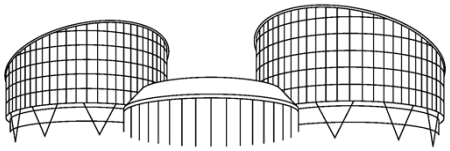

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MEHMET ALİ ESER v. TURKEY

(Application no. 1399/07)

JUDGMENT

STRASBOURG

15 October 2019

FINAL

15/01/2020

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

In the case of Mehmet Ali Eser v. Turkey,

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

Robert Spano, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Arnfinn Bårdsen,
Darian Pavli,
Saadet Yüksel, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 10 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 1399/07) 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 Ali Eser ("the applicant"), on 6 January 2007.

2. The applicant was represented by Mrs G. Altay, a lawyer practising in Istanbul. The Turkish Government were represented by their Agent.

3. The applicant complained under Article 6 §§ 1 and 3 of the Convention, in particular, of the restrictions on his right of access to a lawyer while in police custody and the use by the trial court of statements that he had allegedly given under coercion. He further alleged, under Article 3 of the Convention, that he had been subjected to ill-treatment while in police custody.

4. On 27 May 2015 notice of the above complaints was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. On 7 October 2016 the Vice-President of the Second Section invited the Government to submit further observations, if they so wished, following the judgment in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, 13 September 2016).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1958 and lives in Istanbul.

7. On 5 August 1997 the applicant, who was in possession of fake identity papers in the name of Kenan İnci, was arrested in the course of a

police operation against an illegal armed organisation, namely TKP-ML/TIKKO (Communist Party of Turkey/Marxist-Leninist/Turkish Workers and Peasants' Liberation Army) in a house belonging to A.Ö. The police also arrested A.Ö. and M.Y. in that same house.

8. According to the arrest record dated 5 August 1997, which was signed by A.Ö., M.Y. and the police officers, 1,100 German Marks were found on the applicant. Furthermore, the police found in the house, *inter alia*, an issue of the journal "*Komünist*" (which, according to the Government, was a central publishing body within the illegal organisation), forged registration certificates for two cars, and mobile telephones. The applicant refused to sign the arrest record.

9. The applicant was taken to the police station for questioning. A record was issued by the police on 8 August 1997, indicating, *inter alia*, that the applicant had been arrested on suspicion of being a member of the TKP-ML/TIKKO while in possession of a fake identity card, and that he had remained silent when questioned. The applicant did not have any legal assistance and was allegedly subjected to torture while held in police custody, which lasted seven days.

10. On 8 August 1997, Z.Ş., who was among the accused in the same case as the applicant, gave detailed self-incriminating statements to the police, in which he stated that he was a member of the TKP-ML/TIKKO and that he had stolen cars for the organisation with K.T. and Ö.K. on the instructions of the applicant, whom he had known by the name Bedrettin.

11. On 9 August 1997 the applicant underwent a medical examination. The doctor issued an interim medical report which concluded that no signs of ill-treatment had been found on his body. However, it was recommended in the report that the applicant also be examined by a urologist.

12. On an unknown date, another interim medical report was drawn up in respect of the applicant by the urology department. That report indicated that the applicant's left testicle might have been subjected to trauma. The report lastly indicated that the applicant would receive a medical follow-up.

13. On 12 August 1997 a final medical report was drawn up by the State Security Court branch of the Forensic Medicine Institute. The report noted the applicant's complaint that he had pain in his testicles but stated that there were no signs of injury on the applicant's body.

14. On the same day, the applicant was examined by the public prosecutor, in the absence of a lawyer. The applicant denied the accusations against him and maintained that he had chosen to remain silent while in police custody since he had been ill-treated by the police. The applicant further stated that he had been convicted of membership of the TKP-ML/TIKKO in 1980 and served his sentence, and that after his release in 1986 he had not rejoined the illegal organisation. He also stated that after his release from prison and while working as a manager of a publishing company, he had been taken into police custody and then released on five or

six occasions and that he had been ill-treated by the police several times while in their custody. The applicant argued that he had subsequently used a fake identification card in order to avoid being taken into police custody again.

15. On the same day, the applicant was examined by an investigating judge of the Istanbul State Security Court, again in the absence of a lawyer. During the interview, the applicant confirmed that his statements as made to the public prosecutor were correct. He further stated that since he had been subjected to inhuman treatment while in police custody, he had gone on hunger strike and he had exercised his right to remain silent. Lastly, the applicant denied the content of an identification record signed by another suspect, Z.Ş., which included statements incriminating him, submitting that he did not know Z.Ş. Following his questioning, the investigating judge ordered that the applicant be held on remand.

16. During the preliminary investigation stage Z.Ş. remained silent before the prosecutor, and denied the statements that he had given to the police when appearing before the investigating judge.

17. On 22 August 1997 the public prosecutor at the Istanbul State Security Court filed an indictment with that court, charging the applicant with membership of the illegal armed organisation TKP/ML TİKKO.

18. In the course of the proceedings the applicant denied the accusations against him and reiterated that he had been tortured by the police. He maintained that he had sustained injuries to his stomach and testicles while in police custody.

19. During the proceedings, Z.Ş. denied his statements as given to the police in part, alleging that he had been tortured while in police custody. However, he stated that he had committed car theft with K.T. and Ö.K. on behalf of the illegal organisation and that he knew the applicant by another name, Bedrettin.

20. On 30 April 2003 Istanbul State Security Court found the applicant guilty as charged, and convicted him under Article 168 of the former Criminal Code, Law no. 765, of membership of an illegal organisation, namely the TKP/ML-TIKKO. The trial court found that the applicant had engaged in the activities of the illegal organisation on the basis of, in so far as relevant to the case before the Court, his arrest in possession of a fake identity card; the documents related to the organisation, the forged traffic documents and vehicle registration certificates that had been seized from the house where he had been arrested; and the statements of his co-accused, Z.Ş.

21. On 23 July 2003 a lawyer representing the applicant lodged an appeal against the judgment. In the appeal, the applicant denied the accusations against him, arguing that the people who had testified against him had been tortured at the police station. He further stated that he had refused to give any statements to the police since he had been under duress.

22. On 12 April 2004 the Court of Cassation quashed the judgment of 30 April 2003 on the ground that the certified copies of the statements taken from İ.S., H.M., İ.B., E.E., M.G. and M.P. at various stages of the proceedings were not included in the case file.

23. On 21 May 2008 the Istanbul Assize Court convicted the applicant under Article 314 § 2 of the Criminal Code of membership of an illegal organisation, namely the TKP/ML-TIKKO and sentenced him to imprisonment for six years and three months. The trial court found that the applicant had engaged in the activities of the illegal organisation on the basis of, in so far as relevant to the case before the Court, the applicant's arrest in possession of a fake identity card; the documents related to the organisation and the forged car registration certificates that had been seized from the house in which he had been arrested; and the statements of his co-accused, Z.Ş.

24. In its reasoned decision the trial court stated, *inter alia*:

> "... Although the accused [the applicant] did not admit having committed the offence imputed to him during the preliminary investigation stage and denied the accusations throughout the proceedings, the accused is found to be a member of the illegal organisation TKP/ML-TIKKO on the basis of the arrest report, the fake identity card and the expert report drawn up in respect of it, the statements of Z.Ş. and the case file as a whole ..."

25. The applicant's lawyer lodged an appeal against the judgment of 21 May 2008 by means of a petition dated 28 May 2008. In the petition the applicant's lawyer stated that she intended to submit a further appeal petition containing the arguments of the defence, once they had been served with the reasoned judgment. However, there is nothing in the case file showing that the applicant or his lawyer actually submitted another appeal petition to the domestic authorities.

26. On 13 July 2009 the Court of Cassation upheld the judgment. It did not assess the applicant's allegations of torture and ill-treatment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. 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. Under 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

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

28. The applicant complained under Article 3 of the Convention that he had been subjected to ill-treatment during his police custody.

29. The Government argued that this complaint should be declared inadmissible on account of the applicant's failure to comply with the admissibility conditions contained in Article 35 § 1 of the Convention. Specifically, the Government stated that the applicant had failed to comply with the six-month rule. In their view, the fact that the authorities were not going to take any action in respect of his ill-treatment allegation must have become gradually apparent to the applicant before the decision of the Court of Cassation of 12 April 2004.

30. The Court observes that the applicant raised his allegations of ill-treatment before the public prosecutor and the investigating judge at the pre-trial stage, and before the trial court during the criminal proceedings. However, the judicial authorities did not take any action regarding the applicant's allegations. The State Security Court made no mention of the applicant's allegations in its interlocutory decisions during the proceedings. Nor did it assess those allegations in its reasoned judgment of 30 April 2003. Moreover, although the applicant repeated his allegations before the Court of Cassation, the matter was not addressed by that court either.

31. In the particular circumstances of the present case, the Court considers that the failure of the judicial authorities to act must have become gradually apparent to the applicant in the period up until 30 April 2003, that is to say the date on which the Istanbul State Security Court rendered its judgment without addressing the matter. In any event, the applicant must have become aware of the ineffectiveness of the remedies available in domestic law at the latest by 12 April 2004, when the Court of Cassation quashed the judgment of 30 April 2003 without assessing the applicant's allegation of ill-treatment. Accordingly, the six-month period provided for in Article 35 of the Convention should be considered as having started running by no later than 12 April 2004. This complaint should therefore have been lodged with the Court no later than October 2004, whereas it was in fact lodged on 6 January 2007 (see *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003, and compare *Ahmet Engin Şatır v. Turkey*, no. 17879/04, §§ 35-36, 1 December 2009, and *Mehmet Duman v. Turkey*, no. 38740/09, §§ 50-53, 23 October 2018).

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

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

33. The applicant complained that his right to a fair trial, guaranteed by Article 6 of the Convention, had been infringed by the use of statements extracted from him by means of coercion while in police custody, during which time he had been denied access to a lawyer. He further complained that he had been denied access to a lawyer during the preliminary investigation stage and that his statements taken in the absence of a lawyer had been used by the trial court. The Court considers that these complaints should be examined under Article 6 §§ 1 and 3 (c) of the Convention, of which the relevant parts read 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 ..."

34. The Government contested the applicant's claims.

A. Alleged use of statements obtained from the applicant by coercion while in police custody

35. The applicant alleged that his statements taken in the absence of a lawyer and allegedly by means of coercion while in police custody, had been used by the trial court to convict him.

36. The Government submitted that the present case differed from *Özcan Çolak v. Turkey* (no. 30235/03, 6 October 2009), as the applicant had exercised his right to remain silent and had not given any statements to the police while in police custody.

37. The Court's established case-law regarding the use of evidence obtained under circumstances which may give rise to an arguable claim under Article 3 in criminal proceedings can be found in *Örs and Others v. Turkey* (no. 46213/99, § 60, 20 June 2006), *Özcan Çolak v. Turkey* (cited above, §§ 41-50), and *Gäfgen v. Germany* ([GC], no. 22978/05, § 166, ECHR 2010).

38. The Court observes that, in the instant case, the applicant was arrested on 5 August 1997, and transferred to the police station where he remained in custody until 12 August 1997. The Court further observes that the applicant underwent three medical examinations during this time and, although two medical reports (of 9 and 12 August 1997) revealed no signs of ill-treatment, the medical report drawn up by the urology department

indicated that the applicant's left testicle might have been subjected to trauma.

39. The Court also notes that while in police custody the applicant remained silent and did not give any statements to the police. Later on, when the applicant was examined by the public prosecutor, in the absence of a lawyer, he denied the accusations against him and stated that he had chosen to remain silent during his time in police custody as a result of the ill-treatment that he alleged had been inflicted on him by the police. Finally, when the applicant was examined before an investigating judge of the Istanbul State Security Court, again in the absence of a lawyer, the applicant indicated that his statements as made to the public prosecutor had been correct.

40. 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 (see *Özcan Çolak*, cited above, § 43; *Jalloh v. Germany* [GC], no. 54810/00, § 99, ECHR 2006-IX, and *Söylemez v. Turkey*, no. 46661/99, § 23, 21 September 2006). The Court further reiterates that the absence of an admissible Article 3 complaint does not, in principle, preclude it from taking into consideration the applicant's allegations that the statements made before the police had been obtained using methods of coercion or oppression and that their admission to the case file, relied upon by the trial court, therefore constituted a violation of the fair trial guarantee of Article 6 (see *Aydın Çetinkaya v. Turkey*, no. 2082/05, § 104, 2 February 2016).

41. Notwithstanding the absence of an admissible Article 3 complaint in the instant case, the Court is mindful of the serious nature of the indications contained in the urology department's undated report. However, the Court observes, for the purposes of its examination under Article 6 of the Convention, that no evidence was obtained against the applicant while he was held in custody, as he remained silent during that period (see, *a contrario*, *Özcan Çolak*, cited above, § 43, and *Aydın Çetinkaya*, cited above, § 105). Thus, no statements obtained by coercion were in fact used in the applicant's conviction.

42. In the light of the foregoing, the Court finds that this complaint should be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Access to a lawyer during the preliminary investigation stage

1. Admissibility

43. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

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

45. The Government submitted that the present case differed from *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008), on the grounds that the overall fairness of the applicant's trial had not been prejudiced by the absence of a lawyer. The Government pointed in this regard to the fact that the applicant had not made any self-incriminating statements to the police as he had exercised his right to remain silent during his time in police custody, and to the fact that he had denied the accusations against him before the public prosecutor and investigating judge at the preliminary investigation stage.

46. The Government further commented that the trial court had explicitly stated that the applicant had denied having committed the offences imputed to him both during the preliminary investigation stage and throughout the proceedings and that it had not relied on the statements taken from the applicant in the absence of a lawyer for his conviction, but had relied on other evidentiary elements.

(b) The Court's assessment

(i) General principles

47. 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).

(ii) Application to the present case

(α) Existence and extent of the restrictions

48. 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 preliminary investigation stage.

(β) Whether there were "compelling reasons" to restrict access to a lawyer

49. 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. There was clearly no such individual assessment in the present case, as the restriction was one of a general and mandatory nature (see *Beuze*, cited above, §§ 142 and 161).

50. The Court notes that the Government have failed to demonstrate the existence of any exceptional circumstances which could have justified the restrictions on the applicant's right, and it is not for the Court to ascertain such circumstances of its own motion (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 130, 12 May 2017, and *Beuze*, cited above, § 163).

51. As a result, the restrictions in question were not justified by any compelling reason.

(γ) The fairness of the proceedings as a whole

52. In such circumstances, the Court must apply very strict scrutiny to its fairness assessment, especially where there are statutory restrictions of a general and mandatory nature. More importantly, the onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to a lawyer (see *Beuze*, cited above, § 145, and *Ibrahim and Others*, cited above, § 265).

53. In the course of this exercise, the Court will examine, to the extent that they are relevant in the present case, the various factors deriving from its case-law (see *Beuze*, cited above, § 150, and *Ibrahim and Others*, cited above, § 274).

54. Firstly, the Court notes again that the applicant exercised his right to remain silent and did not give any statements to the police while in their custody. Moreover, according to the trial court, the statements given by the applicant before the public prosecutor and the investigating judge did not contain any confessions. The Government also took that position.

55. The Court reiterates that the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position (see *Schmid-Laffer v. Switzerland*, no. 41269/08, § 37, 16 June 2015; *A.T. v. Luxembourg*, no. 30460/13, § 72, 9 April 2015; and *Beuze*, cited above, § 178).

56. In the present case, the Court observes that the applicant remained silent while in police custody and no inference was drawn against the applicant by the trial court as a result of that silence (see, *a contrario*, *John*

Murray v. the United Kingdom, 8 February 1996, §§ 59-70, *Reports of Judgments and Decisions* 1996-I). He gave statements only before the public prosecutor and the investigating judge, both times in the absence of a lawyer, and in those statements he denied all the accusations against him. Those statements were never retracted. Furthermore, the applicant did not change his version of events either during the pre-trial stage or in the course of the criminal proceedings (see, *a contrario*, *Beuze*, cited above, § 179). Accordingly, there was no inconsistency noted by the trial court in the applicant's pre-trial statements or his statements given in the course of the criminal proceedings (see, *mutatis mutandis*, *Faruggia v. Malta*, no. 63041/13, § 118, 4 June 2019). On the contrary, the trial court stated in its reasoned judgment that the applicant's defence, as argued before it, was in line with his pre-trial statements.

57. As a result, the Court is of the view that there is nothing in the case file showing that the statements taken from the applicant in the absence of a lawyer at the pre-trial stage of the proceedings substantially affected his position. Nor did the applicant argue otherwise before the Court.

58. Similarly, the Court observes that the trial court, in its reasoned judgment, relied on the arrest report, the fake identity card seized from the applicant, the statements of Z.Ş., and the case file as a whole, to convict the applicant, while noting that the applicant had denied the accusations against him throughout the proceedings. Therefore, the Court agrees with the Government that the domestic courts relied on evidence other than the applicant's statements in order to convict him, particularly the statements of Z.Ş., the forged identification document found on the applicant, and the arrest record.

59. In conclusion, while very strict scrutiny must be applied where there are no compelling reasons to justify the restriction on the right of access to a lawyer, the Court finds that the Government have demonstrated that the procedural shortcomings at the initial stage of the investigation did not irretrievably prejudice the overall fairness of the criminal proceedings.

60. 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 complaint concerning the restriction on the applicant's right of access to a lawyer during the pre-trial stage admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the use by the trial court of evidence obtained in the absence of a lawyer.

Done in English, and notified in writing on 15 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Robert Spano
Registrar	President