



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

SECOND SECTION

CASE OF DOĞAN AND KALIN v. TURKEY

(Application no. 1651/05)

JUDGMENT

STRASBOURG

21 December 2010

FINAL

21/03/2011

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

In the case of Doğan and Kalin v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 30 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 1651/05) 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 two Turkish nationals, Mr Metin Doğan and Mr Talip Kalın (“the applicants”), on 16 December 2004.

2. The applicants were represented by Mrs M. Avcı, a lawyer practising in İstanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 8 October 2008 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. On 24 February 1994 the applicants were taken into police custody in İstanbul on suspicion of membership of an illegal organisation.

5. On 11 March 1994 the applicants were brought before the investigating judge at the İstanbul State Security Court, who ordered their detention pending trial.

6. On 23 June 1994, the public prosecutor at the İstanbul State Security Court filed a bill of indictment against the applicants, charging them under

Article 125 of the former Criminal Code with carrying out activities with the aim of bringing about the secession of part of the national territory.

7. On 5 May 1999 the İstanbul State Security Court convicted the first applicant as charged and sentenced him to death. As regards the second applicant, the court decided that his case should be disjoined from the file as his defence had not been submitted to the court.

8. On 29 February 2000 the Court of Cassation quashed the judgment of 5 May 1999.

9. The case was remitted to the İstanbul State Security Court for further examination.

10. On 5 February 2001 the second applicant's case was joined to the file again.

11. On 21 June 2004 the applicants were released pending trial.

12. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, State Security Courts were abolished. The case against the applicants was subsequently resumed before the İstanbul Assize Court.

13. According to the information submitted to the case file on 3 February 2010 the proceedings are currently pending before the İstanbul Assize Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. A description of the relevant domestic law and practice prior to the entry into force of the new Code of Criminal Procedure (“the CCP”) (Law no. 5271) on 1 June 2005 may be found in *Çobanoğlu and Budak v. Turkey* (no. 45977/99, §§ 29-31, 30 January 2007). The current practice under the CCP is outlined in *Şayık and Others v. Turkey* (nos. 1966/07, 9965/07, 35245/07, 35250/07, 36561/07, 36591/07, and 40928/07, §§ 13-15, 8 December 2009).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

15. The applicants complained under Article 5 § 3 of the Convention that the length of their pre-trial detention had been excessive. The applicants further complained under Article 13 of the Convention that there had been no domestic remedies available under Turkish law whereby they could challenge the unlawfulness of their pre-trial detention. The Court considers that this complaint should be examined under Article 5 § 4 of the

Convention, being the *lex specialis* in the matter (see *Elğay v. Turkey* (dec.), no. 18992/03, 11 September 2007).

16. The Government contested the applicants' arguments.

A. Article 5 § 3 of the Convention

17. The Court notes that this complaint 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.

18. As regards the merits, the Government maintained that the applicants' detention had been based on the existence of reasonable grounds of suspicion of them having committed an offence, and that their detention had been reviewed periodically by a competent authority, with special diligence, in accordance with the requirements laid down by the applicable law. They pointed out that the offences with which the applicants had been charged had been of a serious nature, and that their continued remand in custody had been necessary to prevent crime and to preserve public order.

19. The Court notes that the period to be taken under consideration is over nine years and six months for the first applicant and over ten years and three months for the second applicant (see *Solmaz v. Turkey*, no. 27561/02, §§ 36-37, ECHR 2007-II (extracts)).

20. The Court has frequently found violations of Article 5 § 3 of the Convention in cases disclosing comparable lengthy periods of pre-trial detention (see, for example, *Tutar v. Turkey*, no. 11798/03, § 20, 10 October 2006, and *Cahit Demirel v. Turkey*, no. 18623/03, § 28, 7 July 2009). Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject and the length of the applicants' pre-trial detention in the present case, the Court finds that in the instant case the length of the applicants' pre-trial detention was excessive.

21. There has accordingly been a violation of Article 5 § 3 of the Convention.

B. Article 5 § 4 of the Convention

22. The Court notes that this complaint 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.

23. As regards the merits of the case, the Government submitted that the applicants had in fact had the possibility of challenging their continued detention by lodging objections.

24. The Court has already examined the possibility of challenging the lawfulness of pre-trial detention in Turkey in other cases and concluded that the Government had failed to show that the above-mentioned remedies provided for a procedure that was genuinely adversarial for the accused (see, for example, *Koştı and Others v. Turkey*, no. 74321/01, §§ 19-24, 3 May 2007, and *Şayık and Others v. Turkey*, cited above, §§ 28-32). The Court notes that the Government have not put forward any argument or material in the instant case which would require the Court to depart from its previous findings.

25. In the light of the foregoing the Court concludes that there has been a breach of Article 5 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

26. The applicants complained under Article 6 § 1 of the Convention that the length of the criminal proceedings brought against them had been unreasonable. They further complained under Article 13 of the Convention that there were no domestic remedies available under Turkish law whereby they could challenge the excessive length of the criminal proceedings in question. The Government disputed these allegations.

27. The Court notes that these complaints 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.

28. As regards the merits of the complaint under Article 6 § 1 of the Convention, the Government submitted that the length of the proceedings could not be considered to be unreasonable in view of the complexity of the case, the number of the accused and the nature of the offence with which the applicants were charged.

29. The Court notes that the criminal proceedings commenced on 24 February 1994 when the applicants were taken into police custody, and according to the information in the case file, they are still pending before the first-instance court. They have thus already lasted over sixteen years and eight months before two levels of jurisdiction.

30. Having examined all the material submitted to it, the Court considers that the length of the proceedings was excessive and failed to meet the “reasonable time” requirement (see *Daneshpayeh v. Turkey*, no. 21086/04, § 28, 16 July 2009).

31. There has accordingly been a breach of Article 6 § 1 of the Convention.

32. As regards the merits of the complaint under Article 13 of the Convention, the Court has examined similar issues in previous applications and has found violations of Article 13 of the Convention in respect of the

lack of an effective remedy under Turkish law whereby the applicants could have contested the length of the proceedings at issue (see, most recently, *Daneshpayeh v. Turkey*, cited above, §§ 35-38). It finds no reason to depart from that conclusion in the present case.

33. There has accordingly been a violation of Article 13 of the Convention.

III. OTHER ALLEGED VIOLATION OF THE CONVENTION

34. The applicants maintained under Article 14 of the Convention that they were discriminated against since they were tried and charged with offences against the State.

35. In the light of all the material in its possession, the Court finds that the above submission by the applicants does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this complaint must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicants claimed 10,000 euros (EUR) each in respect of pecuniary and non-pecuniary damage.

38. The Government contested this amount.

39. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicants EUR 10,000 each in respect of non-pecuniary damage.

40. Furthermore, according to the information submitted by the parties, the criminal proceedings against the applicants are still pending. In these circumstances, the Court considers that an appropriate means for putting an end to the violations which it has found would be to conclude the criminal proceedings at issue as speedily as possible, while taking into account the requirements of the proper administration of justice (see *Yakışan v. Turkey*, no. 11339/03, § 49, 6 March 2007).

B. Costs and expenses

41. The applicants did not submit a claim for costs and expenses. Accordingly, the Court considers that there is no call to award them any sum on that account.

C. Default interest

42. 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 complaints concerning the length of pre-trial detention, the lack of a remedy to challenge the lawfulness of the pre-trial detention, the length of criminal proceedings and the lack of a domestic remedy in respect of this complaint admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 §§ 3 and 4 of the Convention;
3. *Holds* that there has been a violation of Articles 6 § 1 and 13 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable on 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 amounts 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President