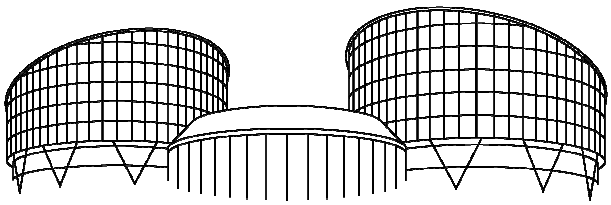

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF ATTI AND TEDİK v. TURKEY

(Application no. 32705/02)

JUDGMENT

STRASBOURG

20 October 2009

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 Attı and Tedik v. Turkey,

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos, *judges,*
and Sally Dollé, *Section Registrar,*

Having deliberated in private on 29 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 32705/02) 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 two Turkish nationals, Mr Hikmettin Attı and Mr Nevzat Tedik ("the applicants"), on 15 October 1999.

2. The applicants were represented by Mr Mesut Beştaş and Ms Meral Beştaş, lawyers practising in Diyarbakır. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged, in particular, that they had not been informed of the reasons for their arrest, that they had not been brought before a judge within a reasonable time, that their families had not been informed about their arrests and that they had not had the opportunity to challenge the lawfulness of their detention in police custody. They also alleged that the criminal proceedings against them had not been conducted fairly.

4. On 2 October 2007 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the applicants' right to be informed promptly of the reasons for their arrest, their right to be brought promptly before a judge following their arrest, their right to take proceedings to challenge the lawfulness of their detention in police custody, their right to a fair trial**,** their right to legal assistance and their right to respect for their family life to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1979 and 1975 respectively and live in Diyarbakır.

6. On 31 May 1999 the applicants were arrested at different locations in Diyarbakır. It appears from the arrest report in respect of Mr Attı that he was arrested outside the university where he was a student. The reason for the arrest was the police officers' "suspicion of his appearance/condition" (*durumundan şüphe ettiğimiz*). He was taken into police custody for the "necessary investigation to be carried out".

7. According to the arrest report in respect of Mr Tedik, he was arrested in a house and "in relation to an investigation". Mr Tedik was also taken to the police station. The police officers who arrested Mr Tedik also searched the house and found a number of books and magazines in the Kurdish and Turkish languages. The books included a book of poems, a novel and a Kurdish grammar book.

8. The Diyarbakır Police Headquarters, where the applicants were being detained, wrote to the prosecutor's office at the Diyarbakır State Security Court on 2 and 4 June 1999, and asked for permission to detain the applicants for a number of additional days. On 4 June 1999 the prosecutor granted permission to the police to detain the applicants until 10 June 1999.

9. Also on 4 June 1999 a number of police officers took the applicants to a number of locations where, the applicants claimed in two signed statements prepared the same day, they had carried out a number of activities on behalf of the PKK[1], including preparing and throwing Molotov cocktails.

10. The applicants were questioned by police officers on 8 June 1999. They stated that they were PKK sympathisers and also members of the Patriotic Youth Union (*Yurtsever Gençlik Birliği*).

11. On 9 June 1999 the applicants were released from police custody and brought before the prosecutor at the Diyarbakır State Security Court, who took statements from them. In their statements the applicants denied any connections with the PKK, and submitted that they had been forced to sign their police custody statements without having been allowed to read them first. The same day the applicants were brought before the duty judge, who remanded them in custody pending the introduction of criminal proceedings against them.

12. When questioned by police officers and subsequently by the prosecutor and the judge, the applicants were not represented by a lawyer.

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1. The Workers' Party of Kurdistan, an illegal organisation.

13. On 14 June 1999 the prosecutor at the Diyarbakır State Security Court filed an indictment with that court, charging the applicants and ten other persons with the offence of membership of an illegal organisation, an offence defined in Article 168 of the Criminal Code which was in force at the time.

14. The first hearing in the case was held on 22 June 1999 by the First Division of the Diyarbakır State Security Court. In the course of the trial, the applicants were represented by lawyers, and they repeatedly denied the accuracy of the contents of their police custody statements.

15. On 13 March 2001 the applicants were found guilty as charged and sentenced to twelve and a half years' imprisonment. In convicting the applicants the Diyarbakır State Security Court relied on the statements taken from them in police custody.

16. The prosecutor at the Court of Cassation submitted his written observations to that court but they were not forwarded to the applicants or their lawyers. The applicants' convictions were upheld by the Court of Cassation on 11 October 2001.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

17. The applicants complained under Article 5 § 2 of the Convention that they had not been promptly informed of the reason for their arrests. Relying on Article 5 § 3 and 4 of the Convention, they complained that their period of detention in police custody had been excessively long and that they had not had the opportunity to challenge the lawfulness of their detention. Article 5 of the Convention, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

..."

18. The Government contested the applicants' arguments.

A. Admissibility

19. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Complaint under Article 5 § 2 of the Convention

20. The applicants complained that they had not been given any reasons for their arrests on 31 May 1999.

21. In the opinion of the Government, the fact that the applicants both signed the arrest reports indicated that they were well aware of the reasons for their arrests. Moreover, a number of materials had been seized in the house of Mr Tedik and he could not therefore claim to have been unaware of the nature of those materials.

22. The Court reiterates that Article 5 § 2 of the Convention contains the elementary safeguard that any person arrested should know why he or she is being deprived of his or her liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language which can be understand, the essential legal and factual grounds for the arrest, so as to be able, if the person sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 40, Series A no. 182, and *H.B. v. Switzerland*, no. 26899/95, § 47, 5 April 2001).

23. In the present case the applicants were arrested on 31 May 1999 and on the same day they were placed in police custody, where they remained

until they were brought before a prosecutor and a judge on 9 June 1999. When communicating the application, the Court invited the Government to submit documentary evidence showing that the applicants had been informed promptly of the reasons for their arrests. In their replies, as pointed out above, the Government referred to the arrest reports signed by the applicants which, the Court observes, do not contain any reasons. The reports merely state that Mr Attı was arrested on the basis of the police officers' "suspicion of his appearance/condition" (see paragraph 6 above). Mr Tedik, for his part, was arrested "in relation to an investigation" (see paragraph 7 above).

24. As for the Government's reference to the "materials" found in the house where Mr Tedik was arrested, the Court notes that the "materials" in question consisted of books and magazines (see paragraph 7 above) which were not connected with the offence for which he was subsequently indicted and convicted. In any event, the Court considers that the finding of those books and magazines in the house where Mr Tedik was arrested cannot be regarded as relaying to him "the essential legal and factual grounds" for his arrest (see, *inter alia*, *Fox, Campbell and Hartley*, cited above, § 40).

25. The Court thus notes the absence of any evidence in the file to show that the applicants were informed of the reasons for their arrests until they were taken to a number of locations and questioned there by police officers on 4 June 1999 (see paragraph 9 above). Although the Court is prepared to accept that the contents of the applicants' statements drawn up after these site visits were such as to enable the applicants to understand why they had been arrested, it considers that the provision of the information to the applicants some four days after their arrests cannot be regarded as prompt.

26. In light of the foregoing, the Court finds that there has been a violation of Article 5 § 2 of the Convention.

2. Complaint under Article 5 § 3 of the Convention

27. The applicants alleged that they had been held in police custody for ten days without being brought before a judge or other officer authorised by law to exercise judicial power.

28. The Government argued that the length of the applicants' detention in custody had been in conformity with the legislation in force at the material time.

29. The Court notes that the applicants' detention in police custody lasted nine days. It reiterates that, in the case of *Brogan and Others v. the United Kingdom* (29 November 1988, § 62, Series A no. 145-B), it held that detention in police custody which lasted four days and six hours without judicial control fell outside the strict time constraints of Article 5 § 3 of the Convention, even though its purpose was to protect the community as a whole against terrorism.

30. Even supposing that the activities of which the applicants stood accused were serious, the Court cannot accept that it was necessary to detain them for nine days without bringing them before a judge or other officer authorised by law to exercise judicial power.

31. There has accordingly been a violation of Article 5 § 3 of the Convention.

3. Complaint under Article 5 § 4 of the Convention

32. The applicants alleged under Article 5 § 4 that they had not been able to lodge an objection to challenge the lawfulness of their detention in police custody.

33. The Government contended that Article 128 of the Code of Criminal Procedure, which was in force at the material time, provided an effective remedy by which to challenge the lawfulness of detention in police custody.

34. The Court points out that, in several cases raising similar questions to those in the present case, it has rejected the Government's aforementioned submission and found a violation of Article 5 § 4 of the Convention (see, most recently, *İpek and Others v. Turkey*, nos. 17019/02 and 30070/02, §§ 39-42, 3 February 2009, and the cases cited therein). The Court finds no particular circumstances in the instant case which would require it to depart from such earlier findings.

35. In conclusion, the Court holds that there has been a violation of Article 5 § 4 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

36. Under Article 6 § 1 of the Convention the applicants complained that the written observations which the public prosecutor had submitted to the Court of Cassation had not been forwarded to them (see paragraph 16 above). They also complained that they had not had the assistance of a lawyer in police custody. Article 6 of the Convention, in so far as relevant, reads as follows:

> "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:
>
> ...
>
> (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."

37. The Government contested the applicants' arguments and submitted that the applicants could have found out about the written observations of the prosecutor as all files pending before the Court of Cassation were accessible to the parties. The Government also argued that the applicants had been informed about their right to legal assistance in police custody. In any event, they had been represented by a lawyer throughout the criminal proceedings.

A. Admissibility

38. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Complaint concerning the lack of legal assistance at the initial stages of the criminal proceedings

39. The Court reiterates the basic principles laid down in the case of *Salduz v. Turkey* [GC] (no. 36391/02, §§ 50-55, 27 November 2008). It will examine the present case in the light of those principles.

40. The Court observes that, in the present case, the restriction imposed on the applicants' right of access to a lawyer was systematic and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts. Furthermore, even though the applicants repeatedly denied the content of their statements taken in the absence of a lawyer (see paragraph 14 above), the Diyarbakır State Security Court relied on those statements when convicting them (see paragraph 15 above). Thus, in the present case, the applicants were undoubtedly affected by the restrictions on their access to a lawyer. Therefore, neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred earlier.

41. In sum, even though the applicants had the opportunity to challenge the evidence against them at the trial, the absence of a lawyer while they were in police custody irretrievably affected their defence rights.

42. There has therefore been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1.

2. Complaint concerning the non-communication of the prosecutor's written observations to the applicants

43. The Court notes that it has already examined the same grievance and found a violation of Article 6 § 1 of the Convention in its judgment in the case of *Göç v. Turkey* [GC] (no. 36590/97, §§ 53-58, ECHR 2002-V).

44. The Court has examined the complaint made by the applicants in the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned jurisprudence.

45. There has accordingly been a violation of Article 6 § 1 of the Convention as regards the non-communication to the applicants of the prosecutor's written observations.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

46. Relying on Article 8 of the Convention the applicants complained that their relatives had not been informed about their arrests.

47. The Government submitted to the Court the detention reports drawn up on 31 May 1999 in the present case. It appears from these reports that relatives of both applicants were informed about the arrests.

48. Noting that the accuracy and authenticity of the reports were not challenged by the applicants, the Court considers this complaint to be manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and rejects it pursuant to Article 35 § 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. Each applicant claimed 20,000 Turkish liras (TRY; approximately 10,700 euros (EUR)) in respect of pecuniary and TRY 30,000 (approximately EUR 16,000) in respect of non-pecuniary damage.

51. The Government considered the sums to be excessive and unsupported by any evidence.

52. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim. However, deciding on an equitable basis, it awards each applicant EUR 5,000 in respect of non-pecuniary damage.

53. The Court also reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicants, as far as possible, are put in the position in which they would have been had this provision not been disregarded. Consequently, it considers that the most appropriate form of redress would be the retrial of the applicants in accordance with the requirements of Article 6 § 1 of the Convention, should they so request (see *Salduz*, cited above, § 72 and the cases cited therein).

B. Costs and expenses

54. The applicants also claimed TRY 16,250 (approximately EUR 8,700) for costs and expenses incurred before the domestic courts and for those incurred before the Court. In support of their claims the applicants submitted to the Court an itemised breakdown of the hours spent by their legal representatives on the case.

55. The Government contested the claim and considered it to be unsubstantiated.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000, covering costs under all heads.

C. Default interest

57. 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* the complaint under Article 8 of the Convention inadmissible and the remainder of the application admissible;

2. *Holds* that there has been a violation of Article 5 §§ 2, 3 and 4 of the Convention;

3. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1;

4. *Holds* that there has been a further violation of Article 6 § 1 of the Convention;

5. *Holds*
(a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and to the applicants jointly EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to them, which sums are to be converted into the national currency of the respondent Government at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 20 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President