



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

SECOND SECTION

CASE OF ADEMOVIČ v. TURKEY

(Application no. 28523/03)

JUDGMENT

STRASBOURG

5 June 2012

FINAL

05/09/2012

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

In the case of Ademovič v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

Işıl Karakaş,

Guido Raimondi,

Paulo Pinto de Albuquerque,

Helen Keller, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 15 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 28523/03) 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 Serbian national, Mr Šefkija Ademovič (“the applicant”), on 24 July 2003.

2. The applicant, who had been granted legal aid, was represented by Mr S. Okçuoğlu, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 21 November 2008 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).

4. On 22 December 2008 the Serbian Government informed the Court that they did not wish to exercise their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of the Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972 and lives in Serbia.

6. In 1992 the applicant was found guilty of drug trafficking and sentenced to seventeen years’ imprisonment by an Italian court *in absentia*.

7. On 11 August 1994 the applicant was arrested and taken into custody at the Kapıkule border in Edirne, on the basis of a Red Notice issued by Italy via Interpol.

8. On 12 August 1994 the judge at the Edirne Magistrates' Court ordered the applicant's provisional arrest on the basis of Article 9 of the former Criminal Code and Article 16 of the European Convention on Extradition.

9. On 20 September 1994 the Ministry of Justice sent a letter to the Edirne Public Prosecutor informing him that, on 10 June 1992, the applicant had been sentenced to seventeen years' imprisonment for drug trafficking in Italy. On the same day, the public prosecutor stated that the applicant should remain under provisional arrest until the decision of the Council of Ministers regarding his extradition.

10. On 4 October 1994 the Edirne Criminal Court delivered a decision, pursuant to Article 9 of the former Criminal Code (Law no. 765), indicating the applicant's nationality and the nature of the offences allegedly committed.

11. On 3 November 1994 the applicant's lawyer requested the Ministry of Justice to allow his client to be tried in Turkey for the crimes he had allegedly committed there. Subsequently, a preliminary investigation was initiated into the applicant's activities and, on 9 November 1994, the applicant was remanded in custody in connection with the offences he had allegedly committed in Turkey.

12. On 2 December 1994 the Edirne Public Prosecutor filed a bill of indictment charging the applicant with drug trafficking under Article 403 of the former Criminal Code.

13. On 6 January 1995 the Council of Ministers decided to extradite the applicant to Italy when his trial in Turkey was over.

14. On 19 April 1995 the applicant's trial commenced before the Istanbul State Security Court. On 10 October 1997 the court ordered the applicant's release pending trial. On the same day, he was placed in provisional detention again with a view to his extradition to Italy on the basis of the order of the Edirne Magistrates' Court dated 12 August 1994.

15. On 11 April 2002 the Istanbul State Security Court informed the Ministry of Justice that the applicant could be extradited to Italy.

16. In the meantime, the applicant had filed several petitions with the Edirne Criminal Court, requesting his release. In all his petitions, he argued that his prolonged provisional detention with a view to his extradition was illegal. On 24 January 2003 the applicant's lawyer once again requested the Edirne Criminal Court to lift the decision for the applicant's provisional arrest and to order his release. In his petition, he relied on Article 16 of the European Convention on Extradition, which limited the length of the provisional detention to forty days after arrest. The applicant further maintained that by virtue of Article 90 of the Constitution international

agreements adopted by Turkey formed an integral part of the domestic law, and thus his prolonged detention with a view to extradition for more than five years constituted a breach of Article 16 of the European Convention on Extradition. On 25 January 2003 the court dismissed this request without providing any answer to the applicant's claim regarding the European Convention on Extradition. On 29 January 2003 the applicant's lawyer objected to the decision of 25 January 2003, again making a reference to the European Convention on Extradition and arguing that his provisional detention, which had exceeded five years, was illegal. On 30 January 2003 the Edirne Assize Court rejected the applicant's request for release, upholding the reasoning of the Edirne Criminal Court.

17. On 7 February 2003 the applicant was extradited to Italy.

18. On 29 June 2004 State Security Courts were abolished by Law no. 5190 and the criminal proceedings against the applicant were therefore transferred to the Istanbul Assize Court.

19. On 16 February 2005 the criminal proceedings against the applicant were terminated as the statutory time-limit had expired. On 4 July 2005 the Court of Cassation upheld the judgment.

20. On an unspecified date, the applicant returned to Serbia, where he currently resides.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. International law

21. The European Convention on Extradition which was signed in Paris on 13 December 1957 and which came into force on 11 May 1986 provides as follows:

Article 1 - Obligation to extradite

"The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order."

Article 16 - Provisional arrest

"1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law. ...

4. Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition ... It shall not, in any event, exceed 40 days from the date of such arrest."

Article 19 - Postponed or conditional surrender

“1. The requested Party may, after making its decision on the request for extradition, postpone the surrender of the person claimed in order that he may be proceeded against by that Party or, if he has already been convicted, in order that he may serve his sentence in the territory of that Party for an offence other than that for which extradition is requested.

2. The requested Party may, instead of postponing surrender, temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement by the Parties.”

B. National law*1. The Constitution*

22. Article 90 § 5 of the Constitution reads:

“... International treaties that are duly in force are directly applicable in domestic law. Their constitutionality cannot be challenged in the Constitutional Court.

In the event of conflict as to the scope of fundamental rights and freedoms between an international agreement duly in force and a domestic statute, the provisions of the international agreement shall prevail.”

2. Former Turkish Criminal Code (no. 765)

23. Article 3 reads:

“Whoever commits a crime in Turkey shall be punished in accordance with Turkish law, and a Turk, even if sentenced in a foreign country for a commission of a crime, shall be retried in Turkey.”

24. Article 9 reads:

“The Turkish State shall not accede to a request for the extradition of an alien by a foreign country for offences that are political in nature or related thereto.

When called upon to deal with a request by a foreign State for the extradition of an alien, the criminal court with jurisdiction for the place in which the person concerned is located shall determine that person’s nationality and the nature of the offence.

...

If the criminal court finds that the person whose extradition is requested is an alien and that the offence is an ordinary criminal offence the request for extradition may be granted by the Government.

The investigating judge may order the detention of the alien pending his extradition.”

3. *Law no. 466 on the Payment of Compensation to Persons Unlawfully Arrested or Detained*

25. Section 1 provides:

“Compensation shall be paid by the State in respect of all damage sustained by persons:

(1) who have been arrested, or detained under conditions or in circumstances incompatible with the Constitution or statute;

(2) who have not been immediately informed of the reasons for their arrest or detention;

(3) who have not been brought before a judicial officer after being arrested or detained within the time allowed by statute for that purpose;

(4) who have been deprived of their liberty without a court order after the statutory time allowed for being brought before a judicial officer has expired;

(5) whose close family have not been immediately informed of their arrest or detention;

(6) who, after being arrested or detained in accordance with the law, are not subsequently committed for trial ..., or are acquitted or discharged after standing trial; or

(7) who have been sentenced to a term of imprisonment shorter than the period spent in detention or ordered to pay a pecuniary penalty only...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

26. The applicant complained that he had been arbitrarily held in detention in Turkey for a long time. He also argued that he had had no domestic remedy whereby he could obtain compensation for his allegedly arbitrary detention. In this connection, the applicant relied on Article 5 §§ 1, 3 and 5 of the Convention. He further invoked a breach of Article 13 of the Convention, stating that he had no effective remedy whereby he could challenge the lawfulness of his detention.

27. The Court firstly recalls that Article 5 § 3 refers only to paragraph 1 (c) of Article 5. It does not therefore apply to detention with a view to extradition within the meaning of Article 5 § 1 (f) (see *Quinn v. France*, 22 March 1995, § 53, Series A no. 311). The Court therefore considers that the applicant’s complaint regarding the excessive length of

his provisional detention with a view to his extradition should be examined under Article 5 § 1 (f) of the Convention. It further concludes that the applicant's other complaint raised under Article 13 of the Convention in connection with the lawfulness of his detention should be examined under Article 5 § 4 of the Convention.

28. Article 5 of the Convention, in so far as relevant, reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. The period to be taken into consideration

29. The Government stated that when examining the applicant's Article 5 complaint, his detention prior to 10 October 1997 could not be taken into account for non-compliance with the six months time-limit.

30. The Court notes that the applicant was initially placed in provisional detention on 12 August 1994 by the decision of the Edirne Magistrates' Court pending his extradition to Italy. His provisional detention ended on 9 November 1994 when the Edirne Public Prosecutor remanded the applicant in custody in connection with the offences he had allegedly committed in Turkey. The applicant was subsequently released pending trial on 10 October 1997 upon the order of the Istanbul Security Court. The same day, he was placed in provisional detention again, pending his extradition to Italy. The applicant remained in provisional detention until his extradition to Italy on 7 February 2003.

31. The Court observes that in the present case, there are three periods of detention. The first period of provisional detention ended on 9 November 1994 and the second period of detention (on remand) ended on 10 October 1997. As the application was lodged with the Court on 24 July 2003, the Court will only take into account the period between 10 October 1997 and 7 February 2003 when examining the applicant's Article 5 complaints

32. The Court further notes that the applicant's complaints raised under Article 5 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also considers that this part of the application is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Article 5 § 1 of the Convention

33. The applicant contested the lawfulness of his detention pending extradition.

34. The Government stated that the applicant's provisional detention was based on Article 16 of the European Convention on Extradition and Article 9 of the former Criminal Code (no. 765).

35. The Court recalls that Article 5 § 1 (f) does not require that the detention of a person against whom action is being taken with a view to extradition be reasonably considered necessary, for example to prevent his committing an offence or absconding. In this connection, Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation or extradition". It is therefore immaterial, for the purposes of Article 5 § 1 (f), whether the underlying decision to expel can be justified under national or Convention law (see *Čonka v. Belgium*, no. 51564/99, § 38, ECHR 2002-I, and *Chahal v. the United Kingdom*, 15 November 1996, § 112, *Reports of Judgments and Decisions* 1996-V).

36. The Court reiterates, however, that it falls to it to examine whether the applicant's detention was "lawful" for the purposes of Article 5 § 1 (f), with particular reference to the safeguards provided by the national system. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, which is to protect the individual from arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports of Judgments and Decisions* 1996-III).

37. The Court must therefore ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the

“quality of the law”, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. “Quality of law” in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Khudoyorov v. Russia*, no. 6847/02, § 125, 2005-X (extracts); *Jėčius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; and *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III).

38. Turning to the present case, the Court observes that the request for the applicant’s extradition was accompanied by the Red Notice issued by Interpol. In this connection, the Court observes that Turkish law does not provide for any specific rules regarding extradition. It was therefore Article 9 of the former Criminal Code (no. 765) which governed the application of a measure of restraint pending a decision on the applicant’s extradition. Accordingly, the applicant’s initial placement in custody was ordered on 12 August 1994 by the Edirne Magistrates’ Court on the basis of Article 9 of the former Criminal Code and Article 16 of the European Convention on Extradition. However, although by virtue of Article 90 of the Constitution the terms of the European Convention on Extradition should be considered as forming an integral part of the domestic law, in the present case the domestic courts failed to take into account the forty day time-limit which was set by Article 16 of the said Convention. It is observed in this connection that the decision to place the applicant in provisional detention did not set a time-limit for his detention. Nor did the Government provide an explanation as to the legal basis for the applicant’s provisional detention, which lasted for more than five years. The Court is also struck by the fact that although on 11 April 2002 the Istanbul Assize Court had informed the Ministry of Justice that the applicant could be extradited (see paragraph 15 above), he was kept in detention for a further ten months until his extradition. The Court observes therefore that in the present case, the applicant fell in a legal lacuna in the absence of clear and specific regulations governing extradition.

39. In sum, the Court considers that by prolonging the applicant’s provisional detention for more than five years, the domestic system failed to protect the applicant from arbitrary detention and the Turkish criminal law system regarding extradition fell short of the requirement to provide clear and foreseeable principles.

40. In view of the foregoing the Court concludes that the applicant’s detention between 10 October 1997 and 7 February 2003 was unlawful and arbitrary, contrary to Article 5 § 1 (f) of the Convention.

41. There has therefore been a violation of Article 5 § 1 (f) of the Convention.

C. Article 5 § 4 of the Convention

42. The applicant further complained that he had not been able to obtain effective judicial review of his detention, in breach of Article 5 § 4 of the Convention.

43. The Government contested this claim. They stated that the applicant had the right to file an objection against his detention pursuant to the Criminal Procedure Code. They further underlined the fact that, albeit unsuccessful in the end, the applicant had indeed used this remedy and filed objections with the Edirne Criminal Court regarding his detention.

44. The Court reiterates that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the “lawfulness”, within the meaning of Article 5 § 1, of his or her deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements of domestic law but also the reasonableness of the suspicion underpinning the arrest, and the legitimacy of the purpose pursued by the arrest and the ensuing detention (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 65, Series A no. 145-B).

45. In the present case, despite the long period of time spent in provisional detention, namely more than five years, in examining the applicant’s request for release, the domestic courts did not address the specific arguments advanced by the applicant in his written submissions challenging his continued provisional detention. The Court reiterates that, while Article 5 § 4 of the Convention, does not impose an obligation to address every argument contained in the detainee’s submissions, the judge, who is examining appeals against pre-trial detention, must take into account concrete facts which are referred to by the detainee and are capable of casting doubt on the existence of those conditions essential for the “lawfulness”, for the Convention purposes, of the deprivation of liberty (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 61, ECHR 1999-II, and *Rafiq Aliyev v. Azerbaijan*, no. 45875/06, § 109, 6 December 2011).

46. The Court observes in this connection that in his petition challenging his continued provisional detention, the applicant repeated several times that his detention was in breach of the European Convention on Extradition, which limited the duration of provisional detention to forty days. The applicant further maintained that by virtue of Article 90 of the Constitution international agreements adopted by Turkey formed an integral part of the domestic law, and thus his prolonged detention with a view to extradition for more than five years was a breach Article 16 of the European Convention on Extradition (see paragraph 16 above). The Court observes that when the domestic courts rejected the applicant’s requests for release,

they did not make any reference to the European Convention on Extradition or to the other arguments advanced by the applicant.

47. In view of the foregoing, the Court considers that, by not taking into account the applicant's specific arguments against his continued provisional detention, the domestic courts failed to carry out a judicial review of the scope and nature required by Article 5 § 4 of the Convention challenging the legality of his detention.

48. There has therefore been a violation of Article 5 § 4 of the Convention.

D. Article 5 § 5 of the Convention

49. The applicant argued that the domestic law did not entitle him to obtain compensation for his detention in breach of Article 5 of the Convention.

50. The Government maintained that the applicant could have requested compensation pursuant to Law no. 466 on account of his allegedly illegal detention.

51. The Court notes that in so far as it has found that there have been violations of Article 5 §§ 1 and 4 of the Convention in the present case, Article 5 § 5 of the Convention is also applicable. The Court observes that in the present case, the domestic courts which reviewed the applicant's detention did not consider that he had been deprived of his liberty unlawfully. In this connection, the Court recalls that an action for compensation pursuant to Law No. 466 could be brought for damage suffered as a result of an unlawful deprivation of liberty (Section 1 § 1) or a lawful detention if the person was not subsequently committed for trial, or was acquitted or discharged after standing trial (Section 1 § 6). Accordingly, the aforementioned legal provisions did not provide the applicant with an enforceable right to claim compensation. The Court further notes that it does not appear that such a right was secured under any other provision of the Turkish legislation, given the absence of any specific rules governing extradition (see paragraphs 39 and 40 above). Moreover, the Government have not provided any sample decision which would indicate the contrary.

52. The Court therefore concludes that in the present case, the applicant did not have an enforceable right to compensation for his unlawful detention, as required by Article 5 § 5 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

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

55. The Government submitted that the length of the proceedings could not be considered unreasonable, particularly in view of the complexity of the case and the inherent difficulties in collecting evidence in a case involving international organised crime.

56. 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.

57. In the present case, the criminal proceedings against the applicant commenced on 9 November 1994, when he was placed in detention on remand in connection with the offence he had allegedly committed in Turkey, and ended on 4 July 2005 with the decision of the Court of Cassation. They thus lasted ten years and seven months before two levels of jurisdiction.

58. 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 considers that the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

59. There has therefore been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

60. The applicant further claimed that there had been no effective remedy in domestic law whereby he could challenge the excessive length of the proceedings in dispute. He relied on Article 13 of the Convention.

61. 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.

62. The Court has examined similar complaints 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 applicant could

have contested the length of the proceedings at issue (see *Daneshpayeh v. Turkey*, no. 21086/04, §§ 35-38, 16 July 2009).

63. It finds no reason to depart from that conclusion in the present case. There had accordingly been a violation of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. The applicant sought an amount of just satisfaction for both pecuniary and non-pecuniary damage suffered and left the amount to the discretion of the Court. As regards legal fees, without specifying any sum, the applicant referred to the Istanbul Bar Association's scale of fees.

65. The Government contested the applicant's claims.

66. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As regards non-pecuniary damage, the Court considers that the applicant must have suffered pain and distress which cannot be compensated solely by the Court's finding of a violation. Having regard to the nature of the violations found and deciding on an equitable basis, it awards the applicant twenty six thousand euros (EUR) in respect of non-pecuniary damage.

67. As regards legal fees, according to the Court's case-law an applicant is entitled to 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, the Court notes that the applicant solely referred to the Istanbul Bar Association's rates in relation to his claim for legal fees and failed to submit any supporting documents. Accordingly, the Court makes no award in respect of legal fees.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
4. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
5. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
6. *Holds* that there has been a violation of Article 13 of the Convention;

7. *Holds*

(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, EUR 26,000 (twenty six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 5 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President