



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

SECOND SECTION

CASE OF FIRAT CAN v. TURKEY

(Application no. 6644/08)

JUDGMENT

STRASBOURG

24 May 2011

FINAL

24/08/2011

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

In the case of Firat Can v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

David Thór Björgvinsson,

Dragoljub Popović,

András Sajó,

Işıl Karakaş,

Guido Raimondi, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 3 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 6644/08) 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 Firat Can (“the applicant”), on 24 January 2008.

2. The applicant was represented by Mr E. Kanar, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 14 April 2009 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the applicant’s alleged ill-treatment during his transfer from Istanbul to Kırklareli in June 2007, his right to be released pending trial, his right to challenge the lawfulness of his pre-trial detention and his right to a fair hearing within a reasonable time 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 is currently detained in Kırklareli E-type Prison pending the criminal proceedings against him.

A. The criminal proceedings against the applicant

5. On 5 February 1997 the applicant was arrested and taken into police custody by police officers from the Anti-Terrorist Branch of the Istanbul Police Headquarters on suspicion of membership of an illegal organisation.

6. On 19 February 1997 a single judge at the Istanbul State Security Court ordered the applicant's pre-trial detention.

7. On 20 May 1997 the public prosecutor at the Istanbul State Security Court filed a bill of indictment with that court, charging the applicant with attempting to undermine the constitutional order, an offence proscribed by Article 146 § 1 of the former Criminal Code.

8. On 8 February 2002 the Istanbul State Security Court convicted the applicant as charged and sentenced him to death.

9. On 15 October 2002 the Court of Cassation quashed the judgment of the Istanbul State Security Court on account of a procedural defect which had prejudiced the rights of the defence.

10. In the meantime on 4 September 2002 the Head Office of the Institute of Forensic Medicine issued a report noting that the applicant suffered from Wernicke-Korsakoff syndrome and recommended the suspension of the execution of his sentence for a period of six months for medical reasons. It appears that this recommendation was not taken into account by the authorities.

11. State Security Courts were abolished by Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004. The case against the applicant was therefore transferred to the Istanbul Assize Court.

12. At the hearing held on 6 August 2008, the applicant asked to be released in view of the excessive amount of time he had already spent in pre-trial detention. The Fourteenth Chamber of the Istanbul Assize Court, however, ordered the applicant's continued detention in view of the nature of the offence, the existence of a strong suspicion that the applicant had committed the offence and the possibility that he would abscond if released.

13. On 13 August 2008 the applicant objected to the decision of 6 August 2008 and again requested his release.

14. On 25 August 2008 the Ninth Chamber of the Istanbul Assize Court dismissed the applicant's objection without holding a hearing and without providing any reasons for its decision.

15. On 18 December 2009 the Istanbul Assize Court convicted the applicant as charged under Article 146 § 1 of the former Criminal Code and sentenced him to aggravated life imprisonment. The applicant appealed this judgment.

16. According to the information in the case file, the case is still pending before the Court of Cassation.

B. The applicant's transfer between prisons and the alleged ill-treatment he was subjected to during the transfer

17. On an unspecified date the applicant was temporarily transferred from Kırklareli E-type Prison to Istanbul Bayrampaşa Prison to attend the final exams at Marmara University, where he was registered as a student.

18. On 11 June 2007, before he was transferred from Istanbul back to Kırklareli following the end of the exam period, he was medically examined by the resident doctor at Bayrampaşa Prison, who noted no signs of ill-treatment on his body. On the same day the applicant also signed a document stating that he had not been ill-treated or subjected

to any other adverse treatment during the course of his transfer to Kırklareli and that the gendarmerie personnel had not confiscated his money or other valuables. At 10.00 p.m. on the same day he was handed back to the prison authorities in Kırklareli.

19. On 12 June 2007 the applicant lodged a complaint with the Kırklareli Public Prosecutor's Office against the gendarme soldiers in charge of his transfer, alleging that he had been tortured at their hands during the transfer from Istanbul to Kırklareli, and requested to be referred to the forensic medicine institute for examination. He also complained that the gendarme soldiers in question had appropriated under duress two gold and two silver rings he was wearing on the relevant day and he requested the return thereof.

20. On the same day a doctor at the Kırklareli Forensic Medicine Institute examined the applicant and noted a slight abrasion on the right inner corner of his upper lip, bruising and swelling on his biceps, pain on his tenth, eleventh and twelfth right ribs, widespread hyperaemia and pain in his right axial region (7-8 cm below the armpit) caused by physical trauma, pain and swelling around the metatarsal bones of his left foot, pain in the waist area and throat and difficulty in swallowing related to trauma. The report noted that the symptoms were likely to be the result of beatings or violence, and requested the applicant's referral to Kırklareli State Hospital for the verification of any fractured bones.

21. On 13 June 2007 the applicant was examined at Kırklareli State Hospital, where it was noted that the injuries he had sustained were not life-threatening and would not cause long-term damage to his health.

22. On 10 September 2007 the applicant repeated his allegations of ill-treatment against the gendarmerie personnel before the Fourteenth Chamber of the Istanbul Assize Court.

C. Criminal proceedings against the gendarme sergeant

23. On 12 June 2007 Kırklareli Public Prosecutor interrogated the applicant regarding his allegations of ill-treatment. The applicant contended that on 11 June 2007, before he was put in the patrol wagon bound for Kırklareli Prison, a gendarme sergeant and ten gendarme soldiers in his command had shoved him into a toilet at Bayrampaşa Prison and beaten him up, squeezed his testicles, hit his throat with a truncheon and insulted him. He claimed that this treatment had mainly resulted from his refusal to comply with the gendarmes' orders to remove and hand over his rings prior to the transfer.

24. On 14 June 2007 the Kırklareli Public Prosecutor issued a decision of lack of jurisdiction (*görevsizlik kararı*) in respect of the applicant's complaints and referred the matter to the Eyüp Public Prosecutor.

25. On 10 January 2008 the Eyüp Public Prosecutor interrogated the gendarme sergeant, N.T., who had been in charge of the applicant's transfer from Kırklareli to Istanbul on 11 June 2007. N.T. stated that he had no recollection of the applicant, nor of the events as recounted by him, and denied the allegations against him. He added that in accordance with the relevant regulations and instructions, prisoners' valuables were removed prior to any transfer and handed over to the prison administration, which was responsible for their subsequent return to the prisoner.

26. On the same day the Eyüp Public Prosecutor requested information from the administration of Bayrampaşa Prison in respect of the applicant's confiscated rings. On 15 January 2008 the prison administration informed the public prosecutor that the applicant's personal belongings had been handed over to his wife on 18 June 2007.

27. On 25 February 2009 the Eyüp Public Prosecutor filed a bill of indictment with the Eyüp Magistrates' Court against N.T., charging him with the offence of causing bodily harm under Article 86 §§ 2 and 3 of the Criminal Code and excessive use of force under Article 256 of the Criminal Code. The public prosecutor noted that despite N.T.'s outright denial of the charges against him, the findings of the medical report dated 12 June 2007 appeared to corroborate the applicant's allegations of ill-treatment. He further specified in the bill of indictment that since the offences in question did not fall within the scope of Law no. 4483 (Law on the Prosecution of Civil Servants and Public Officials), no administrative authorisation was required for N.T.'s prosecution.

28. On 2 March 2009 the Eyüp Magistrates' Court admitted the indictment and ordered that the first hearing be held on 10 November 2009. According to the information in the case file, the proceedings are still pending before the Eyüp Magistrates' Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Judicial review of pre-trial detention

29. A description of the relevant domestic law and practice concerning judicial review of pre-trial detention under the former Code of Criminal Procedure (Law no. 1412) may be found in *Çobanoğlu and Budak v. Turkey* (no. 45977/99, §§ 29-31, 30 January 2007).

B. Compensation scheme provided for under Article 141 of the new Code of Criminal Procedure (Law no. 5271)

30. Section 1 of Article 141 of the new Code of Criminal Procedure provides the following:

“Persons; ...

b) who were not brought before a judge within the period prescribed by law,

...

d) who were lawfully detained but not brought before a legal authority within a reasonable time and who were not tried within a reasonable time,

during the criminal investigation or prosecution may demand compensation for all pecuniary and non-pecuniary damage they sustained from the State.”

31. Section 1 of Article 142 of the new Code of Criminal Procedure further provides:

“Compensation may be demanded [from the State] within three months from the date of service of the final ... judgment and, in any case, within one year following the date on which the ... judgment becomes final.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

32. The applicant complained under Article 3 of the Convention that he had been subjected to ill-treatment by certain members of the Istanbul gendarmerie prior to his transfer from Istanbul back to Kırklareli E-type Prison on 11 June 2007.

A. Admissibility

33. The Government argued that the applicant had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. In this connection, they maintained that the criminal proceedings against the gendarme officer, N.T., who had allegedly ill-treated the applicant at Bayrampaşa Prison, were still pending before the domestic courts. The Government further maintained that the applicant had not availed himself of the civil and administrative law remedies which could have provided reparation for the harm which he had allegedly sustained.

34. The applicant disputed the Government's arguments.

35. As regards the Government's first preliminary objection, the Court notes that the question whether the criminal proceedings pending against N.T. could be regarded as effective under the Convention is closely linked to the substance of the applicant's complaint. The Court therefore joins the Government's objection on this point to the merits (see *Veli Tosun and Others v. Turkey*, no.62312/00, §§ 39-40, 16 January 2007 and the cases cited therein).

36. As regards the objection concerning recourse to alternative civil and administrative remedies, the Court reiterates that it has already examined and dismissed the Government's preliminary objection in similar cases (see, for example, *Dur v. Turkey*, no. 34027/03, § 26, 18 September 2008; *Eser Ceylan v. Turkey*, no. 14166/02, § 23, 13 December 2007; and *Arif Çelebi and Others v. Turkey*, nos. 3076/05 and 26739/05, § 53, 6 April 2010). It finds no particular circumstances in the instant case requiring it to depart from its findings in the above-mentioned cases. It therefore rejects the Government's preliminary objection.

37. 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

38. The Government noted that prior to being taken back to Kırklareli on 11 June 2007, the applicant had undergone a medical examination at Bayrampaşa Prison, which had revealed no signs of ill-treatment on his body. Furthermore, before being handed over to the Kırklareli prison authorities on the same day, he had signed a document attesting that he had received no adverse treatment throughout his transfer from Istanbul to Kırklareli. Without making any comments on the findings of the medical report dated 12 June 2007, the Government went on to state that upon receiving the applicant's

complaints, the public prosecutor had immediately initiated a preliminary investigation, which had resulted in the indictment of N.T. The relevant criminal proceedings were still pending before the domestic courts and there was no reason to doubt their effectiveness. The Government further emphasised that by virtue of the nature of the charges brought against N.T., it had not been necessary to seek administrative authorisation for his prosecution under Law no. 4483, which had further accelerated the proceedings.

39. Relying on the injuries identified on his body in the medical report dated 12 June 2007, the applicant maintained his allegations. As regards the attestation dated 11 June 2007 submitted by the Government as first-hand evidence that he had not been ill-treated by the gendarmes, the applicant contended that the authenticity of the signature on the document had not been verified by the public prosecutor or the trial court. Moreover, even assuming that he had signed the document without coercion, the State was still under an obligation to account for the injuries he had sustained under their control in custody, which they had failed to fulfil in the instant case. As regards the effectiveness of the ongoing criminal proceedings into his allegations of ill-treatment, the applicant stressed that proceedings had been initiated against only one of the perpetrators, and that more than two years after his initial complaint. No action had been taken against the other gendarme soldiers involved in the incident. Noting in particular the limited scope of the investigation, and the significant delays encountered from the very beginning of the criminal proceedings, the applicant argued that an effective investigation had not been conducted into his allegations of ill-treatment.

40. The Court indicates, as it has held on many occasions, that the authorities have an obligation to protect the physical integrity of persons in detention. It reiterates in this connection that where an individual is taken into police custody or arrives otherwise under the control of the authorities in good health and is found to be injured while in detention or under their control, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention (see *Tomasi v. France*, 27 August 1992, §§ 108-11, Series A no. 241-A; *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; and *Denisenko and Bogdanchikov v. Russia*, no. 3811/02, § 82, 12 February 2009).

41. In the instant case, the Court notes that the medical report drawn by the resident doctor at Bayrampaşa Prison in the applicant's respect prior to his departure from that prison on 11 June 2007 indicated no signs of ill-treatment on his person. However, the report issued the very next day by the Kırklareli Forensic Medicine Institute upon the applicant's request noted a number of injuries on his body, particularly on his arms, torso and left foot (see paragraph 20 above). The Court observes that the findings in this report appear to corroborate the applicant's allegations, both as regards the sequence of events that occurred on the relevant day and the particular treatment he had been subjected to by members of the Istanbul gendarmerie. The Court notes on the other hand that the Government failed to provide an explanation for these injuries, which were undoubtedly sustained by the applicant while under the absolute control of the State authorities. Considering the circumstances of the case as a whole, and the absence of a plausible explanation from the Government, the Court finds that the Government bear responsibility for the injuries sustained by the applicant.

42. The Court emphasises in this connection that it attaches no weight to the declaration allegedly signed by the applicant prior to being handed over to the prison authorities in Kırklareli, exonerating the gendarmes overseeing his transfer from any responsibility, in view of the suspicious circumstances under which it was signed and the unambiguous findings of the Kırklareli Forensic Medicine Institute in its report of 12 June 2007. The Court moreover notes that the Eyüp Public Prosecutor similarly appears to have paid no attention to this document in the bill of indictment filed against N.T.

43. The Court further reiterates that Article 3 of the Convention also requires the authorities to investigate allegations of ill-treatment when they are “arguable” and “raise a reasonable suspicion” (see, in particular, *Ay v. Turkey*, no. 30951/96, §§ 59-60, 22 March 2005). The minimum standards as to effectiveness defined by the Court’s case-law include the requirements that the investigation be independent, impartial and subject to public scrutiny, and that the competent authorities act with exemplary diligence and promptness (see, for example, *Çelik and İmret v. Turkey*, no. 44093/98, § 55, 26 October 2004). Moreover, when the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the prohibition of ill-treatment. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow grave attacks on physical and moral integrity to go unpunished (see *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts)). The Court further reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and trial, and should be dismissed if convicted (see *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

44. The Court has found above that the respondent State was responsible, under Article 3 of the Convention, for the injuries sustained by the applicant. An effective investigation was therefore required.

45. The Court notes that the applicant complained of his ill-treatment to the public prosecutor’s office in Kırklareli on 12 June 2007, the day after the impugned incidents and the Kırklareli Public Prosecutor took the applicant’s official statement regarding his allegations on the very same day. However, on 14 June 2007, he issued a decision of lack of jurisdiction and referred the matter to the Eyüp Public Prosecutor. It was not until seven months later that the Eyüp Public Prosecutor questioned N.T., who was the gendarme sergeant in charge of the applicant’s transfer. According to the information in the case file, none of the other gendarmes who were allegedly involved in the incidents was identified by the public prosecutor, let alone questioned as a suspect or even as a witness. Moreover, following N.T.’s questioning, it took one year and one month to file a bill of indictment with the Eyüp Magistrates’ Court against N.T. In the absence of any information provided by the Government as to any investigative steps taken by the public prosecutor in the meantime or, in the alternative, to any obstacles that held the investigation back, the Court cannot but assume that the public prosecutor remained passive throughout this period. The Court further notes that although the first-instance court reviewed and admitted the bill of indictment on 2 March 2009, it ordered the first hearing to be held eight months later, that is, on 10 November 2009, a delay which

similarly remains unjustified. According to the information in the case file, the proceedings are still pending before the first-instance court. There is, moreover, no indication in the case file to demonstrate that the accused gendarme sergeant was suspended from duty during the investigation and trial or that any disciplinary proceedings were taken against him or other gendarme soldiers allegedly involved in the incident.

46. The Court is aware that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating torture or ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. In the instant case, the substantial delays encountered at every step of the proceedings indicate that the authorities failed to act with the diligence and promptness required under Article 3 of the Convention. In the Court's opinion, these delays are all the more unacceptable considering that no prior authorisation was required for the prosecution of the gendarme in question under Law no. 4483.

47. Furthermore, the fact that none of the other gendarmes on duty at the time of the relevant incidents was identified during the investigation, not even to provide statements as a witness, and that the only person who was charged has stayed in duty throughout this period without even being subjected to disciplinary proceedings, raises significant concerns of impunity for the alleged perpetrators.

48. In view of the procedural shortcomings identified above, the Court concludes that the national authorities failed to carry out an effective and independent investigation into the applicant's allegations of ill-treatment.

49. In the light of the foregoing factors and conclusions, the Court also dismisses the Government's objection that the applicant failed to exhaust domestic remedies in view of the pending criminal proceedings against N.T. (see paragraph 33 above, and *Veli Tosun and Others*, cited above, § 60).

50. There has accordingly been a violation of Article 3 of the Convention under its substantive limb, on account of the inhuman and degrading treatment that the applicant was subjected to, and under its procedural limb.

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

51. The applicant complained under Articles 5 § 3 and 13 of the Convention that the length of his pre-trial detention had been excessive, that he had not been released from detention despite the fact that he had been diagnosed with Wernicke-Korsakoff syndrome and that his requests to challenge the lawfulness of his pre-trial detention had been rejected on stereotypical grounds. He further submitted under Article 6 § 2 of the Convention that his lengthy remand in custody had violated his right to be presumed innocent. Lastly, he maintained under Articles 5 § 4 and 13 of the Convention that there had been no effective domestic remedies to challenge the lawfulness of his detention.

52. The Court considers that the applicants' complaints under Articles 5 § 3, 13 and 6 § 2 of the Convention concerning the length of his pre-trial detention should be examined from the standpoint of Article 5 § 3 alone (see, *mutatis mutandis*, *Güler v. Turkey* (dec.), no. 14152/02, 28 September 2006, and *Tamamboğa and Gül v. Turkey*, no. 1636/02, § 26,

29 November 2007). The Court further considers that the complaints concerning the lack of effective remedies by which to challenge the lawfulness of the pre-trial detention should be examined under Article 5 § 4 of the Convention, which provides a *lex specialis* in relation to the more general requirements of Article 13 (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009-...).

A. Admissibility

53. The Government argued that the applicant could not claim to be a victim of a violation of Article 5 § 3 of the Convention because the time spent by him on remand would eventually be deducted from his total sentence. The Government further maintained that, as the applicant had lodged his complaint under Article 5 § 3 of the Convention on 24 January 2008, the time he had spent in detention between 8 February and 15 October 2002, that is, the period starting with the applicant's conviction by the Istanbul State Security Court and ending with the quashing of the decision by the Court of Cassation, should be rejected for having been introduced outside the six-month time-limit laid down in Article 35 § 1.

54. The applicant disputed the Government's arguments.

55. As regards the applicant's victim status, the Court notes that it has already examined and dismissed similar submissions made by the respondent Government in other cases (see, for example, *Ari and Şen v. Turkey*, no. 33746/02, § 19, 2 October 2007). The Government have not submitted any arguments which could lead the Court to reach a different conclusion in the instant case. Accordingly, the Government's objection to the applicant's victim status must be rejected.

56. As regards the Government's preliminary objection concerning the applicant's failure to observe the six-month time-limit in respect of his initial period of pre-trial detention, the Court refers to the principles adopted in the *Solmaz v. Turkey* judgment (no. 27561/02, § 36, ECHR 2007-II (extracts)), where it was held that, if the applicant is in effect imprisoned throughout, the multiple, consecutive detention periods should be regarded as a whole and the six-month period should start running only from the end of the last period. Bearing in mind that the applicant's pre-trial detention came to an end on 18 December 2009 after his conviction by a competent court within the meaning of Article 5 § 1 (a) of the Convention, the Court dismisses the Government's objection.

57. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Article 5 § 3 of the Convention

58. The Government maintained that the applicant's detention was based on the existence of reasonable grounds of suspicion of him having committed an offence, and that his detention had been reviewed periodically by the competent authority, with special diligence, in accordance with the requirements laid down by the applicable law at the relevant time. They pointed out that the offence with which the applicant had been

charged was of a very serious nature, and that his continued remand in custody was necessary to prevent him from committing a further offence, absconding and removing evidence, as well as to preserve public order.

59. The Court notes that, after deducting the period when the applicant was detained after conviction under Article 5 § 1 (a) of the Convention (namely the period between 8 February and 15 October 2002) from the total time that he has been held in pre-trial detention, the period to be taken into consideration in the instant case is approximately twelve years and two months (see *Solmaz*, cited above, §§ 36-37).

60. The Court reiterates in the first place that the Convention cannot be construed as laying down a general obligation to release detainees on health grounds (see, *mutatis mutandis*, *Matencio v. France*, no. 58749/00, § 78, 15 January 2004). In the absence of any particular complaints by the applicant about the unsuitability of his detention conditions to his physical condition or the lack of appropriate medical care in detention, which could have otherwise necessitated his immediate release under Article 3 of the Convention, the Court cannot criticise the assessment of the national authorities not to release the applicant solely on account of the fact that he had been diagnosed with Wernicke-Korsakoff syndrome back in 2002 (see, *mutatis mutandis*, *Horoz v. Turkey* (dec.), no. 1639/03, 31 March 2009).

61. The Court, however, notes independently of the applicant's medical condition that it 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, the Court finds that in the instant case the length of the applicant's pre-trial detention was excessive.

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

2. Article 5 § 4 of the Convention

63. The Government contended that the domestic law provided an effective remedy to challenge the lawfulness of pre-trial detention under Article 297 of the former Code of Criminal Procedure and its subsequent provisions.

64. The applicant maintained that his objection to his detention had received no serious consideration by the domestic courts, which used stereotyped wording in dismissing his requests. He further claimed that the proceedings reviewing his pre-trial detention had been conducted on the basis of the case file and had not been truly adversarial, as neither he nor his lawyer could participate in the proceedings.

65. The Court notes that it has already found that the remedy provided for by Articles 297-304 of the former Code of Criminal Procedure, whereby the applicant could object to the decisions ordering his continued detention, offered little prospect of success in practice, and that it did not provide for a procedure that was genuinely adversarial for the accused (see *Koştı and Others v. Turkey*, no. 74321/01, § 22, 3 May 2007; *Bağrıyanık v. Turkey*, no. 43256/04, §§ 50-51, 5 June 2007; *Doğan Yalçın v. Turkey*, no. 15041/03, § 43, 19 February 2008; and *Cahit Demirel v. Turkey*, no. 18623/03, § 34, 7 July 2009). The Court further notes that, despite these apparent shortcomings in the domestic law, the

applicant in the present case has objected to his continued detention on at least one occasion. His objection, however, was rejected by the Istanbul Assize Court in circumstances which lacked the guarantees appropriate to the kind of deprivation of liberty in question, such as a hearing (see paragraph 14 above).

66. In the present case, there is no element which would require the Court to depart from its previous findings in the aforementioned cases. The Court therefore concludes that, in the light of the aforementioned case-law, the remedy indicated by the Government for the review of the lawfulness of the applicant's pre-trial detention was not in conformity with the requirements of Article 5 § 4 of the Convention.

67. There has accordingly been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

68. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings against him had not been concluded within a reasonable time.

A. Admissibility

69. The Government asked the Court to dismiss the complaint under Article 6 § 1 of the Convention for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They submitted that the applicant could have sought compensation pursuant to Article 141 of the new Code of Criminal Procedure.

70. The applicant maintained that the remedy referred to by the Government was not effective.

71. The Court reiterates that it has already examined this objection in the case of *Tunçe and Others v. Turkey* (nos. 2422/06, 3712/08, 3714/08, 3715/08, 3717/08, 3718/08, 3719/08, 3724/08, 3725/08, 3728/08, 3730/08, 3731/08, 3733/08, 3734/08, 3735/08, 3737/08, 3739/08, 3740/08, 3745/08, and 3746/08, §§ 35-37, 13 October 2009) and found it to be ineffective. The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned application. It therefore rejects the Government's objection, and finds that this part of the application is admissible.

B. Merits

72. The Government submitted that the length of the proceedings could not be considered to be unreasonable, particularly in view of the complexity of the case, the number of the accused, the nature of the offence with which the applicant was charged and the inherent difficulties in collecting evidence in cases involving organised crime.

73. The Court notes that the proceedings in question commenced on 5 February 1997 when the applicant was taken into police custody, and according to the information in the case file, they are still pending before the Court of Cassation. They have thus already lasted over fourteen years and two months before two levels of jurisdiction.

74. The Court has frequently found violations of Article 6 § 1 of the Convention in applications raising issues similar to the one in the present case (see *Bahçeli v. Turkey*, no. 35257/04, § 26, 6 October 2009; *Er v. Turkey*, no. 21377/04, § 23, 27 October 2009;

and *Şahap Doğan v. Turkey*, no. 29361/07, § 39, 27 May 2010). 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, the Court therefore considers that the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

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

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

76. Lastly, the applicant complained that the postponement by Law no. 5320 of the date of enforcement of Article 102 of the new Code of Criminal Procedure, which regulates and decreases the authorised length of pre-trial detention, to 31 December 2010 for certain types of offences including his own, violated Article 14 of the Convention in conjunction with Article 6.

77. The Government did not make any submissions regarding this complaint.

78. The Court considers in the first place that this question relates to the length of the applicant’s pre-trial detention and should therefore be examined under Article 14 taken together with Article 5 § 3 of the Convention.

79. Secondly, the Court notes that the distinction introduced by Law no. 5320 is made not between different groups of people, but between different types of offences, according to the legislature’s view of their gravity. The Court sees no ground for concluding that that practice amounts to a form of discrimination that is contrary to the Convention (see, *mutatis mutandis*, *Gerger v. Turkey* [GC], no. 24919/94, § 69, 8 July 1999).

It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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 and costs and expenses

81. The applicant claimed 65,000 Turkish liras (TRY) (approximately 29,450 euros (EUR)) in respect of pecuniary damage and TRY 100,000 (approximately EUR 45,300) in respect of non-pecuniary damage.

82. The Government contested these claims.

83. 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 non-pecuniary damage which cannot be compensated solely by the finding of violations. Having regard to the gravity of the

violations and to equitable considerations, it awards the applicant EUR 23,400 for non-pecuniary damage.

84. Furthermore, according to the information submitted by the parties, the criminal proceedings against the applicant are still pending. In these circumstances, the Court considers that an appropriate means for putting an end to the violation which it has found would be to conclude the criminal proceedings in 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).

85. The applicant also claimed TRY 12,125 (approximately EUR 5,500) for the legal fees incurred before the Court and TRY 8,500 (approximately EUR 3,850) for those incurred during the domestic proceedings. He further claimed TRY 1,500 (approximately EUR 680) for his postal, telephone, translation and stationery expenses and TRY 3,000 (approximately EUR 1,360) for his representative's travel expenses in attending the hearings before the domestic courts and visiting him at the prison. In addition, he demanded TRY 30,000 (approximately EUR 13,600) in respect of the costs and expenses borne by his family on account of his detention, including travel expenses made for prison visits. The applicant submitted two invoices regarding legal fees incurred in the proceedings before the domestic courts. In respect of the legal fees incurred before the Court, the applicant relied on the Istanbul Bar Association's recommended fee list. He did not submit any invoices or other documents in support of his remaining claims.

86. The Government contested these claims.

87. 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 2,000 to cover costs under all heads (see *Société Colas Est and Others v. France*, no. 37971/97, § 56, ECHR 2002-III).

B. Default interest

88. 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

1. *Joins* by a majority to the merits the Government's preliminary objection on the issue of exhaustion of domestic remedies in respect of Article 3 and *dismisses* it;
2. *Declares* unanimously the complaint under Article 14 of the Convention inadmissible;
3. *Declares* by a majority the complaint under Article 3 admissible ;
4. *Declares* unanimously the remainder of the application admissible ;

5. *Holds* by 6 votes to 1 that there has been a violation of Article 3 of the Convention under its substantive limb, on account of the inhuman and degrading treatment that the applicant was subjected to, and under its procedural limb;
6. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention on account of the length of the applicant's pre-trial detention;
7. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention on account of the lack of effective domestic remedies by which to challenge the lawfulness of the applicant's pre-trial detention;
8. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention on account of the length of the proceedings brought against the applicant;
9. *Holds* by 6 votes to 1
 - (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 on the date of settlement:
 - (i) EUR 23,400 (twenty-three thousand four hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (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;
10. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President

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

F.T.
S.H.N.

STATEMENT OF DISSENT BY JUDGE SAJÓ

To my regret I was unable to follow the finding of the majority that there has been a violation of Article 3 of the Convention as I would have relied on the findings of the domestic court. As I could not find the Article 3 complaint admissible I had no opportunity to share the concerns of my colleagues as to the lack of suspension of the accused gendarme sergeant.