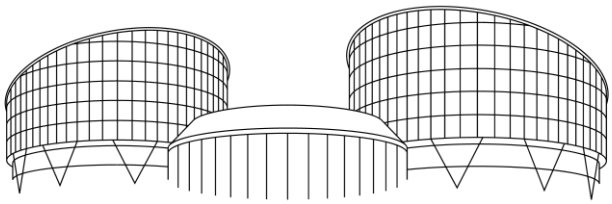

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ŞAMAN v. TURKEY

(Application no. 35292/05)

JUDGMENT

STRASBOURG

5 April 2011

FINAL

05/07/2011

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

In the case of Şaman v. Turkey,

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

Françoise Tulkens, *President*,
Danutė Jočienė,
Ireneu Cabral Barreto,
David Thór Björgvinsson,
Dragoljub Popović,
András Sajó,
Işıl Karakaş, *judges*,
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 15 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 35292/05) 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, Ms Sultan Şaman ("the applicant"), on 1 September 2005.

2. The applicant was represented by Mr Z. Değirmenci, a lawyer practising in Izmir. The Turkish Government ("the Government") were represented by their Agent.

3. On 6 October 2009 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the fairness of the criminal proceedings under Article 6 § 3 (c) and (e) of the Convention in conjunction with Article 6 § 1 to the Government. It 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 1974 and at the time of lodging her application was serving a prison sentence in Buca Prison.

5. On 19 February 2004 the applicant was taken into police custody by police officers from the Denizli Security Directorate, upon intelligence reports that she was a member of the illegal organisation

PKK/KONGRA-GEL (the Kurdistan Workers' Party). When she was arrested, the applicant was in possession of a fake identity card.

6. On the same day the applicant was examined by a doctor, who noted that there was no sign of ill-treatment on her body. The applicant was subsequently taken to the Denizli Security Directorate for interrogation.

7. According to a form dated 19 February 2004 which explained an arrested person's rights, the applicant was reminded of her right to remain silent and was informed that she could request the assistance of a lawyer. The applicant marked this form with her fingerprint and stated that she did not want to be represented by a lawyer. Subsequently, a police officer prepared a further report, in which it was stated that although the applicant had been reminded of her right to legal assistance she had expressed her wish to defend herself in person. The applicant marked this report with her fingerprint as well.

8. On 20 February 2004 the applicant was questioned by the police in the absence of a lawyer. Before the questioning commenced the applicant was once again reminded of her right to have legal assistance, but she refused. In her police statement the applicant gave a detailed account of her involvement in the illegal organisation.

9. On 20 and 21 February 2004 respectively, the applicant was examined by a medical doctor. The medical reports indicated that there was no sign of ill-treatment on her body.

10. On 21 February 2004 the applicant was taken before the public prosecutor. During her questioning, the applicant was represented by a lawyer, Mr A.O. from the Denizli Bar Association, and she availed herself of her right to remain silent. The prosecutor questioned the applicant about the fake identity card that had been found on her during her arrest and the applicant accepted that she had been using a fake identity paper. The lawyer left the public prosecutor's office without signing the applicant's statement, stating that although the applicant had expressed her wish to remain silent, the prosecutor had continued asking questions.

11. The same day, the applicant was questioned by the investigating judge, again in the absence of a lawyer. Before the judge, the applicant retracted her police statement, stating that it had been taken under duress. When asked about her involvement in the illegal organisation, the applicant accepted that when she was a teenager she had joined the PKK and moved to Iraq. She denied however having taken part in any terrorist activity. She stated that she had come back to Turkey to benefit from the Reintegration of Offenders into Society Act (Law no. 4959). After the questioning was over, the investigating judge remanded the applicant in custody.

12. On 8 March 2004 the public prosecutor at the Izmir State Security Court filed an indictment with that court, accusing the applicant of membership of an illegal organisation, an offence under Article 168 of the

former Criminal Code and Section 5 of the Prevention of Terrorism Act (Law no. 3713).

13. The proceedings commenced before the Izmir State Security Court and during the proceedings the applicant was represented by a lawyer. At the request of the applicant, the State Security Court gave permission to the applicant to have the assistance of an interpreter. In its decision the first-instance court noted that the applicant was capable of expressing herself in Turkish; however, in order not to hinder her right to defence and to comply with Article 6 § 3 of the Convention, she was given leave to use an interpreter.

14. In her defence submissions before the Izmir State Security Court, the applicant retracted the statements she had made during the preliminary investigation stage. She alleged that she had been forced to fingerprint her statement. According to the applicant, as she was illiterate, she could not understand the content of the document. She went on to deny the accusations against her and explained that when she was a teenager she had escaped to Iraq for family reasons and that she had stayed in a refugee camp there.

15. On 1 October 2004, the applicant's representative brought to the attention of the Izmir State Security Court that the applicant, being of Kurdish origin, had a limited knowledge of Turkish and that during her police custody she had not had the assistance of a lawyer or an interpreter.

16. During the trial, the Izmir State Security Court took into consideration the police statements of three people who had also been charged with membership of the PKK. These three people testified that the applicant was a member of the PKK.

17. In the meantime, Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, abolished State Security Courts. The case against the applicant was therefore transferred to the Izmir Assize Court.

18. On 26 October 2004 the Izmir Assize Court found the applicant guilty as charged and sentenced her to twelve years and six months' imprisonment. In convicting her, the court had regard to the applicant's police statement and the statements of three witnesses who had confirmed that the applicant was a member of the PKK.

19. The applicant appealed. In her appeal, she alleged that her right to legal assistance during police custody had been breached in so far as she had been denied the assistance of a lawyer.

20. On 14 March 2005 the Court of Cassation upheld the judgment of the first-instance court.

21. On 13 June 2005 the Izmir Assize Court re-examined the case in the light of the new Criminal Procedure Code which entered into force in 2005. It found the applicant guilty as charged but reduced her sentence to six years and three months' imprisonment.

II. RELEVANT DOMESTIC LAW

22. A description of the relevant domestic law concerning the right of access to a lawyer may be found in *Salduz v. Turkey* ([GC] no. 36391/02, §§ 27-31, 27 November 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF THE LACK OF ACCESS TO A LAWYER AND AN INTERPRETER

23. The applicant complained that, during her custody period her defence rights had been violated on account of the lack of access to a lawyer and an interpreter. Relying on Article 6 § 3 (c) and (e) of the Convention, the applicant stated that the lack of access to a lawyer or interpreter during her questioning by the police, the public prosecutor and the investigating judge respectively had hindered her defence rights, as she was illiterate and had a poor knowledge of the Turkish language.

The relevant provisions, in so far as relevant, read:

Article 6

"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."

...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

A. Admissibility

24. The Government maintained that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention, since at no stage of the proceedings had she relied on the fact that she had been deprived of her right to legal assistance and an interpreter during police custody.

25. In the present case, the Court observes from the documents in the case file that in her defence submissions dated 1 October 2004, the applicant's representative brought to the attention of the Izmir State Security Court that the applicant, being of Kurdish origin, had a poor knowledge of Turkish and that while she was in police custody she had not had the assistance of a lawyer or an interpreter. As a result, the Court considers that the applicant can be considered to have exhausted the domestic remedies in compliance with Article 35 § 1 of the Convention. Consequently, it rejects the Government's preliminary objection.

26. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 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 reiterated that she was of Kurdish origin and illiterate, and that she had left Turkey when she was twelve years old. She therefore stated that she could not understand Turkish well enough and that her defence rights had been violated during her police custody as she was deprived of the assistance of a lawyer and an interpreter.

28. The Government submitted that the applicant's access to a lawyer had not been hindered at any stage of the criminal proceedings. They maintained that before each questioning the applicant had been reminded of her rights as an accused, including her right to be assisted by a lawyer. They drew the Court's attention to the fact that the applicant had refused legal assistance and that this had been confirmed by the reports which had been fingerprinted by the applicant.

29. The Court observes that the applicant's complaint that her defence rights were violated is twofold, raising issues of access to a lawyer and an interpreter during her police custody. The Court will examine these complaints together, as they are closely linked.

30. The Court reiterates that, even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus Article 6 - especially paragraph 3 – may be relevant before a case is sent for trial if and

so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Salduz*, cited above, § 50). As the Court has already held in its previous judgments, the right set out in paragraph 3 (c) of Article 6 of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in paragraph 1 (see *Imbrioscia v. Switzerland*, 24 November 1993, § 37, Series A no. 275, and *Salduz*, cited above, § 50). The Court further recalls that the investigation stage is of crucial importance for the preparation of criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered (*Salduz*, cited above, § 54). The Court has also held that, in the context of application of paragraph 3 (e), the issue of the defendant's linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court (see *Hermi v. Italy* [GC], no. 18114/02, § 69, ECHR 2006-XII). Finally, the Court has ruled that the assistance of an interpreter should be provided during the investigation stage unless it can be demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict this right (see *Diallo v. Sweden* (dec.), no. 13205/07, § 25, 5 January 2010).

31. In view of the above principles, the Court is called on to examine the nature of the accusations against the applicant and to assess whether they are sufficiently complex to require a detailed knowledge of the language in which she was questioned. The Court notes that the applicant is Kurdish-speaking, with a limited knowledge of Turkish. This fact is also confirmed by the decision of the State Security Court to authorise her to have an interpreter during the trial. It is also undisputed that she is illiterate. Although she apparently gave a detailed account of her involvement in an illegal organisation, the Court observes that she made those self-incriminating statements without an interpreter and also without the assistance of a lawyer. Taking into account the importance of the investigation stage as reiterated above, the Court is not convinced that the applicant had a sufficient understanding of the questions she was being asked or that she was able to express herself adequately in Turkish, and certainly not to a level which would justify reliance on her statements as evidence against her at the trial.

32. With regard to the lack of legal assistance, the Court observes that neither the letter nor the spirit of Article 6 prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards (see *Pishchalnikov v. Russia*, no. 7025/04,

§ 77, 24 September 2009). A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Talat Tunç v. Turkey*, no. 32432/96, § 59, 27 March 2007).

33. The Court recalls that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard. It is not to be ruled out that, after initially being advised of his rights, an accused may himself validly waive his rights and respond to questioning. However, the Court strongly indicates that additional safeguards are necessary when the accused declines the right to a counsel, because if an accused has no lawyer he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected (see *Pishchalnikov*, cited above, § 78).

34. Turning to the particular circumstances of the instant case, the Court observes that as regards the lack of access to a lawyer during the applicant's custody, the present case differs from *Salduz*, cited above, as in 2004 when the applicant was arrested the domestic legislation had already been amended by Law no. 4928, adopted on 15 July 2003. Consequently, the restriction on an accused's right of access to a lawyer in proceedings before State Security Courts had already been lifted. As a result, when the applicant was arrested on 19 February 2004, she had the right of access to a lawyer from the moment she was taken into custody. Despite this amendment in the Turkish legislation, the Court notes that in the instant case the applicant did not benefit from the assistance of a lawyer during the preliminary investigation stage. When questioned by the police, the public prosecutor and the investigating judge respectively, the applicant gave self-incriminating statements and signed the reports with her fingerprint. The Court notes that the applicant was accused of being a member of an illegal organisation, which is a very serious charge, and faced a heavy penalty.

35. Against this background, and taking into account its above finding that the applicant had an insufficient knowledge of Turkish, the Court considers that, without the help of an interpreter, she could not reasonably have appreciated the consequences of accepting to be questioned without the assistance of a lawyer in a criminal case concerning the investigation of particularly grave criminal offences (see *Talat Tunç*, cited above, § 60). Consequently, it cannot find that the applicant waived her right to a lawyer in a knowing and intelligent way. Furthermore, the Court considers that additional protection should be provided for illiterate detainees with a view

to ensuring that the voluntary nature of a waiver is reliably established and recorded. In the present case, however, no specific measures of this kind were envisaged.

36. In view of the foregoing, the Court considers that even though the applicant had the assistance of a lawyer and an interpreter during her trial before the first-instance court and subsequently before the appeal court, the absence of an interpreter and a lawyer during her police custody irretrievably affected her defence rights.

37. The Court therefore concludes that there has been a violation of Article 6 § 3 (c) and (e) of the Convention in conjunction with Article 6 § 1 in the present case.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

38. The applicant alleged under Article 6 § 1 of the Convention that generally State Security Courts were not independent and impartial.

39. Firstly, the Court observes that following the amendments made by Law no. 4390 on 22 June 1999, the military judge sitting on the bench of the Izmir State Security Court was replaced by a civilian judge. Thus, no military judge participated in the applicant's trial. Secondly, with regard to the applicant's general complaint about the independence and impartiality of the State Security Courts, the Court observes that she has failed to substantiate this claim. The Court therefore concludes that the applicant cannot be regarded as having been deprived of a fair hearing on account of the composition of the court (see *Sever and Aslan* (dec.), no. 33675/02, 12 April 2007).

40. In the light of the foregoing, the Court rejects this complaint as manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. The applicant claimed 20,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage. She further claimed EUR 4,250 for legal fees (corresponding to 8.5 hours' work)

42. The Government contested the claims.

43. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, the Court considers that the applicant must have suffered some non-pecuniary damage and therefore, taking into account the circumstances of the present case, and ruling on an equitable basis, it awards her EUR 1,800 in respect of non-pecuniary damage.

44. The Court further 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 she so request (see *Salduz*, cited above, § 72).

45. As regards costs and expenses, the Court reiterates that 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. Taking into account the awards made in comparable cases (see *Bolukoç and Others v. Turkey*, no. 35392/04, § 47, 10 November 2009; *Gürova v. Turkey*, no. 22088/03, § 21, 6 October 2009; and *Salduz*, cited above, § 79), the Court finds it reasonable to award EUR 1,000 under this head.

46. The Court considers it appropriate that the default interest 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 lack of legal assistance and an interpreter for the applicant admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 3 (c) and (e) of the Convention in conjunction with Article 6 § 1;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the convention, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:

(i) EUR 1,800 (one thousand eight hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,000 (one thousand 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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 April 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Françoise Tulkens President