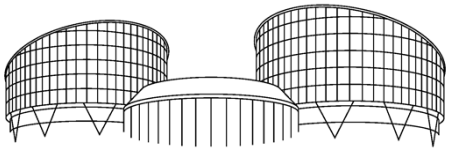

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF PERVANE v. TURKEY

(Application no. 74553/11)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Defence through legal assistance • Systemic restriction to right of access to a lawyer at pre-trial stage • No compelling reasons for restriction • Very strict scrutiny • Overall fairness of criminal proceedings not impaired

STRASBOURG

8 September 2020

FINAL

08/12/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Pervane v. Turkey,

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Saadet Yüksel,
Peeter Roosma, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to:

the application (no. 74553/11) 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 Fırat Pervane ("the applicant"), on 14 October 2011;

the decision to give notice of the application to the Turkish Government ("the Government");

the parties' observations;

Having deliberated in private on 30 June 2020,

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

THE FACTS

1. The applicant was born in 1979 and is detained in Diyarbakır prison. The applicant was represented by Ms Z. Turhallı, a lawyer practising in Paris.

2. The Government were represented by their Agent.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. On 12 November 1999 a clash broke out between the members of the PKK (Workers' Party of Kurdistan, an illegal armed organisation) and the security forces in Kurtalan as a result of which ten PKK members were killed and fourteen others, including five injured, were captured with their weapons and arrested. The applicant was amongst the injured PKK members and was arrested while in possession of a Kalashnikov rifle.

5. On 13 November 1999 Kurtalan magistrate's court ordered the applicant's detention on remand *in absentia* given that he had been hospitalised as he had been injured during the clash with the security forces.

6. On 14 November 1999 a single judge at the Diyarbakır State Security Court read out the order about his detention to him and he was taken to Diyarbakır D-Type Prison.

7. On 15 December 1999 the applicant made statements to the police in the absence of a lawyer, explaining how he had joined the PKK. The

applicant did not give any statement regarding the incidents that took place on 12 November 1999.

8. On 24 December 1999 the applicant made statements to the public prosecutor in the absence of a lawyer, reiterating the statements that he had made to the police. He added, however, that on the night of the armed clash he had been sleeping in the fields around Kurtalan, and had woken up to the sound of gunfire. Subsequently, he had been wounded in his arm and back and had lost consciousness. The applicant further stated that he had been carrying a Kalashnikov rifle with him, but asserted that he had not taken part in any armed act and that, in any event, he would have surrendered regardless of having been captured by the security forces.

9. On 6 January 2000 the public prosecutor at the Diyarbakır State Security Court filed an indictment with that court, charging the applicant together with other individuals, under Article 125 of the former Criminal Code, with seeking to destroy the unity of the Turkish State and to remove part of the country from the State's control.

10. During the trial, the applicant was represented by his defence counsel.

11. At a hearing held on 2 May 2000 the applicant gave evidence before the Diyarbakır State Security Court and, while confirming the information about his background and his involvement in the illegal organisation, he once again claimed that he had been wounded while sleeping at the scene of the incident with a Kalashnikov rifle he had taken from a female member who had not been able to carry it. As a result, he claimed that he had not used it during the clash.

12. The applicant's defence counsel frequently submitted that his actions, as they had been explained by him, had merely constituted the offence of membership of an illegal organisation and requested that he be released pending trial.

13. On 27 October 2009 Diyarbakır Assize Court found the applicant guilty under Article 125 of the then Criminal Code and sentenced him to life imprisonment. The trial court rejected the applicant's submission that he had not committed any armed act, holding that he had been present at the scene of the incident with a rifle and formed part of the group of terrorists who had had an armed clash with the security forces. As a result, the trial court found him criminally responsible for the armed clash, which constituted the material element of the offence prescribed under Article 125 of the then Criminal Code. In the part entitled "general assessment regarding the applicant" the trial court referred to the available information regarding the applicant's involvement in the PKK, which appears to have been mentioned by him during both the preliminary investigation stage and the trial.

14. The applicant's lawyer appealed and the Court of Cassation upheld the judgment.

RELEVANT LEGAL FRAMEWORK

15. The relevant provisions of the former Code of Criminal Procedure (Law no. 1412), namely Articles 135, 136 and 138, provided that anyone suspected or accused of a criminal offence had a right of access to a lawyer from the moment he or she was taken into police custody. In accordance with section 31 of Law no. 3842 of 18 November 1992, which amended the legislation on criminal procedure, the above-mentioned provisions were not applicable to persons accused of offences falling within the jurisdiction of the State Security Courts. On 15 July 2003, by virtue of Law no. 4928, the restriction on an accused's right of access to a lawyer in proceedings before the State Security Courts was lifted (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 27-29, ECHR 2008).

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (C) OF THE CONVENTION

16. The applicant complained of a violation of Article 6 § 3 (c) of the Convention, arguing that he had not been able to benefit from the assistance of a lawyer when making statements during the preliminary investigation stage, which had later been relied upon by the trial court to convict him. The Court will examine his complaints under Article 6 §§ 1 and 3 (c), which, in so far as relevant, provides:

> "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."

A. Admissibility

17. The Government pleaded non-exhaustion of domestic remedies, arguing that the applicant had failed to raise before the Court of Cassation his complaint that the statements he had made during the preliminary investigation stage and in the absence of a lawyer had been used to convict him. Thus, they invited the Court to declare the application inadmissible due to the applicant's failure to exhaust domestic remedies.

18. The applicant did not comment on this issue.

19. The Court reiterates that it has already examined and rejected identical objections from the Government (see, among others, *Halil Kaya v. Turkey*, no. 22922/03, §§ 13-14, 22 September 2009). There being no reason to depart from its jurisprudence, the Court dismisses the Government's preliminary objection.

20. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

21. The applicant alleged that he had been deprived of legal assistance during the pre-trial stage and that his statements taken in the absence of a lawyer had been used by the trial court to convict him.

22. The Government submitted that the present case differed from the *Salduz* case (cited above) in that the overall fairness of the criminal proceedings against the applicant had not been prejudiced by the absence of a lawyer. First of all, although the applicant was represented by a defence counsel during the trial, he had not retracted the statements he had made in the absence of a lawyer, instead he reiterated them. In that connection, the Government pointed out that throughout the trial the applicant consistently admitted to being a member of the organisation and carrying a weapon with him at the time of the clash after which he was arrested, while at the same time denying that he had carried out an armed act.

Nevertheless, the applicant's arrest in an injured state immediately after the operation conducted against the illegal armed organisation had constituted a case of discovery in *flagrante delicto*. For this reason, the Government were of the opinion that the applicant's statement taken at the investigation stage in the absence of his lawyer did not have any decisive effect on his conviction. This was further evidenced by the line of reasoning adopted by the trial court, which relied on the fact that the applicant had been captured with his rifle and together with the other PKK members who had clashed with the security forces. Thus, the Government invited the Court to find that there has been no violation of the applicant's right to a fair trial.

2. The Court's assessment

(a) General principles

23. The general principles with regard to access to a lawyer, the right to remain silent, the privilege against self-incrimination, and the relationship of those rights with the overall fairness of the proceedings under the

criminal limb of Article 6 of the Convention can be found in *Beuze v. Belgium* ([GC], no. 71409/10, §§ 119-50, 9 November 2018), and *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, §§ 249-74, 13 September 2016).

(b) Application of the general principles to the facts of the case

(i) Whether there was a restriction on the right to a lawyer

24. The Court notes that the applicant's access to a lawyer was restricted by virtue of Law No. 3842 and was, as such, a systemic restriction applicable at the time of the applicant's arrest (see *Salduz*, cited above, § 56, and *Bayram Koç v. Turkey*, no. 38907/09, § 23, 5 September 2017). As a result, the applicant did not have access to a lawyer during the pre-trial stage.

(ii) Whether there were compelling reasons for the restriction

25. The Court reiterates that restrictions on access to a lawyer for compelling reasons, at the pre-trial stage, are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. Reiterating that the existence of exceptional circumstances which satisfy the substantive requirement of compelling reasons does not automatically provide adequate justification for limiting suspects' access to legal advice, the Court notes that a statutory restriction of the kind described in the above paragraph, which excludes any individual assessment, cannot stand up to scrutiny in relation to the procedural requirements of the concept of "compelling reasons" (see *Beuze*, cited above, § 138). Hence, the Court considers that there were no compelling reasons to restrict the applicant's right to a lawyer while in police custody.

(iii) Fairness of the proceedings as a whole

26. When there are no compelling reasons for restricting the applicant's right to a lawyer during the pre-trial stage, the Court must apply very strict scrutiny to its fairness assessment (see *Beuze*, cited above, § 165). The burden of proof thus falls on the Government, which must demonstrate convincingly that the applicant nevertheless had a fair trial as a whole. The Government's inability to establish compelling reasons weighs heavily in the balance, and the balance may thus be tipped towards finding a violation of Article 6 §§ 1 and 3 (c).

27. The Court observes firstly that it is not disputed between the parties that the applicant was injured during the clash between the PKK members and the security forces which resulted in the killing of ten PKK members and the arrest of fourteen others. Similarly, it has not been disputed that the

applicant was arrested immediately thereafter with a Kalashnikov rifle in his possession, along with other PKK members, who were also arrested with arms and cartridges. Whilst the applicant denied having committed any "armed act", a crucial element for his conviction under Article 125 of the then Criminal Code, he admitted throughout the proceedings that he had been a member of the PKK.

28. In view of the above, the legal question before the Court is whether the overall fairness of the criminal proceedings were prejudiced by virtue of the use of the statements the applicant had made in the absence of a lawyer for his conviction.

29. As to the above circumstances giving rise to the applicant's arrest, the Court agrees with the Government that they should be considered as an instance of *in flagrante delicto*, a factor to be weighed in assessing the overall fairness of the proceedings.

30. The Court further observes that although the applicant made incriminatory statements in the absence of a lawyer during the pre-trial stage as to his involvement in the PKK, he at no stage of the proceedings accepted that he had committed an armed act during the clash. As a result, the argument that the applicant's conviction under Article 125 of the then Criminal Code in so far as it concerned his committing an armed act rested on the statements he had made in the absence of a lawyer cannot stand up to scrutiny. Indeed, as can be seen from the trial court's reasoned judgment, its conclusion that the applicant had done so stemmed from the fact that he had been arrested in an injured state with a Kalashnikov rifle following an armed clash with the security forces. In other words, the trial court did not rely on the statements the applicant had made in the absence of a lawyer to establish his criminal responsibility for the armed clash (compare *Mehmet Ali Eser v. Turkey*, no. 1399/07, §§ 52-60, 15 October 2019, where the Court considered that the applicant's silence throughout the statements he had made during the preliminary investigation stage was not such as to prejudice the overall fairness of the proceedings against him).

31. Therefore, the Court cannot conclude that the use of the applicant's statements taken in the absence of a lawyer for his conviction under Article 125 of the Convention irretrievably prejudiced the overall fairness of the proceedings against him. The fact that the trial court appears to have relied on the part of the applicant's statements relating to his involvement in the PKK in its general assessment of the applicant does not alter that finding in the light, in particular, of the fact that he had at no stage of the proceedings denied his involvement in the PKK (compare *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, §§ 57-73, 28 January 2020 where the applicant's change of position vis-à-vis his earlier statements concerning the accusations against him necessitated the effective operation of the procedural safeguards by the domestic courts with a view to remedying the

prejudice stemming from the systemic restriction on the applicant's right to a lawyer).

32. In view of the above, although very strict scrutiny is to be applied to cases where there are no compelling reasons to restrict an applicant's right to a lawyer, the Court considers that the Government have discharged the burden of demonstrating convincingly that the overall fairness of the criminal proceedings against the applicant were not prejudiced by the systemic restriction on his right to a lawyer during the preliminary investigation stage (see, *mutatis mutandis, Moroz v. Ukraine*, no. 5187/07, § 72, 2 March 2017; *a contrario*, *Aras v. Turkey* (no.2), 15065/07, §§ 36-42, 18 November 2014).

33. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

Done in English, and notified in writing on 8 September 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Jon Fridrik Kjølbro
Deputy Registrar	President