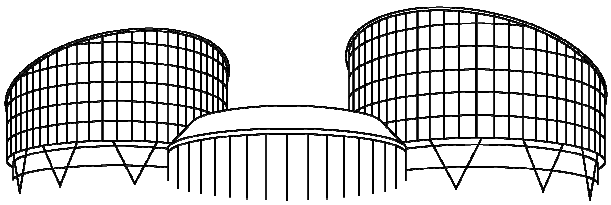

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF BALLIKTAŞ v. TURKEY

(Application no. 7070/03)

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 Ballıktaş v. Turkey,

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

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

Having deliberated in private on 15 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 7070/03) 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 a Turkish national, Ms Burcu Ballıktaş ("the applicant"), on 3 January 2003.

2. The applicant was represented by Mr Ercan Kanar, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that she had been subjected to ill-treatment in a gendarmerie station and that the criminal proceedings subsequently brought against her had not been fair.

4. On 29 November 2007 the President of the Court's Second Section decided to give notice of the application to the Government. It was 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 applicant was born in 1978 and lives in Ankara.

6. On 6 March 2000 the applicant was arrested by the gendarmerie in the border city of Edirne on her return from Bulgaria. She was detained in a gendarmerie station. According to an arrest report prepared by the

gendarmerie the same day, the applicant was informed of her right to be represented by a lawyer and to inform her family about her arrest. Nevertheless, it was also stated in the same document that, if the offence in respect of which she was arrested fell within the jurisdiction of State Security Courts, she could consult a lawyer only if her detention period was extended by a judge or if a judge ordered her detention in a prison. The applicant signed the report and wrote on it that she had "no requests".

7. The applicant was interrogated during her detention at the gendarmerie station, and an eight-page statement was taken from her between 7 and 9 March 2000. In her statement the applicant admitted to having engaged in activities on behalf of the PKK[1].

8. On 9 March 2000 the applicant was examined by a doctor at the Edirne branch of the Forensic Medicine Directorate. According to the medical report drawn up the same day, there were "no injuries or signs of ill-treatment on her body".

9. The same day she was brought before the prosecutor and then before the Edirne Magistrates' Court, which ordered her pre-trial detention in prison. In two statements made during meetings with the prosecutor and the judge the applicant admitted to being a member of the PKK.

10. According to the three statements referred to above, the applicant did not want to be represented by a lawyer during the questioning.

11. On 3 April 2000 the prosecutor at the Istanbul State Security Court filed an indictment against the applicant with that court for the offence of membership of an illegal organisation, namely the PKK. The prosecutor, referring to the above-mentioned statements made by the applicant, alleged that the applicant had left Turkey in 1996 and had been taken to the PKK's training camp in Lavrion, Greece, where she had received training. Following her training she had obtained a false German passport in order to enter the Netherlands. During her time in Europe she had engaged in activities on behalf of the PKK in Germany and the Netherlands.

12. Criminal proceedings against the applicant commenced before the Istanbul State Security Court (hereafter "the trial court"). During the proceedings the applicant was represented by a lawyer.

13. During the first hearing, which was held on 22 June 2000, the applicant rejected the allegations against her and alleged that, before she was brought before the prosecutor and the judge on 9 March 2000, she had been told by the gendarmes that if she did not accept the accusations before the judge and the prosecutor she would be taken back to the gendarmerie station and tortured again. That had been the reason she had accepted the accusations before the prosecutor and the judge. When asked by the trial court what she had to say about the medical report of 9 March 2000 in which it was stated that her body bore no signs of ill-treatment, the

[1]. Kurdistan Workers' Party, an illegal organisation.

applicant replied that the medical report had been prepared before she was beaten up by gendarme officers and threatened with rape. She also alleged that she had been stripped naked by the gendarmes during her detention. The applicant further informed the trial court that the gendarmes had not asked her whether she wanted to be represented by a lawyer during the questioning.

14. During the second hearing, which was held on 29 August 2000, the applicant submitted a handwritten letter to the trial court. In the letter she alleged, in particular, that while she was being detained in the gendarmerie station she had been insulted by gendarme officers, blindfolded, beaten up and drenched with water. Before being questioned she had been undressed and "they" had touched various parts of her body. Threats of rape and death, directed at her and her mother, had also been made.

15. The lawyer representing the applicant told the trial court that his client's questioning had been in breach of the applicable procedure and legislation and, as such, the statements taken from her constituted unlawfully obtained evidence which was not admissible in a court of law. Other than the statements taken from his client by the gendarmerie and then by the prosecutor and the judge on 9 March 2000, there was no evidence against her. The lawyer drew the trial court's attention to a Court of Cassation decision according to which confessions not supported by further evidence were not admissible as evidence.

16. The lawyer further asked the trial court to hear a "cassette of the questioning" of the applicant which had apparently been mentioned in a document drawn up by the gendarmerie. This request was rejected by the trial court which noted that the cassette was not in its possession.

17. The lawyer also pointed out that there was no mention of his client's name in the statements taken from E.Ş. who, according to the indictment, had helped his client to go to Greece.

18. On 9 October 2001 the applicant was found guilty as charged and sentenced to twelve years and six months' imprisonment. In convicting the applicant the trial court had regard to the statements taken from her at the gendarmerie station and then by the prosecutor and the judge on 9 March 2000, as well as to the statements made by E.Ş. in the course of his trial in 1998.

19. The applicant appealed against her conviction and argued, in particular, that the decision of the trial court had not been adequately reasoned. In the grounds of appeal the applicant's lawyer also repeated his earlier defence submissions concerning the allegedly unlawful nature of the evidence used in convicting his client, and referred to various Articles of the Convention.

20. On 8 July 2002 the Court of Cassation upheld the applicant's conviction.

21. At the time notice of the application was given to the respondent Government, the Government were requested to submit to the Court a copy of the "cassette of questioning" referred to above (see paragraph 16 above). It appears from the documents submitted to the Court by the applicant that the Ministry of Foreign Affairs requested the Ministry of Justice to obtain the cassette so that it could be submitted to the Court. The gendarmerie, who were requested by the domestic judicial authorities to produce the cassette, stated in their letter of 21 May 2008 that they had "no records of the cassette being handed over to the Edirne prosecutor".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

22. The applicant complained that that she had been subjected to ill-treatment in the gendarmerie station in breach of Article 3 of the Convention which reads as follows:

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

23. The Government contested that argument.

A. Admissibility

24. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B Merits

25. The applicant alleged that when detained in the gendarmerie station she had been blindfolded, stripped naked and threatened with rape. She maintained that she had been examined by a doctor before making her statement to the gendarmerie. She also alleged that the cassette on which her questioning had been recorded, which would have proved her allegations of ill-treatment, had deliberately been withheld from the Court by the authorities.

26. In the Government's opinion the medical report of 9 March 2000 (see paragraph 8 above) proved that the applicant had not been subjected to ill-treatment. Moreover, apart from making abstract allegations of threats of

rape, the applicant had never given further details of the alleged ill-treatment before the national authorities. Such abstract allegations were not sufficient for the initiation of criminal proceedings.

1. The alleged ill-treatment

27. The Court notes that in support of her allegations the applicant relied on a cassette allegedly recorded at the time of her questioning and submitted that the medical report of 9 March 2000 had been drawn up before she was questioned. The Government, for their part, considered that according to the medical report the applicant's allegations were baseless.

28. The Court considers that the medical report referred to by the Government lacks detail and falls significantly short of both the standards recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which are regularly taken into account by the Court in its examination of cases concerning ill-treatment (see, *inter alia*, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X), and the guidelines set out in the Istanbul Protocol (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 100, ECHR 2004-IV (extracts)). As such, the Court considers that the medical report in question cannot be relied on as evidence for proving or disproving that the applicant was ill-treated.

29. As for the cassette of the applicant's questioning, the Court observes that it specifically asked the respondent Government to provide a copy of it. However, they failed to respond to that request or even mention the exchange of official correspondence on the subject, correspondence which was ultimately submitted to the Court by the applicant (see paragraph 21 above). Thus at no stage have the Government clearly denied the existence of what might have been an important element in the determination of the present issue. Nevertheless, the Court does not deem it necessary to draw inferences from the Government's failure to assist the Court in this matter as it finds it more appropriate to deal with this aspect of the evidence when it examines the effectiveness of the national investigation into the applicant's allegations (see paragraph 33 below).

30. In the absence of any other evidence in support of the applicant's allegations, the Court considers that there has been no violation of Article 3 of the Convention in its substantive aspect in respect of the ill-treatment to which the applicant was allegedly subjected.

2. The national authorities' response to the applicant's allegations of ill-treatment

31. The Court reiterates that Article 3 of the Convention requires the authorities to investigate allegations of ill-treatment which are “arguable” and “raise a reasonable suspicion” (see, in particular, *Salmanoğlu and*

Polattaş v. Turkey, no. 15828/03, § 99, 17 March 2009 and the cases cited therein). This investigation should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (*Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII).

32. Having regard to the information given by the applicant to the trial court on two occasions (see paragraphs 13-16 above), the Court cannot but disagree with the Government that the applicant's allegations had been abstract, lacked detail and, as such, merited no investigation by the national authorities. The Court thus considers that the applicant's allegations of ill-treatment required an effective investigation in compliance with the requirements inherent in Article 3 of the Convention. In this regard the Court reiterates the requirements of an effective investigation which have been set out in previous judgments (see, *mutatis mutandis*, *Batı and Others*, cited above, §§ 133-37).

33. However, the Court is not persuaded that there has been an effective investigation in the present case. No attempts were made by the trial court or any investigating authority to question the applicant about her consistent and detailed allegations of ill-treatment. Similarly, the investigating authorities do not seem to have considered the possibility of questioning the gendarmerie officers who had interrogated the applicant (see paragraph 7 above). Furthermore, the Government have remained silent about the existence or whereabouts of a cassette which the applicant alleged had been made of her interrogation. This cassette, if it existed, could have clarified the accuracy of the applicant's claims (see paragraph 29 above).

34. Having regard to the national authorities' failure to take even the most rudimentary steps to investigate the applicant's allegations of ill-treatment, the Court concludes that they acted in complete disregard of the above-mentioned positive obligation inherent in Article 3 of the Convention.

35. There has accordingly been a violation of Article 3 of the Convention in its procedural limb.

II. ALLEGED VIOLATION OF ARTICLES 5 AND 6 OF THE CONVENTION

36. Relying on Article 5 § 3 of the Convention, the applicant alleged that she had not had the assistance of a lawyer when questioned in the gendarmerie station. Under Article 6 § 1 she submitted that she had not had a fair trial because unlawfully obtained evidence had been used against her.

37. The Court considers it more appropriate to examine these complaints solely from the standpoint of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, of which the relevant part provides 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; ..."

38. The Government contested the applicant's arguments.

A. Admissibility

39. 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

40. The Government referred to the applicant's statements (see paragraphs 7 and 9-10 above) and argued that she did not want the assistance of a lawyer when she was held in police custody or when she was brought before the prosecutor and the Magistrates' Court at the end of her police custody. In any event, throughout the criminal proceedings against her, the applicant had been represented by a lawyer.

41. The Court notes at the outset that, notwithstanding the statements taken from the applicant according to which she allegedly did not want the assistance of a lawyer (see paragraph 10 above), at the time of the applicant's police custody systemic restrictions were imposed on the right of access to a lawyer, pursuant to section 31 of Law no. 3842, of persons arrested in connection with an offence falling within the jurisdiction of the State Security Courts (see *Çimen v. Turkey*, no. 19582/02, § 21, 3 February 2009). Indeed, this can be seen from the arrest report of 6 March 2000 according to which she could only ask for legal representation if a judge extended her police custody or ordered her detention in a prison (see paragraph 6 above). The Court considers, therefore, that it would have been futile for the applicant to request the assistance of a lawyer in police custody or when she was brought before the prosecutor and the Magistrates' Court.

42. The Court reiterates the basic principles laid down in its judgment 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.

43. The Court considers that, even though the applicant denied the accuracy of the content of the statements taken from her in the absence of legal assistance (see paragraph 15 above), the trial court relied on those statements when convicting her (see paragraph 18 above).

44. Thus, the applicant in the present case was undoubtedly affected by the restrictions on her access to a lawyer in the course of her custody at the gendarmerie station. Therefore, neither the assistance provided subsequently by a lawyer not the adversarial nature of the ensuing proceedings could cure the defects which had occurred earlier.

45. In sum, the Court finds that the absence of a lawyer at the initial stages of the investigation irretrievably affected the applicant's defence rights.

46. Having regard to its conclusion under Article 3 of the Convention concerning the lack of an investigation into the applicant's allegations of ill-treatment, the Court does not deem it necessary to examine separately whether the use of evidence allegedly obtained in violation of Article 3 also impaired the fairness of the criminal proceedings against the applicant

47. There has therefore been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the applicant's inability to benefit from the assistance of legal counsel at the initial stages of the criminal proceedings.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

48. The applicant complained under Article 5 § 3 of the Convention that her family had not been informed about her arrest and detention in police custody. Furthermore, relying on Article 6 § 1 of the Convention, the applicant alleged that the trial court had wrongly considered that her name was mentioned in the statements of E.Ş. Finally, relying on Article 6 § 3 (d) of the Convention, the applicant complained that the trial court had failed to examine E.Ş. as a witness.

49. The Court has examined these complaints. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant claimed 22,000 Turkish liras (TRY) (approximately 11,500 euros (EUR)) in respect of pecuniary damage and TRY 50,000 (approximately EUR 26,200) in respect of non-pecuniary damage.

52. The Government considered that the applicant's claims were unsubstantiated and excessive.

53. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 7,000 in respect of non-pecuniary damage.

54. Furthermore, where the Court finds that an applicant has been convicted in criminal proceedings which were found to be in breach of Article 6 § 1 of the Convention, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant, as far as possible, be put in the position in which he or she would have been had this provision not been disregarded (see *Şirin v. Turkey*, no. 47328/99, § 30, 15 March 2005). The Court therefore considers that the most appropriate form of redress would be the re-trial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request (see, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003, and *Salduz*, cited above, § 72).

B. Costs and expenses

55. The applicant also claimed TRY 7,300 (approximately EUR 3,800) for the costs and expenses incurred before the domestic courts and TRY 16,500 (approximately EUR 8,600) for those incurred before the Court. She also claimed TRY 3,740 (approximately EUR 2,000) in respect of postal, translation and stationery expenses and the travel expenses incurred by her legal representative when he visited her in prison. In support of her claims for her legal representative's fees the applicant submitted to the Court a breakdown of the hours of work, showing that the legal representative had spent a total of 30 hours on the case.

56. The Government were of the opinion that the expenses incurred in the course of the domestic proceedings could not be claimed under the head

of just satisfaction. They also considered that the applicant's claims were unsubstantiated.

57. In response to the Government's arguments concerning the costs and expenses relating to the proceedings at the national level, the Court reiterates that, if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see *Société Colas Est and Others v. France*, no. 37971/97, § 56, ECHR 2002-III, and the cases cited therein). In the present case, before the domestic courts the applicant complained that she had been ill-treated. She also referred to her rights under the Convention and challenged the use of unlawfully obtained evidence against her. In the light of the foregoing, the Court considers that the applicant has a valid claim in respect of part of the costs and expenses incurred at the national level.

58. The Court considers that 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 were reasonable as to quantum. In the present case, regard being had to the information in its possession and to the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads.

C. Default interest

59. 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

1. *Declares* unanimously the complaints under Article 3 of the Convention, as well as the complaints under Article 6 of the Convention concerning the lack of legal assistance and the use of unlawfully obtained evidence in the proceedings, admissible, and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been a violation of Article 3 of the Convention in its procedural limb;

3. *Holds* unanimously that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, concerning the lack of legal assistance at the initial stages of the criminal proceedings;

4. *Holds* by five votes to two
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage,
      (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
   (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;

5. *Dismisses* unanimously the remainder of the applicant's 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

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Sajó and Karakaş is annexed to this judgment.

F.T.
S.D.

JOINT PARTLY DISSENTING OPINION OF JUDGES SAJÓ AND KARAKAŞ

(Translation)

We do not share the majority's opinion that there was a violation of Article 3 of the Convention in its procedural aspect in the present case.

The applicant did not produce any *prima facie* or other evidence in support of her allegations of treatment contrary to Article 3 of the Convention (see, for example, *Avcı v. Turkey* (dec.), no. 52900/99, 30 November 2004; *Kılıçgedik v. Turkey* (dec.), no. 55982/00, 1 June 2004; and *Jeong v. the Czech Republic* (dec.), no. 34140/03, 13 February 2007).

The sole medical report, drawn up on 9 March 2000, stated that there were no signs of assault or violence on her body. The applicant did not dispute the reliability of the report but alleged that she had been ill-treated after it had been drawn up, when she had been brought before the prosecutor attached to the Edirne Magistrates' Court and the judge of the same court who, later that day, had ordered her pre-trial detention.

As to whether or not there existed a cassette containing a recording of the questioning, the applicant's lawyer did not ask for the cassette to be produced in evidence before the Istanbul State Security Court until 2001, long after the second hearing. The Istanbul court refused the request on the ground that the cassette in question was not in the case file and there was no indication that it had been found in anyone's possession (*emanete alındığına dair bir kayıt olmadığı*). The majority attached a certain amount of weight to the Government's silence on this matter in their observations. However, although the Government did not mention the letters from the national authorities on the subject, documents supplied by the applicant's lawyer refer to the Government's request to be sent the cassette and to the replies from the gendarmerie, the public prosecutor and the trial court denying its existence; only the applicant's lawyer, in 2001, had ever claimed that it existed. None of the evidence at our disposal provides a conclusive answer as to whether or not this item was indeed real. Furthermore, there is no proof that at that time there was a practice in Turkey of recording police or gendarmerie questioning.

Allegations of ill-treatment must be supported by appropriate evidence (see *Güzel (Zeybek) v. Turkey*, no. 71908/01, § 68, 5 December 2006, and *Martínez Sala and Others v. Spain*, no. 58438/00 § 121, 2 November 2004).

In the present case we believe that the applicant did not produce conclusive evidence in support of her allegations of ill-treatment or any other material that could have given rise to a reasonable suspicion in that regard.

Accordingly, we consider that in the absence of an arguable complaint or a reasonable suspicion, Article 3 did not require the national authorities to

investigate the allegations of a breach of that Article (see, to similar effect, *Işık v. Turkey* (dec.), no. 35064/97, 2 September 2003, and *Yiğit v. Turkey* (dec.), no. 4260/02, 4262/02, 4271/02, 5 December 2006).