel Bilge Uslu, a lawyer practising in Izmir

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

1 *Particular circumstances of the case*

On 16 March 1990, a group of students demonstrated in front of the University of the Aegean buildings without having first obtained authorization for the demonstration The police intervened and took 79 people, including the applicant, into police

custody. They were accused of organising an illegal demonstration and violently resisting police orders on dispersal of the demonstration.

After being interrogated by the police, the applicant, together with the other defendants, was brought before the Public Prosecutor's Office attached to Izmir State Security Court.

On 20 March 1990, the applicant appeared before Izmir State Security Court alongside 95 co-defendants (15 defendants were arrested subsequently), on charges of participating in an illegal demonstration, violently resisting police orders and distributing separatist propaganda

In a letter of 13 April 1990, the Director of Izmir Security Department informed the applicant's father that the applicant had been arrested following the events at the University of the Aegean, that he had been taken into police custody and subsequently brought before Izmir State Security Court and remanded in custody in Buca remand prison

The applicant was represented by five lawyers in the criminal proceedings before the State Security Court He disputed the version of the facts submitted by the prosecution. He asked the court to hear evidence in his defence from his girlfriend (S.D.), who had been with him during the demonstration. He further submitted that in view of the status of the military judges sitting on the State Security Court, it could not be considered to be an impartial tribunal He argued that his arrest during a demonstration constituted an infringement of his freedom of thought, expression and assembly

In a judgment of 28 December 1990, the State Security Court, composed of two civil judges and one military judge with the rank of colonel, found the applicant and thirty other defendants guilty of participating in a demonstration on the public highway without first obtaining authorization, contrary to Law No 2911 on demonstrations, and of violently resisting orders from the police who were there to disperse the demonstrators The court sentenced the applicant to two and a half years' imprisonment He was acquitted on the other charges, as were his co defendants.

In returning a guilty verdict against the applicant, the court took into consider ation evidence given by the police who had arrested him, photographs printed in a daily newspaper and a video recording made at the scene of the offence. The court held that the applicant had participated in an illegal demonstration, resisted orders by the police who were trying to disperse the demonstrators and thrown stones at the police It also observed that, as shown on the video recording, the police had given the demonstrators a warning and ordered them to disperse before intervening and making arrests.

The court considered that the evidence given by the applicant's friends to the effect that the applicant had been a mere spectator at the event did not reflect the entire truth, given that their evidence did not tally with the exact time of the arrest these witnesses stated that they had seen the police arrest the applicant and S D at approximately 11 30 a m 12 00 noon on the day of the incident, but it had already been established that the demonstration had not commenced until approximately 12 15 p m The court refused to hear evidence from S D , the applicant's girlfriend, as a defence witness on the ground that she herself had been charged in connection with the same case and had been questioned by the court

On 15 February 1991, the applicant appealed to the Supreme Court against the judgment of 28 December 1990 In his grounds of appeal, he contested the version of the facts given by the State Security Court and its assessment of the evidence He also criticised the State Security Court's choice of classification of the offences He argued further that his conviction constituted a violation of Articles 9, 10 and 11 of the Convention

In a judgment of 28 May 1991, the Supreme Court acquitted two of the appellants and upheld the judgments against the other appellants, including the applicant

2 *Relevant domestic law*

Article 107 of the Turkish Code of Criminal Procedure

"Para 1 Arrested suspects may inform their relatives of their arrest, unless this would prejudice the purpose of the arrest If the suspect so requires, official notice of the arrest may also be given

Para 2 The suspect's relatives shall be immediately informed when the suspect is brought before the court "

COMPLAINTS

The applicant alleges a violation of Articles 3, 5 para 1 (c), 3 and 4, 6 paras 1, 2, 3 (c) and (d), and of Articles 8, 9, 10 and 11 of the Convention

He claims that he suffered ill-treatment while in police custody at Izmir police station contrary to Article 3 of the Convention

The applicant further complains that he was arrested contrary to Article 5 para 1 (c) of the Convention without reasonable grounds for suspecting him of having committed an offence

He invokes Article 5 para 3 of the Convention, complaining that he was not brought "promptly" before a judge after his arrest, but spent nearly four days in police custody

The applicant also complains of a violation of Article 5 para 4 of the Convention in that he was unable to bring proceedings before a tribunal in order to dispute the lawfulness of his detention

He further alleges a violation of Article 6 para 1 of the Convention in so far as he was not given a fair hearing by an independent and impartial tribunal He submits, in support of this allegation, that a military judge sat on the State Security Court and argues that military judges cannot be relied upon to act independently of their military superiors He adds that judges are appointed to the State Security Courts by the Judicial Service Commission

The applicant complains further of a violation of the principle of the presumption of innocence provided for in Article 6 para 2 of the Convention and of his right to respect for his private life guaranteed by Article 8 of the Convention in so far as Izmir Security Department informed his father of his arrest for participating in an illegal demonstration

He further complains that he was unable to consult a lawyer while in police custody and invokes Article 6 para 3 (c) of the Convention in this respect

The applicant also claims that the court violated Article 6 para 3 (d) of the Convention by refusing to hear evidence from certain witnesses

The applicant alleges finally a violation of Articles 9, 10 and 11 of the Convention in so far as he was convicted of a criminal offence for participating in a demonstration against Iraqi repression of the Kurdish population in Iraq

PROCEEDINGS BEFORE THE COMMISSION

This application was introduced on 28 November 1991 and registered on 9 March 1992

On 10 January 1994, the Commission decided to give notice of the application to the respondent Government and to invite them to submit their written observations on the admissibility and merits thereof

On 30 June 1994, the respondent Government submitted their written observations The applicant's observations in reply were submitted on 29 August 1994

THE LAW

1 The applicant raises a number of complaints under Article 6 of the Convention He complains firstly that owing to the composition of the State Security Court which dealt with the case, he was not given a fair hearing by an independent and impartial tribunal He also complains that, contrary to Article 6 of the Convention, he was unable

to consult a lawyer while in police custody for nearly four days and that the court refused to hear evidence from a number of witnesses

The respondent Government submit firstly that the applicant failed to exhaust domestic remedies under Article 26 of the Convention They argue that the applicant could have lodged an application with the Public Prosecutor attached to the Supreme Court requesting him to apply for amendment of the Supreme Court decision delivered on 28 May 1991

The applicant counters this argument on the ground that an application for amendment of the decision is not an effective remedy under Article 26 of the Convention

The Commission recalls that under Turkish Criminal law, an application for amendment of a judgment is not a legal remedy directly available to the applicant (see, *inter alia*, No 16727/90, Çirkin v Turkey, Dec 4 9 91) The Commission therefore considers that the applicant cannot be criticised for failing to exhaust this legal remedy and that the Government's plea of inadmissibility cannot therefore be upheld

As regards the merits of the complaints raised under Article 6 of the Convention, the Government submit that State Security Courts are special courts and that the Constitution guarantees that their members, including the military judges, are impartial and independent from the Executive The Government argue further that the proceedings before Izmir State Security Court complied with all the requirements of Article 6 of the Convention The Government further observe that the applicant was assisted by a lawyer during the criminal proceedings

The applicant contests the Government's reasoning He emphasises in particular that military judges are first and foremost army officers who cannot act with full independence He also argues that the principle of a fair hearing' applies not only to the proceedings before the trial courts, but also to the stages covered by the preliminary investigation, including the period spent in police custody

The Commission has made a preliminary examination of these complaints in the light of its case-law It considers that this part of the application raises complex questions of law and fact which cannot be resolved at this stage of the examination of the application, but require an examination on the merits This part of the application cannot therefore be declared manifestly ill-founded within the meaning of Article 27 para 2 of the Convention The Commission also notes that this part of the application cannot be contested on any other ground of inadmissibility

2 The applicant complains of Izmir Security Department's action in informing his parents of his arrest contrary to Article 6 para 2 of the Convention

The Commission recalls its case law that the authorities must not inform the public of investigations in progress, but do not violate Article 6 para 2 if they state that

a suspicion exists, that people have been arrested, that they have confessed, etc. What is excluded, however, is a formal declaration that someone is guilty (No 7986/77, Dec. 3.10.78, D.R. 13 pp. 73, 79). In the instant case, the letter from the police to the applicant's parents is confined to informing them of his arrest and does not contain any statement regarding the applicant's guilt.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. The applicant also complains of a violation of Articles 9, 10 and 11 of the Convention in so far as he was convicted of participating in a demonstration.

The respondent Government submit that the applicant failed to exhaust domestic remedies as required by Article 26 of the Convention and argue that the applicant could have referred the case to the Public Prosecutor attached to the Court of Cassation with a request for him to file an application for amendment of the Supreme Court decision delivered on 28 May 1991. The applicant contests this argument.

The Commission, referring to the grounds set out above on the question of admissibility of the complaints raised under Article 6 of the Convention, considers that this plea of inadmissibility cannot be upheld in respect of the complaints based on Articles 9, 10 and 11 of the Convention.

As regards the merits of these complaints, the Government submit that the applicant's conviction is justified under the second paragraph of the provisions alleged to have been violated.

The applicant disputes the Government's submission.

The Commission recalls at the outset that, in the case of a demonstration by way of procession, the right to freedom of thought and freedom of expression are subsidiary to that of freedom of assembly and do not require separate examination (No. 10126/82, Dec. 17.10.85, D.R. 44 p. 65). Such is also the case here, especially as the applicant was acquitted on the charges of distributing separatist propaganda. The Commission will therefore confine its examination of this complaint to the aspects concerning Article 11.

The Commission recalls in this regard that anyone intending to organise a peaceful demonstration has the right to freedom of peaceful assembly. The concept of "peaceful" does not, however, include a demonstration in which the organisers and participants intend to use violence resulting in public disorder (see No. 8440/78, Dec. 16.7.80, D.R. 21 p. 138; No. 13079/87, Dec. 6.3.89, D.R. 60 pp. 256, 270). The Commission further recalls that a requirement for authorization of gatherings on the

public highway does not, in theory, constitute an interference with the essence of the right (see No 8191/78, Dec 10 10 79, D R 17 p 93)

The Commission observes that, in the instant case, the applicant participated in a gathering on the public highway which was held without first obtaining the necessary authorization and in breach of the relevant domestic legislation It also notes that the applicant, along with other demonstrators, disobeyed orders from the police to disperse and, furthermore, used violence against the police

In the circumstances, the Commission considers that in this case, the dispersal, with the assistance of the police, of the gathering in question, and the arrest and conviction of a number of demonstrators, including the applicant, were measures prescribed by law constituting measures necessary in a democratic society for the prevention of public disorder within the meaning of Article 11 para 2 of the Convention

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para 2 of the Convention

4 As regards the applicant's complaint that he suffered ill treatment while in police custody, contrary to Article 3 of the Convention, the Commission recalls that pursuant to Article 26 of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised principles of international law In this case, the applicant has neither complained to the relevant prosecuting authorities, nor brought the complaint which he submits to the Commission before any national court It follows that the applicant has failed to satisfy the requirement that domestic remedies must be exhausted and that this complaint must be rejected pursuant to Articles 26 and 27 para 3 of the Convention

5 The applicant alleges that he was arrested, contrary to Article 5 para 1 (c) of the Convention, without there being any reasonable grounds on which to suspect him of having committed an offence

The Commission stresses that reasonable suspicion as provided for in this provision of the Convention does not mean that the suspect's guilt must be established and proved at the time of arrest (see, for example, No 10803/84, Dec 16 12 87, D R 54 p 35)

In this case, the applicant was arrested during an illegal demonstration on suspicion of being one of the instigators of the demonstration and of having used violence against the police He was subsequently convicted on certain charges and acquitted on others following a trial in court The Commission therefore considers that in ordering the applicant to be remanded in custody, the State Security Court could reasonably suspect the applicant of having committed the offences in question

It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para 2 of the Convention

6 The applicant also complains of the length of his detention in police custody and his inability to contest the lawfulness of his detention before a tribunal, contrary to Article 5 paras 3 and 4 of the Convention

The Commission recalls that it considered this issue in a previous case and decided that, at the material time, there was no legal remedy under Turkish law to contest the length of detention in police custody (see for example, Nos 14116/88 and 14117/88 (joined), Sargin and Yağci v Turkey, Dec 11 5 89, D R 61 pp 250, 262) The Commission also refers to its established case law that in the absence of a domestic legal remedy, the six month period runs from the date on which the act complained of in the petition took place (see for example, No 10389/83, Dec 17 7 86, D R 47 p 72)

The Commission observes that in the instant case the applicant's detention in police custody ended on 20 March 1990, while the application was introduced more than six months after that date This part of the application is therefore time barred and must be rejected pursuant to Articles 26 and 27 para 3 of the Convention

7 Finally, and in so far as the applicant complains that the information given to his parents concerning his arrest was contrary to his right to respect for private life under Article 8 of the Convention, the Commission considers that, assuming there was in this case interference with the exercise of the applicant's right to respect for his private life such interference was justified under Article 8 para 2 of the Convention

The Commission notes that the police action in informing the applicant's parents of his arrest was lawful under Turkish law, as provided for in Article 107 para 2 of the Turkish Code of Criminal Procedure

The Commission further recalls that the concept of the necessity of a measure 'in a democratic society' means that the interference must be based on a pressing social need and, in particular, be proportionate to the legitimate aim being pursued (see, for example Eur Court H R , Leander judgment of 26 March 1987, Series A no 116, p 25, paras 58 and 59) In this case, informing a detainee's family of his arrest is one of the major safeguards laid down in the Code of Criminal Procedure Having regard to the contents of the letter complained of the interference which the applicant alleges he suffered cannot be considered disproportionate to the legitimate aim pursued, i e the prevention of criminal offences and the protection of the rights and freedoms of others

It follows that this part of the application is manifestly ill founded within the meaning of Article 27 para 2 of the Convention

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits, as regards the impartiality and independence of Izmir State Security Court which gave judgment in this case, and the fairness of the proceedings before that court,

DECLARES INADMISSIBLE the remainder of the application