SECOND SECTION

CASE OF FİDANCI v. TURKEY

(Application no. 17730/07)

JUDGMENT

STRASBOURG

17 January 2012

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 Fidancı v. Turkey,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 13 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 17730/07) 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, Mr Mehmet Fidancı ("the applicant"), on 10 April 2007.

2. The applicant, who had been granted legal aid, was represented by Mr N. Özdemir, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") were represented by their Agent.

3. On 26 April 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1972 and lives in Diyarbakır.

A. The arrest and alleged ill-treatment of the applicant in police custody

5. The applicant alleges that he was taken into police custody on 24 March 2001. However, the arrest report signed by the applicant and the police custody records show that the applicant was arrested on 13 April 2001 on suspicion of membership of an illegal armed organisation, namely Hizbullah. When he was arrested, the applicant was in possession of a fake identity card.

6. Following his arrest, on 13 April 2001 the applicant was taken to the Diyarbakır State Hospital for medical examination. The doctor who examined the applicant reported that there were no signs of physical violence on his body. However, he noted the presence of certain old wounds under his armpits and old lesions under his left kneecap.

7. On 22 April 2001 the applicant was interrogated by the police in the absence of a lawyer. He gave a lengthy statement about his involvement in the armed wing of Hizbullah and admitted to being involved in several murders.

8. On 23 April 2001 the applicant was examined by a doctor at the Diyarbakır State Hospital, who noted that he had scabbed lesions between fifteen and twenty days old under his armpits and around his wrists.

9. Again on 23 April 2001, the applicant was further interrogated by the public prosecutor and the investigating judge, still in the absence of a lawyer. He was then remanded in custody on the order of the investigating judge.

10. On the same date, at the request of the Governor of the State of Emergency Region and the public prosecutor, pursuant to Article 3 (c) of Decree no. 430, which allowed them to take further measures in the context of the ongoing state of emergency, a single judge at the State Security Court authorised the applicant's relocation from prison to the anti-terrorism branch of the Diyarbakır Security Directorate for further interrogation for a period of ten days. This period was extended by the same court for an additional ten days on each of 3 May 2001, 9 May 2001, 19 May 2001 and 28 May 2001.

11. This procedure was repeated again on 2 July 2001, when, at the request of the Governor of the State of Emergency Region and the public prosecutor, pursuant to Article 3 (c) of Decree no. 430, a single judge at the State Security Court once again authorised the applicant's relocation from prison to the anti-terrorism branch of the Diyarbakır Security Directorate for interrogation for another period of ten days. This period was extended by the same court for an additional ten days on each of 12 July 2001, 22 July 2001 and 1 August 2001.

12. On 10 May, 28 May, 2 July, 12 July, 22 July, 1 August and 10 August 2001, the applicant was again examined by doctors who noted

that there were no new findings, except for the medical report of 1 August 2001 where the doctor noted two old wounds on the applicant's right leg.

13. On 28 January 2002 the applicant filed a complaint with the Diyarbakır Public Prosecutor and alleged that he had been ill-treated during his unacknowledged detention between 24 March and 13 April 2001.

14. On 6 February 2004 the Diyarbakır public prosecutor decided not to prosecute six police officers who had been involved in the applicant's arrest and detention on the grounds that there was insufficient evidence to support the applicant's allegations of ill-treatment. In his decision, the public prosecutor referred to the medical reports, which noted no signs of physical violence on the applicant's body. The public prosecutor further stated that the applicant's allegation regarding his unacknowledged detention between 24 March and 13 April 2001 was unsubstantiated.

15. On 31 March 2004 the Siverek Assize Court dismissed an objection filed by the applicant against this decision. Its decision was served on the applicant on 22 April 2004.

16. Subsequently, on 6 August 2007 the applicant lodged another complaint with the public prosecutor's office as regards the same allegations. On 23 August 2007 the Diyarbakır public prosecutor dismissed the applicant's complaint. On 17 October 2007 the Siverek Assize Court, noting its earlier decision of 31 March 2004 and the absence of any new evidence, dismissed the objection filed by the applicant against this decision.

17. A further complaint of ill-treatment made by the applicant regarding the same allegations was also dismissed by the Diyarbakır public prosecutor on an unspecified date in 2009 and by the Siverek Assize Court on 8 June 2009. In delivering a non-prosecution decision, the authorities stated that the complaint had already been examined in 2004 and that there was no new evidence in the file.

B. The criminal proceedings concerning the applicant

18. In 2001, the public prosecutor at the Diyarbakır State Security Court filed an indictment against the applicant accusing him of undermining the constitutional order of the State in breach of Article 146 of the Criminal Code. On 15 January 2002, 23 October 2003 and 12 May 2005 the public prosecutor filed additional indictments against the applicant, accusing him of taking part in the killing of seventeen people and of injuring eight others on behalf of Hizbullah.

19. On 13 January 2005 the Diyarbakır Assize Court convicted the applicant as charged. This decision was quashed by the Court of Cassation on 7 June 2005.

20. On 28 February 2008 the Diyarbakır Assize Court, after having examined the evidence in the case file, held that it had been established that

the applicant had taken part in the killings of Abdullah Ay, Ihsan Güneşli, Halis Güneşli, Hamit Fidancı, Kemal Türk, Mehmet Şah Tekalp, Müfit Ek and the wounding of Mehmet Elçi and Mesut Kadınan and convicted the applicant as charged. In its decision, the court, noting the absence of signs of ill-treatment in the applicant's medical reports, decided to take into account the statements made by the applicant to the police, which were, in its opinion, corroborated by the evidence in the case file.

21. On 7 July 2009 the Court of Cassation upheld the judgment of the first-instance court.

C. Investigation instigated into the applicant's complaint concerning the destruction of his medical reports

22. In the meantime, in 2008 the applicant asked the Diyarbakır State Hospital for a copy of his medical reports. He was informed, *inter alia*, that the hospital's archives had been flooded and that all medical reports dated between 1990 and 2004, including those of the applicant, had been destroyed. The applicant was advised to obtain copies of his medical reports from the relevant Security Directorate.

23. On 20 March 2009, following a complaint by the applicant, the Diyarbakır Provincial Administrative Council refused to open an investigation against six staff members of the Diyarbakır State Hospital on the ground that there was no indication of intent to destroy the applicant's medical records or of negligence on the part of the staff. On 29 April 2009 the Diyarbakır Regional Administrative Court dismissed an objection filed by the applicant and upheld this decision.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

24. The applicant complained under Article 3 of the Convention that he had been ill-treated during his alleged unacknowledged detention.

25. The Government maintained that the applicant had failed to comply with the six-month rule, as required by Article 35 § 1 of the Convention. In this respect, they stated that the final decision regarding the applicant's ill-treatment allegations had been delivered by the Siverek Assize Court on 31 March 2004, whereas the application was introduced with the Court on 10 April 2007.

26. The Court recalls that the six-month period under Article 35 § 1 begins to run on the day after the date on which the final domestic decision

was pronounced or communicated to the applicant or his lawyer or, where pursuant to domestic law and practice the applicant is automatically entitled to be served with a written copy of the judgment, from the date of receipt (see *Sincar v. Turkey* (dec.), no. 70835/01, 10 October 2002).

27. In the present case, the final domestic court decision regarding the merits of the applicant's ill-treatment complaint was delivered by the Siverek Assize Court on 31 March 2004. The Court observes that this decision was served on the applicant on 22 April 2004. Furthermore, the applicant's subsequent complaints, lodged in 2007 and 2009 respectively, were both rejected by the domestic courts in the absence of new evidence and with reference to their previous decisions and thus did not interrupt the running of the six-month time-limit.

28. The Court therefore concludes that for the purposes of Article 35 § 1 of the Convention, the six-month period should be calculated from 22 April 2004, the date on which the applicant was notified of the final decision of the Siverek Assize Court.

29. It follows that this part of the application has been introduced out of time and must be rejected under Article 35 §§ 1 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. The applicant complained that he had been denied a fair hearing as a result of the domestic courts' reliance on statements obtained from him under duress and in the absence of a lawyer during his detention in police custody. In this respect, he relied on Article 6 §§ 1 and 3 (c) of the Convention, which reads:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
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> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
>
> (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."

31. The Government contested the allegations.

32. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair

hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140).

33. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence - for example, evidence obtained unlawfully in terms of domestic law - may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where the violation of another Convention right is concerned, the nature of the violation found (see, among others, *Jalloh v. Germany* [GC], no. 54810/00, § 95, 11 July 2006).

34. The Court has already held that the use of evidence obtained in violation of Article 3 in criminal proceedings could infringe the fairness of such proceedings, even if the admission of such evidence was not decisive in securing the conviction (*Jalloh*, cited above, § 99, and *Söylemez v. Turkey*, no. 46661/99, § 23, 21 September 2006). It has further held that the absence of an Article 3 complaint does not preclude the Court from taking into consideration the applicant's allegations of ill-treatment for the purpose of determining compliance with the guarantees of Article 6 (see *Örs and Others v. Turkey*, no. 46213/99, § 60, 20 June 2006, and *Kolu v. Turkey*, no. 35811/97, § 54, 2 August 2005).

35. The Court observes that in the present case the applicant repeatedly alleged that he had been held in unacknowledged detention, during which time he had been subjected to ill-treatment. Nevertheless, he explained that he had not been subjected to ill-treatment during his police custody at the Diyarbakır Security Directorate.

36. The Court notes that the applicant's complaint raised under Article 3 of the Convention is to be declared inadmissible for non-compliance with the six-month time-limit (see paragraphs 24-29 above). Furthermore, regarding the applicant's contention that he had been held in unacknowledged detention between 24 March and 13 April 2001, the Court notes that this complaint was examined both by the Diyarbakır Public Prosecutor and by the Diyarbakır Assize Court but was found to be unsubstantiated. In its judgment dated 28 February 2008, the Diyarbakır Assize Court specifically referred to the applicant's request to have his police statements removed from the file. However, that court decided that they should remain in the file as there was no reason to conclude that the statements had been taken under duress (see, *a contrario*, *Desde v. Turkey*, no. 23909/03, § 130, 1 February 2011). Having regard to the above, the Court cannot conclude that the applicant's police statements, which were relied on by the trial court in convicting the applicant, were taken under duress as alleged by the applicant.

37. Nevertheless, the Court observes that it is not in dispute between the parties that the applicant was denied legal assistance during the custody period. The restriction imposed on the applicant's right of access to a lawyer was systemic and applied to anyone held in custody in connection with an offence falling under the jurisdiction of the State security courts (see *Salduz v. Turkey*, ([GC], no. 36391/02, §§ 56, 27 November 2008).

38. In this connection, the Court recalls that in its *Salduz* judgment (cited above, §§ 54-57), it underlined the importance of the investigation stage for the preparation of criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at trial. In order for the right to a fair hearing to remain sufficiently "practical and effective", Article 6 § 1 requires, as a rule, access to a lawyer as from the first interrogation of a suspect by the police, unless it is demonstrated in the specific circumstances of the particular case that there are compelling reasons to restrict this right. Having regard to the foregoing, the Court concludes that even though the applicant had the opportunity to challenge the evidence against him at trial and subsequently on appeal, the denial of legal assistance to the applicant while he was in police custody irretrievably affected his defence rights.

39. In view of the foregoing, the Court holds that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 in the present case.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

40. Under Article 5 § 3 of the Convention, the applicant complained about the length of his pre-trial detention. He further relied on Article 1 of Protocol No. 12 to the Convention and alleged that his medical records were destroyed due to the negligence of the staff of the Diyarbakır State Hospital, preventing him from proving his allegations of ill-treatment.

41. As regards the applicant's allegation raised under Article 5 § 3 of the Convention, the Court notes that the same complaint has already been examined by the Court in application no. 2635/08 (see *Yoldaş and others v. Turkey*, nos. 23706/07, 37912/07, 43801/07, 54514/07, 56503/07, 1033/08, 1522/08 and 2635/08, § 30, 15 March 2011). Consequently, this part of the present application is inadmissible in terms of Article 35 § 2 (b) of the Convention for being substantially the same as that examined in application no. 2635/08, and must be rejected pursuant to Article 35 § 4.

42. As regards the remaining complaint raised under Article 1 of Protocol No. 12, the Court considers that as the respondent State has not ratified Protocol No. 12, the applicant's complaint in this regard is incompatible *ratione personae* with the Convention and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage. He did not submit a separate claim in respect of costs and expenses.

44. The Government contested the claim.

45. The Court considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should he so request (see *Salduz*, cited above, § 72).

46. Furthermore, according to its relevant case-law and the documents in its possession, the Court also considers it reasonable to award the applicant the sum of EUR 1,800 in respect of non-pecuniary damage.

47. The Court considers it appropriate that the default interest rate 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 concerning the breach of the applicant's right to a fair hearing and to the exercise of his defence rights admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the lack of legal assistance afforded to the applicant while in police custody;

3. *Holds*

(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, EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Françoise Tulkens President