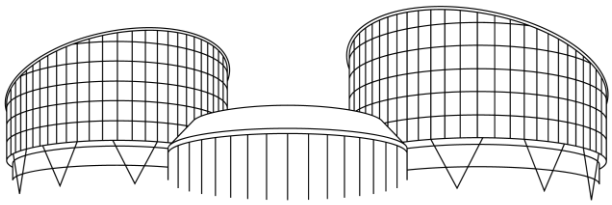

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF FAZLI DİRİ v. TURKEY

(Application no. 4062/07)

JUDGMENT

STRASBOURG

28 August 2012

FINAL

28/11/2012

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

In the case of Fazlı Diri v. Turkey,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*
and Françoise Elens-Passos, *Deputy Section Registrar,*

Having deliberated in private on 10 July 2012,

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

PROCEDURE

1. The case originated in an application (no. 4062/07) 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 Fazlı Diri ("the applicant"), on 9 January 2007.

2. The applicant was represented by Mr Nedim Şenol Çelik, a lawyer practising in Trabzon. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that despite the suspension of criminal proceedings against him, wording employed subsequently by a domestic court had breached his right to the presumption of innocence within the meaning of Article 6 § 2 of the Convention.

4. On 26 September 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in Trabzon. He used to work as a security guard in a security van for Akbank, a private bank in Turkey.

6. On 16 July 1998, on their return from one of the branches of the bank, the applicant and his two colleagues working in the same van realised that a sum of money (approximately 10,000 euros) was missing.

A. Criminal proceedings against the applicant

7. On 23 July 1998 the applicant was questioned by the police and on 3 September 1998 the Trabzon prosecutor filed an indictment formally charging the applicant and his two colleagues with the offence of breach of trust.

8. On 22 December 2000, while the criminal proceedings against the applicant and his colleagues were in progress, Law No. 4616 entered into force. Law No. 4616 provides for the suspension of criminal cases in respect of certain offences committed before 23 April 1999.

9. On 22 December 2003 the Istanbul Assize Court considered the following:

> "...[the applicant] has committed the offence of breach of trust. Nevertheless, the offence was committed before 23 April 1999 and it thus falls within the ambit of Law No. 4616. It is accordingly decided not to convict [the applicant] but to suspend the proceedings in accordance with Law No. 4616"

10. On 13 February 2004 the applicant appealed against the Assize Court's decision, arguing that if the proceedings had not been postponed his innocence would have been proved.

11. On 8 June 2006 the Court of Cassation decided that the Istanbul Assize Court's decision was not appealable because it was not a decision containing a definitive conclusion. It considered, however, that the applicant's appeal could be examined as an "objection" and forwarded it to the Court of Cassation's prosecutor for the necessary action to be taken.

12. On 25 August 2006 the Istanbul Assize Court examined the objection and rejected it.

B. Civil proceedings brought by the bank against the applicant

13. On 30 August 1998 lawyers representing Akbank lodged a claim with the Trabzon Labour Court for the return of the missing money from the applicant and the two colleagues who had been working with him on the day it went missing.

14. On 17 June 2004 the Trabzon Labour Court ordered the applicant and his two colleagues to repay the missing money to the bank together with the "highest rates of interest applicable". It considered, on the basis of the Istanbul Assize Court's decision of 22 December 2003, that the applicant and his colleagues had "committed the offence" in question and embezzled the money. The applicant appealed against the decision and drew the Court

of Cassation's attention to the fact that he had not been convicted of any offence by the Istanbul Assize Court, which, in fact, had decided to suspend the proceedings.

15. The Court of Cassation quashed the decision in so far as it concerned the rate of interest applicable. On 19 July 2005 the Trabzon Labour Court decided, in line with the Court of Cassation's decision, that a lower rate of interest should apply. An appeal lodged against that decision by the applicant was rejected by the Court of Cassation on 26 September 2005.

C. The proceedings brought by the applicant against the bank

16. On 30 October 1998 the applicant's contract of employment was terminated by his employer. The applicant and his two colleagues brought a case against the bank before the Trabzon Labour Court claiming compensation for their dismissal.

17. On 21 September 2004 the Trabzon Labour Court rejected the applicant's claim for compensation for his dismissal. It stated as follows:

> "The case concerns the compensation claim for the dismissal of the plaintiffs who worked for the respondent bank and who, instead of bringing [a sum of] money they had collected from one of the bank's branches back to their branch of the bank, embezzled it...According to the Istanbul Assize Court's decision of 22 December 2003, the plaintiffs committed the offence of breach of trust that the proceedings were suspended in accordance with Law No. 4616..."

18. The applicant appealed against the decision, arguing that the criminal proceedings against him had been suspended by the Istanbul Assize Court. He further argued that the proper course of action for the Labour Court would have been to collect its own evidence, hear witnesses, and reach its conclusion on the basis of that evidence.

19. On 26 May 2005 the Court of Cassation quashed the Labour Court's decision of 21 September 2004. It held that the Istanbul Assize Court's decision had suspended the proceedings and not convicted the applicant. The Labour Court had erred in rejecting the applicant's claim without hearing any of the witnesses proposed by him or obtaining expert reports, or even examining the Istanbul Assize Court's case file.

20. On 13 October 2005 the Trabzon Labour Court reiterated its decision of 21 September 2004. In the opinion of the Labour Court, the applicant had caused financial losses to the bank by embezzling the money and knew that his employment had been terminated because of that. Any expectation on the part of the applicant of receiving compensation for his dismissal would therefore damage confidence in the judiciary and, for that reason, the Labour Court could not adhere to the Court of Cassation's decision of 26 May 2005.

21. On 24 May 2006 an appeal lodged by the applicant against the Labour Court's decision was rejected by the Court of Cassation, which

considered that the Labour Court's decision was in accordance with its decision of 26 May 2005. This decision was communicated to the applicant on 1 August 2006.

II. RELEVANT DOMESTIC LAW

22. Law No. 4616, in so far as relevant, provides as follows:

> "4. In respect of offences committed before 23 April 1999 which are punishable by a maximum prison sentence of ten years:
>
> - where no criminal investigation has been commenced or no indictment has been filed, institution of prosecution shall be suspended;
>
> - where the criminal prosecution has reached the final stages but no definitive finding on the merits has been adopted or where a definitive finding on the merits has not yet become final, adoption of a definitive finding on the merits shall be suspended.
>
> If the person concerned is detained on remand, he or she shall be released. Documents and evidence concerning such offences shall be kept until the statute of limitations has been reached.
>
> In cases where an offence of the same kind or an offence which is punishable by a more severe prison sentence has been committed before the statute of limitations has been reached, a new prosecution shall be brought in respect of the previous offence which was the subject matter of the suspension or the suspended proceedings shall be resumed. If no offences of the same kind or an offence which is punishable by a more severe prison sentence has been committed before the statute of limitations has been reached, no public prosecutions may be brought against those who benefited from the suspension and the suspended proceedings shall be permanently terminated.
>
> ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

23. Relying on Article 6 of the Convention, the applicant complained that, notwithstanding the suspension of the criminal proceedings, the Istanbul Assize Court had stated in its decision that he was guilty. Furthermore, the evidence adduced by him during the proceedings before the Trabzon Labour Court had not been taken into account by that court, and his witnesses had not been heard. Under the same Article, the applicant also complained that the Trabzon Labour Court had relied on the decision suspending the criminal proceedings as if it had been a decision convicting him.

24. The Court considers it appropriate to examine these complaints solely from the standpoint of Article 6 § 2 of the Convention, which provides as follows:

> "...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> ..."

25. The Government contested that argument.

A. Admissibility

26. 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.

B. Merits

27. The applicant maintained that the wording used by both the Istanbul Assize Court and the Trabzon Labour Court in its two decisions had violated his right to the presumption of innocence.

28. The Government submitted that Law No. 4616 did not contain a provision to prevent national courts from expressing their opinions regarding the merits of cases when suspending them. In the view of the Government, such opinions expressed by national courts do not amount to definitive judgments. In the present case, although the Istanbul Assize Court had been of the opinion that the applicant had committed the offence with which he had been charged, it had confined itself to Law No. 4616 and suspended the proceedings. According to the Government, assessment by a national court of the evidence and its probative value and expressing an opinion by that court regarding the merits of the case, could not and should not be considered to be in breach of the right to the presumption of innocence within the meaning of Article 6 § 2 of the Convention.

29. The Government considered that issues relating to the presumption of innocence only arose in cases in which criminal proceedings were still pending. When those criminal proceedings were concluded, as was the case in the present application, the national court could express its opinion as to whether an accused was guilty or not. Hence, no mention could be made of a "presumption" in respect of the offence attributed to a defendant since his or her guilt would have been proven as an actual fact.

30. The Trabzon Labour Court had relied on the principle that a finding of a court to the effect that an offence has been committed is deemed to constitute strong evidence in any subsequent civil proceedings.

31. The Court observes at the outset that the driver of the security van who was on duty together with the applicant at the time when the money went missing, and who was also one of the defendants in the criminal proceedings (see paragraph 7 above) and participated in the two sets of civil proceedings before the Trabzon Labour Court (see paragraphs 13 and 16 above), introduced a separate application with the Court and complained that his right to the presumption of innocence had been breached. In its judgment of 19 April 2011 the Court held that there had been a violation of Article 6 § 2 of the Convention on account of the language used by the Trabzon Labour Court (see *Erkol v. Turkey*, no. 50172/06, §§ 41-42, 19 April 2011).

32. In its *Erkol* judgment the Court noted that, beyond summarising the proceedings in their observations and submitting that "in view of those facts the Government are of the opinion that the applicant's complaints must be rejected", the respondent Government had not elaborated on Mr Erkol's complaint (*ibid*. § 32).

33. In the present case, however, the Government made the above submissions and the Court has examined them. It observes that the points raised by the Government have already been examined by the Court in its *Erkol* judgment, and it considers that the Government have not advanced any arguments requiring the Court to depart from its findings in the *Erkol* judgment. To that end the Court refers, in particular, to its finding in the *Erkol* judgment that the Istanbul Assize Court's decision was not a decision to convict the applicant (*ibid*. § 35).

34. The Court observes that the unambiguously drafted Law No. 4616 required national courts to suspend the adoption of a definitive finding on the merits in cases in which no definitive finding on the merits had been adopted or in which a definitive finding on the merits had not yet become final (see paragraph 22 above). Indeed, in accordance with that wording, domestic courts also regarded the criminal proceedings as "suspended" (see paragraphs 17 and 19 above). The Court cannot accept, therefore, the Government's submissions that the criminal proceedings were "concluded" (see paragraph 29 above) in the applicant's case and that the domestic court could thus regard him as guilty of the offence with which he had been charged. It notes in any event that even assuming the proceedings were "concluded" by the decision of the Assize Court, that decision did not convict the applicant of any offence.

35. As noted in the *Erkol* judgment, when examining the case brought by the applicant against the bank the Trabzon Labour Court not only stated that the applicant had committed the offence with which he had been charged (see paragraph 17 above) but also held that he had "embezzled" the money (see paragraph 20 above), an offence which the applicant had never even been charged with.

36. The Court considers that by the language it used the Labour Court overstepped the bounds of a civil forum and went beyond its task of examining the case before it. Having regard to the wording employed by the Labour Court and the fact that it did not make a fresh assessment of the facts, the Court finds that that court did not only cast doubt on the applicant's innocence of the criminal charge brought against him, but in essence found him guilty of an offence with which he had never been charged.

37. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's right to the presumption of innocence has been breached.

There has accordingly been a violation of Article 6 § 2 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

38. Lastly, without elaborating in what respect, the applicant alleged a violation of Articles 5 and 13 of the Convention and of Article 2 of Protocol No. 7.

39. In the light of all the material in its possession, the Court finds that these submissions by the applicant do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

42. The Government considered the sum claimed to be excessive and unsupported.

43. The Court considers that the applicant must have suffered a degree of distress as a result of the Trabzon Labour Court's finding, and awards the applicant EUR 3,000 in respect of non-pecuniary damage (see *Erkol*, cited above, § 51).

B. Costs and expenses

44. The applicant also claimed EUR 2,000 for the costs and expenses incurred before the Court. In support of his claim the applicant submitted to the Court a fee agreement with his lawyer in the amount of EUR 1,500. The remaining EUR 500 were claimed in respect of postal expenses and translation costs for which the applicant did not submit any documentary evidence.

45. The Government considered that the claim was not supported by documentary evidence.

46. According to the Court's case-law, 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 are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 covering costs under all heads.

C. Default interest

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

1. *Declares* unanimously the complaint under Article 6 § 2 of the Convention concerning the applicant's right to the presumption of innocence admissible and the remainder of the application inadmissible;

2. *Holds* by 6 votes to 1 that there has been a violation of Article 6 § 2 of the Convention;

3. *Holds* by 6 votes to 1
   (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 amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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;

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

Done in English, and notified in writing on 28 August 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens Passos	Françoise Tulkens
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge A. Sajó is annexed to this judgment.

F.T.
F.E.P.

DISSENTING OPINION OF JUDGE SAJÓ

I could not follow the majority for the reasons explained in Erkol v Turkey, no. 50172/06, 19 April 2011.