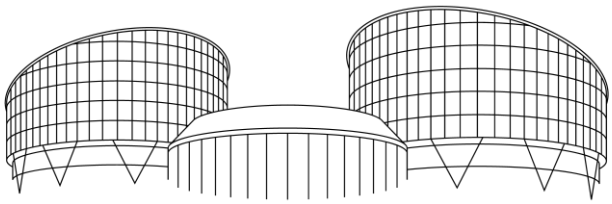

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF DAYANAN v. TURKEY

(Application no. 7377/03)

JUDGMENT

STRASBOURG

13 October 2009

FINAL

13/01/2010

This judgment may be subject to editorial revision.

In the case of Dayanan v. Turkey,

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Dragoljub Popović,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos, *judges,*
and Françoise Elens-Passos, *Deputy Section Registrar,*

Having deliberated in private on 22 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 7377/03) 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, Mr Seyfettin Dayanan ("the applicant"), on 8 January 2003.

2. The applicant was represented by Mr M. Özbekli, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") were represented by their Agent.

3. On 5 March 2008 the President of the Second Section decided to give notice of the application to the Government. As provided for by Article 29 § 3 of the Convention, it was also decided that the Chamber would rule on the admissibility and the merits at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1975.

5. On 30 January 2001, in the context of an operation carried out against the illegal armed organisation Hizbullah ("Party of God"), the applicant was arrested and taken into police custody.

6. The applicant signed a "form explaining the rights of arrested persons" and was notified of the charges against him. He was informed of

his right to remain silent and to see a lawyer at the end of the police custody period. The police questioned him. The applicant exercised his right to remain silent.

7. A search was carried out at the applicant's home. The police seized an audio-cassette. The transcript of the tape was worded as follows: "The tape is, for the most part, inaudible. There are incomprehensible speeches in Kurdish. It also contains songs, in which the word 'sharia' can be heard, but the sentences are also incomprehensible."

8. Throughout this period, the applicant continued to remain silent.

9. On 3 February 2001 the applicant was placed in pre-trial detention by a judge of the Siirt Police Court.

10. In an indictment dated 9 February 2001, the applicant and three other persons were charged with being members of Hizbullah by the public prosecutor at the Diyarbakır State Security Court. The latter called for the applicant's conviction on the basis of Article 168 § 2 of the Criminal Code.

11. The first hearing took place on 10 April 2001 before the Diyarbakir State Security Court ("the State Security Court"). The applicant, assisted by his lawyer, denied all the charges against him. He claimed that the audio-cassette seized from his home belonged to his mother and that he did not know what was on it.

12. At the hearing on 29 May 2001 the judges read out statements by five other persons charged in separate criminal proceedings concerning the same organisation, which named the applicant as one of the leading members of the organisation. The accused were also shown seized documents pertaining to the organisation. Counsel for the applicant addressed the court and argued that the elements constituting the offence had not been made out. He claimed that the applicant should be tried for aiding and abetting an illegal organisation on the basis of Article 169 of the Criminal Code, and not for belonging to such an organisation. He did not ask to call any witnesses.

13. During the hearings of 17 July, 11 September and 6 November 2001 the applicant's lawyer repeated his previous submissions and requested that his client benefit from the provisions of the Amnesty Act (Law no. 4616).

14. The applicant argued his case at the hearing of 4 December 2001. He claimed to have no ties with the organisation in question and asked to be acquitted. His lawyer also addressed the court and referred once again to the defence pleadings that he had filed during the trial, requesting, under Law no. 4616, a stay of the proceedings brought against his client.

15. At the end of the hearing, the State Security Court sentenced the applicant to twelve years and six months' imprisonment on the basis of Article 168 § 2 of the Criminal Code.

16. In support of its decision, the court took into account all the reports and documents in the case file. In particular, it gave consideration to the statements naming the applicant as one of the leading members of the organisation. It also based its decision on a document which showed the

applicant's position within the organisation. The court found it established, among other things, that the applicant was an active member of the organisation.

17. The applicant's lawyer lodged an appeal on points of law against the judgment of 4 December 2001 on behalf of his client.

18. On 18 March 2002 the Principal Public Prosecutor at the Court of Cassation submitted his opinion on the merits of the appeal. This opinion was not sent to either the applicant or his lawyer.

19. Following a hearing on 27 May 2002, the Court of Cassation upheld all the provisions of the impugned judgment. Its judgment was delivered on 29 May 2002 with neither the applicant nor his lawyer present.

20. On 19 August 2002 the full text of the Court of Cassation's judgment was added to the case file kept at the registry of the Diyarbakır State Security Court and was thus made available to the parties.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The relevant provisions of Turkish law can be found in, among other judgments, *Salduz v. Turkey* ([GC], no. 36391/02, §§ 27-31, 27 November 2008) and *Göç v. Turkey* ([GC], no. 36590/97, § 34, ECHR 2002-V).

THE LAW

22. Relying on Article 6 §§ 1 and 3 (c) of the Convention, the applicant complained that he had had no legal assistance while he was in police custody and that he had not been sent a copy of the opinion of the Principal Public Prosecutor at the Court of Cassation.

23. The Government pleaded failure to comply with the six-month time-limit, referring to the date on which the final domestic decision had been taken (29 May 2002), and the date on which the application had been lodged (8 January 2003). Furthermore, they contended that the applicant had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention, as he had failed to raise, even in substance, his complaints under Article 6 §§ 1 and 3 (c) in the national courts.

24. With regard to the six-month rule, the Court refers to its case-law according to which, where an applicant is entitled to be served automatically with a written copy of the final domestic decision, the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written judgment (see *Worm v. Austria*, 29 August 1997, § 33, *Reports of Judgments and Decisions* 1997-V). Where the domestic law does not provide for service, however, the Court considers it appropriate to take the date the decision was

finalised as the starting-point, that being when the parties were definitely able to find out its content (see, *mutatis mutandis*, *Papachelas v. Greece* [GC], no. 31423/96, § 30, ECHR 1999-II, and *Seher Karataş v. Turkey* (dec.), no. 33179/96, 9 July 2002).

25. In the present case the Court notes that, at the material time, Court of Cassation judgments in criminal proceedings were not served on the parties. The latter could be informed only after the decision had been deposited with the registry of the first-instance court and/or an order to enforce the sentence had been served.

26. In the applicant's case, the judgment of 29 May 2002 by the Court of Cassation, which was the final domestic decision, was not served on him or his counsel. On 19 August 2002 the text of the judgment was added to the case file kept at the registry of the Diyarbakır State Security Court and was made available to the parties. The six-month period thus started to run on 19 August 2002. Since the application was lodged less than six months after that date, the Government's objection must be dismissed.

27. With regard to the alleged failure to exhaust domestic remedies the Court observes that, when he was in police custody, the applicant's right to be assisted by a lawyer had been restricted under section 31 of Law no. 3842 on the ground that he was accused of an offence that fell within the jurisdiction of the State Security Courts. Furthermore, the Court notes that the practice of not communicating the opinion of the Principal Public Prosecutor was also in accordance with the legislation in force. Consequently, the Government's objection cannot be upheld.

28. The Court notes that the applicant's complaints under Article 6 §§ 1 and 3 (c) of the Convention 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.

29. With regard to the merits of the case, the Government pointed out that the applicant had exercised his right to remain silent while in police custody and that the absence of a lawyer had therefore in no way affected the observance of his defence rights. As to the complaint that the opinion of the Principal Public Prosecutor at the Court of Cassation had not been sent to the applicant, the Government referred to their observations in *Göç* (cited above, § 54).

30. In relation to the absence of legal assistance in police custody, the Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Salduz*, cited above, § 51; *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A; and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008).

31. The Court is of the view that the fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should

be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention.

32. In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its case-law, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned (for the relevant international legal materials see *Salduz*, cited above, §§ 37-44). Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.

33. In the present case it is not disputed that the applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see *Salduz*, cited above, §§ 27 and 28). A systematic restriction of this kind, on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found, notwithstanding the fact that the applicant remained silent when questioned in police custody.

34. Accordingly, the Court finds that there has been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1.

35. As to the failure to send the applicant a copy of the opinion of the Principal Public Prosecutor at the Court of Cassation, the Court observes that it previously examined a complaint identical to that of the applicant and concluded that, in view of the nature of the prosecutor's observations and the inability of the party in question to respond to them in writing, the non-communication of the opinion of the Principal Public Prosecutor at the Court of Cassation violated Article 6 § 1 (see *Göç v. Turkey* [GC], no. 36590/97, § 55, ECHR 2002-V). Having examined the present case and the submissions of both parties, the Court finds that the Government have failed to provide any convincing facts or arguments capable of justifying a different conclusion on this occasion.

36. Accordingly, the Court considers that the applicant's right to an adversarial procedure was breached. There has therefore been a violation of Article 6 § 1 of the Convention.

37. The applicant further complained of not having been informed of the reasons for his arrest and of the charge against him. He claimed that he had not had adequate facilities for the preparation of his defence (6 § 3 (b)) and that he had not been able to examine the prosecution witnesses (6 § 3 (d)). He further complained of the fact that the prosecution had used the police transcript from the audio-cassette found at his home as evidence, without having an independent expert examine its authenticity.

38. The Court has examined the applicant's complaints as they were submitted (paragraph 37). Having regard to all the elements in its possession, it does not find any appearance of a breach of the rights and freedoms guaranteed by the Convention. The complaints are therefore manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

39. The matter of the application of Article 41 of the Convention remains. The applicant claimed 20,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

40. The Government contested these claims.

41. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim.

42. On the other hand, ruling on an equitable basis, it awards the applicant EUR 1,000 in respect of non-pecuniary damage.

43. 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 application admissible in respect of the complaints concerning the lack of legal assistance while the applicant was in police custody and the lack of prior communication to the applicant of the submissions of the Principal Public Prosecutor at the Court of Cassation, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention taken in conjunction with Article 6 § 1 on account of the fact that the applicant did not have any legal assistance while in police custody;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the non-communication to the applicant, before the Court of Cassation, of the written submissions of the Principal Public Prosecutor;

4. *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 1,000 (one thousand 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;

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

Done in French, and notified in writing on 13 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President