



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

SECOND SECTION

CASE OF BİLAL AKYILDIZ v. TURKEY

(Application no. 36897/07)

JUDGMENT

Art 5 § 1 • Arrest and detention of the applicant on reasonable suspicion of a series of sexual assaults and attempts to abduct minors • Arrest on the basis of his physical resemblance to the perpetrator of those offences • Identification of the applicant as the perpetrator by the two victims and the witness during the identification parade • Arrest and detention based on sufficient evidence to persuade a neutral and objective observer of the applicant's commission of the offence charged • Applicant's subsequent acquittal, after the victims' retraction of the statements, not retroactively calling into question the reasonable suspicion at the time of his initial pre-trial detention

STRASBOURG

15 September 2020

FINAL

15/12/2020

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

In the case of Bilal Akyıldız v. Turkey,

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

Jon Fridrik Kjølbro, *President*,

Marko Bošnjak,

Valeriu Grițco,

Ivana Jelić,

Arnfinn Bårdsen,

Saadet Yüksel,

Peeter Roosma, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to:

the application (no. 36897/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Bilal Akyıldız (“the applicant”), on 19 August 2007;

the decision to give notice to the Turkish Government (“the Government”) of the complaints under Article 5 of the Convention and Article 1 of Protocol No. 1, and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 7 July 2020,

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

INTRODUCTION

The application concerns the arrest of the applicant on suspicion of a series of sexual assaults and attempts to abduct minors, and his subsequent pre-trial detention, before his acquittal twenty-seven days later. The applicant mainly complained that there had been no reasonable suspicion that he had committed an offence, and claimed that he had been remanded in pre-trial detention following an irregular investigation, in breach of Article 5 of the Convention.

THE FACTS

1. The applicant was born in 1972 and lives in Istanbul. He was represented before the Court by Mr M. Yavuz and Mr Z. D. Çiftçioğlu, lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. In 2002 several children were the victims of sexual assaults perpetrated by the same person, a person who was acting mainly in

Ümraniye (Istanbul). In addition, on 25 October 2002 and 6 November 2002 there were two attempts to abduct children in the district of Samandıra, also in Istanbul.

4. On 16 November 2002 the applicant was arrested in Samandıra. Following an anonymous call reporting the presence of an individual who resembled the photofit of the alleged perpetrator of the sexual assaults, gendarmes went to the area indicated by the caller and arrested the applicant, on the basis that he resembled the wanted person. According to the arrest and search report, signed by the applicant, he was arrested on suspicion of attempted child abduction and was notified of his rights. On the report, the question as to whether the applicant had a criminal record was answered in the affirmative. Another handwritten report consisting of a few lines, which was drawn up on the same day by three gendarmes, stated that the applicant had been arrested during a routine patrol for failing to produce his identity card.

5. On the same date the gendarmes organised an identification parade, during which child victims and a child witness identified the applicant as the perpetrator of the attempted abductions. The witness identified him with certainty, and both victims noted that the applicant strongly resembled the perpetrator of the attempted abductions.

6. DNA testing carried out while the applicant was in police custody showed that he was not responsible for the sexual assaults.

7. When questioned by gendarmes on 18 November 2002 about the attempted abduction of the two girls in question, the applicant, while acknowledging the resemblance between himself and the person depicted on the photofit, pointed out that the DNA test had shown that he was not responsible for the sexual assaults, and he denied being the perpetrator of the attempted abductions. The transcript of the questioning indicated that the applicant had no criminal record. After he was notified of his right to be assisted by a lawyer, he indicated that he did not wish to be assisted by a lawyer.

8. On 18 November 2002 the commander of the gendarmerie station sent the investigation file to the Kartal public prosecutor's office, together with a letter explaining what investigative measures had been carried out. He stated that an identification parade had been carried out by presenting the applicant alongside two gendarmes in civilian clothes. Samples had been taken from the applicant and sent for expert examination. According to the results, the applicant was not the perpetrator of the sexual assaults and he had no criminal record. The commander of the gendarmerie station stated that he believed that the victims, the witness and their families had probably acted under the influence of press publications about the "Ümraniye pervert" and had identified the applicant because of his resemblance to the person depicted on the photofit.

9. On the same day the applicant was brought before the judge of the Kartal Criminal Court, who ordered his pre-trial detention in the light of the evidence gathered during the investigation and the nature and seriousness of the alleged offences.

10. On 20 November 2002 the applicant's lawyer lodged an objection to the decision to remand the applicant in custody. He pointed out that the DNA tests had shown that his client was not responsible, and he also referred to contradictions in the descriptions of the attempted abductions which had been given by the victims. He argued that the identification parade had been irregular, as his client had been presented alongside two other persons with no distinguishing features, whereas his client's face was partially burned. Moreover, the victims had not identified his client with certainty during the identification parade. The lawyer also referred to the doubts expressed by the commander of the gendarmerie station as to the identification of the applicant during the identification parade. He concluded by stating that the conditions required by Article 104 of the former Code of Criminal Procedure had not been met. He stated that his client had been arrested because of his resemblance to the person depicted on the photofit of the "Ümraniye pervert" and that he had been detained on the basis of contradictory statements and identifications. Lastly, the lawyer explained that at the time of the attempted abductions the applicant had been working in a neighbourhood far away from the premises in question.

11. On 21 November 2002 the Kartal Criminal Court rejected that objection.

12. On 22 November 2012 the applicant was charged with the attempted abduction of minors, and his trial began before the Assize Court of Kartal.

13. On 11 December 2002 the father of one of the victims submitted a petition to the Assize Court of Kartal. Although his daughter had identified the applicant as the perpetrator of her attempted abduction during the identification parade, he stated that she had acted under the influence of news items about the series of sexual assaults which had been widely distributed in the press and on television, and that after seeing the person who had been arrested for those offences on television (another person, not the applicant), their opinion about the applicant had changed. They were now convinced that the applicant was not the perpetrator of the attempted abduction.

14. On 13 December 2002 the Assize Court of Kartal held a hearing in which the applicant was confronted with the child victims. The victims unequivocally indicated that the applicant was not the perpetrator of the attempted abductions. On the basis of their statements, the Assize Court of Kartal considered that the applicant had not committed the acts of which he was accused (*bu suçları işlemediği anlaşıldığından*) and acquitted him.

A. Investigations launched by the Kartal public prosecutor's office

15. Following the publication of an article about the applicant in a daily newspaper, the Kartal public prosecutor opened a criminal investigation *ex proprio motu* and took statements from him. The applicant explained that he had not been ill-treated either in police custody or in prison. His main complaint was that he had not been able to enjoy his rights while in police custody (*yasal haklarının kullandırılmaması*); he had not been informed of the charges against him until his appearance before the prosecutor, he had not had access to a lawyer, and he had not been allowed to inform his family about what was happening. He also complained that he had been presented to the public as the perpetrator of a series of sexual assaults.

16. At the end of the investigation conducted by him, and in the light of all the information gathered, on 26 December 2002 the public prosecutor issued a decision not to prosecute with regard to the allegations of the applicant. He stated that he had found no irregularities in the matters complained of by the applicant or any ill-treatment. According to the gendarmes' statements, the applicant had been arrested in connection with acts committed in Samandıra, during a check carried out because of his resemblance to the person described given by the victims. According to the officers, the applicant had not been able to produce his identity document, and had therefore been taken to the police station. Shortly after he had been taken to the police station his family had been informed of this by telephone and his brother had taken the identity card to the police station, which was confirmed by the police custody records. Lastly, the prosecutor noted that the applicant had been notified of his right to be assisted by a lawyer.

17. An objection lodged against the decision not to prosecute was rejected on 4 March 2003.

18. In the meantime, on 8 January 2003 the applicant had lodged a formal complaint. He claimed to have been subjected to degrading and humiliating treatment while in police custody, and complained of irregularities in respect of his arrest and detention. He alleged, *inter alia*, that the gendarmes had not been competent to arrest him, as the area where he had been arrested fell within the jurisdiction of the police. He also complained that the reports drawn up while he had been in police custody contained inaccurate information about the circumstances of his arrest and his criminal record. He also complained that he had not enjoyed his legal rights while in police custody (he had not been informed of the charges against him, and he had not had access to a lawyer). He also asserted that the identification parades had been irregular, as he had been presented alongside the fathers of the victims. Lastly, he complained that the gendarmes had exposed him to the public at the entrance to the courthouse.

19. The public prosecutor in Kartal took statements from the applicant, his brothers, the witnesses who had been present at the scene of the

applicant's arrest and the gendarmes. At the end of his investigation, on 17 October 2003 the public prosecutor issued an additional decision not to prosecute. He pointed out that an investigation had already been conducted into the same facts and allegations, and it had ended in a decision not to prosecute. In the light of the information gathered in the course of the additional investigation, the public prosecutor considered that there was no need to prosecute the gendarmes.

20. As to the handwritten report indicating that the applicant had been arrested by gendarmes during routine patrols for failing to produce his identity card, on 17 October 2003 the public prosecutor also decided to charge three gendarmes with abuse of authority (*görevi kötüye kullanmak*). He accused them of having wrongly indicated in the handwritten report that the applicant had been arrested by gendarmes during routine patrols for failing to produce his identity card.

21. On 18 March 2004 the Assize Court of Kadıköy dismissed an objection lodged by the applicant against the additional decision not to prosecute, on the grounds that there had been a failure to comply with the time-limit for an appeal against that decision. It noted that the objection had been lodged more than fifteen days after the applicant had been notified of the decision in question.

22. With regard to the criminal proceedings against the gendarmes for abuse of authority, on 23 June 2005 the Kartal Criminal Court acquitted the gendarmes in question. After cassation proceedings and a referral, on 30 June 2011 the Kartal Criminal Court decided to terminate the criminal action because it was time-barred.

B. Remedy for compensation under Act No. 466 (repealed)

23. Following his acquittal, on 6 March 2003 the applicant lodged a claim for compensation under Act No. 466 with the Assize Court of Kadıköy. He based his claim on the arguments which he had put forward in his criminal complaint of 8 January 2003 (see paragraph 18 above). He added that he had been arrested in the absence of evidence and unlawfully deprived of his liberty.

24. On 22 September 2003 the Assize Court of Kadıköy awarded the applicant 697 Turkish liras (TRY) for pecuniary damage and TRY 1,000 for non-pecuniary damage. It noted that the applicant had been acquitted and released after being in detention for twenty-seven days, and that he had been unjustly deprived of his liberty.

25. The applicant appealed to the Court of Cassation, alleging that the sums awarded by the Assize Court of Kadıköy were insufficient.

26. On 16 November 2006 the Court of Cassation rejected all the arguments put forward by the applicant, except one alleging that the sum

awarded for his lawyer's fees was too low, and it quashed the Assize Court of Kadıköy's decision.

27. After the cassation proceedings had ended and the case was referred back to the Assize Court of Kadıköy, by a decision of 22 March 2007 that court awarded the same amounts for pecuniary and non-pecuniary damage, but increased the sum awarded for legal fees to TRY 1,000. The applicant and his lawyer had asked the court to comply with the judgment given in the cassation proceedings.

28. That decision by the Assize Court of Kadıköy, which only the Treasury appealed against, was confirmed by the Court of Cassation on 4 November 2011.

29. On 3 August 2012 the applicant was paid the sums awarded to him by the Assize Court of Kadıköy, together with interest at the legal rate running from 22 March 2007; he was paid TRY 4,443 in total. The sum paid in respect of non-pecuniary damage amounted to approximately TRY 1,650, including interest (the equivalent of EUR 745 at the exchange rate at the relevant time).

C. Action for damages in the administrative courts

30. On 12 March 2004 the applicant lodged an application with the Istanbul Administrative Court, with a view to obtaining compensation for the harm which he had suffered because he had been unlawfully detained, his rights had not been respected in custody, he had been ill-treated, and his reputation had been damaged as a result of the confidentiality of the investigation not being respected and his name being disclosed so that he had been identified as the "Ümraniye pervert".

31. On 24 July 2006 the Third Administrative Court of Istanbul rejected that application. The court noted that the claim was made up of two parts. In so far as it was based on the irregularities in the applicant's arrest and detention, the court considered that the claim fell within the scope of Law No. 466, and noted that the applicant had been awarded compensation by the Assize Court of Kadıköy. With regard to the applicant's complaint that his identity had been disclosed and he had been exposed to the press, the court considered those allegations unfounded. According to the court, the authorities had not provided any information from the investigation file or made any statements to the press. The court concluded that no misconduct could be attributed to the authorities.

32. On 11 October 2010 the Council of State quashed the part of the judgment dismissing the applicant's claims in respect of non-pecuniary damage. It considered that the applicant had been exposed to public opinion during his time in police custody because the authorities had communicated information to the press and television channels, and thus had acted in contravention of the principle whereby an investigation was confidential.

The way in which the gendarmes had conducted the investigation, in violation of this principle, amounted to misconduct, for which the authorities were responsible. The Council of State therefore considered that compensation should be awarded in this regard.

33. After several sets of cassation proceedings the applicant was finally awarded TRY 80,000 for the non-pecuniary damage he had suffered as a result of the violation of the principle of confidentiality.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

34. Relying on Article 5 of the Convention, the applicant complained that he had been arrested and remanded in custody in the absence of a reasonable suspicion that he had committed an offence. He also claimed that the gendarmes who had arrested him had not been competent to do so, and that the reports relating to his arrest and time in police custody, as well as the identification parades, had been irregular.

The Court considers it appropriate to examine these complaints under Article 5 § 1 of the Convention, the relevant parts of which provide:

“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:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...”

A. Admissibility

1. Non-exhaustion of domestic remedies

35. The Government argued that the applicant had failed to exhaust the domestic remedies available to him, and their argument was made up of two strands. With regard to the arrest, the Government maintained that the applicant should have lodged an appeal under Article 128 of the former Code of Criminal Procedure. In this connection, they referred to the case of *Mustafa Avcı v. Turkey* (no. 39322/12, §§ 63-67, 23 May 2017). As to the pre-trial detention, the Government explained that Law No. 466 (repealed) had provided that persons who had been acquitted after being lawfully detained could seek compensation. They pointed out that the applicant had in fact made use of that remedy, but he had not lodged an appeal against the

decision of the Assize Court of Kadıköy of 22 March 2007 (see paragraph 27 above).

36. The applicant contested the Government's objections and arguments.

37. As regards the remedy provided by Article 128 of the former Code of Criminal Procedure, the Court has already examined arguments based on that provision in several Turkish cases and rejected them (see, for example, *Maçın v. Turkey*, no. 52083/99, §§ 30-33, 4 May 2006; *Ayaz and Others v. Turkey*, no. 11804/02, §§ 23-24, 22 June 2006; and *Hacı Özen v. Turkey*, no. 46286/99, § 71, 12 April 2007). It sees no reason to depart from those previous conclusions in the present case. The Court further notes that the Government's objection in the case of *Mustafa Avci v. Turkey*, to which they referred in their observations, was based on a provision of the new Code of Criminal Procedure – namely Article 91 § 5 – which entered into force after the applicant's arrest. The Court accordingly concludes that the Government's objection in this regard must be rejected.

38. In so far as the Government alleged non-exhaustion of the remedy provided for by Act No. 466, owing to the absence of an appeal by the applicant against the decision of the Assize Court of Kadıköy of 22 March 2007, the Court notes that that decision was issued after the cassation proceedings. In its judgment in the cassation proceedings, the Court of Cassation had limited the quashing of the first-instance decision to the issue of the sum awarded for the lawyer's fees being insufficient, and had simultaneously rejected all the arguments submitted by the applicant, including the one asserting that the amount awarded for non-pecuniary damage was too low (paragraph 26 above). The dismissal of the other arguments by the Court of Cassation was binding on the Assize Court of Kadıköy, which could not modify these aspects of its initial judgment. Only the question of legal fees was examined by the Assize Court of Kadıköy after the cassation proceedings and only this aspect of its original decision has been reviewed. The other aspects of the original decision having become final with the judgment in the cassation proceedings, the Assize Court of Kadıköy did not consider them and reiterated its original decision. Accordingly, the applicant cannot be accused of not having lodged an appeal in cassation against the decision of 22 March 2007. Consequently, the Court also rejects the Government's objection in this regard.

2. *The applicant's victim status*

39. The Government also submitted that the applicant could no longer claim to be a victim, because the national authorities had recognised, in the context of the compensation claim, that there had been a violation of his right to liberty, and he had been awarded compensation. According to the Government, the sum paid to the applicant – namely TRY 4,443 – had been sufficient. They added that the applicant had also been awarded

TRY 10,000 on account of the excessive length of the proceedings before the Assize Court of Kadıköy.

40. The applicant contested the Government's objection.

41. The Court observes that after the applicant's acquittal the Assize Court of Kadıköy awarded him TRY 697 and TRY 1,000 respectively for pecuniary and non-pecuniary damage suffered as a result of his deprivation of liberty. In so doing, that court merely relied on the applicant's acquittal. The Court observes that Act No. 466 provides, *inter alia*, that the State shall compensate any person who, having been arrested or detained in accordance with the law, has then been acquitted. In the context of a claim for compensation following an acquittal, the Turkish courts do not have to examine whether detention was unlawful, let alone recognise this, even in substance.

42. The Court cannot agree with the Government's argument that the authorities clearly recognised a violation of the applicant's right to liberty; in the instant case, the Assize Court of Kadıköy found that the applicant's detention had been unfair not because the detention had been incompatible with the requirements of that right, but simply because he had been acquitted. The court in no way examined whether the applicant's detention had been procedurally defective or whether it had been based on a reasonable suspicion that he had committed the offence charged. As the award of compensation was an automatic consequence of the applicant's acquittal, it did not amount to a finding of a violation of Article 5 § 1 of the Convention (see, to that effect, *Medeni Kavak v. Turkey*, no. 13723/02, § 34, 3 May 2007, and *Elgay v. Turkey*, no. 18992/03, § 32, 20 January 2009). The Court considers that, in the absence of such recognition, the payment of compensation, particularly given the time which the applicant spent in pre-trial detention, was not sufficient to deprive him of his status as a "victim" within the meaning of Article 34 of the Convention (see *Shkarupa v. Russia*, no. 36461/05, § 78, 15 January 2015). Moreover, the Court considers that the sum awarded to the applicant in respect of non-pecuniary damage was significantly lower than the sums that the Court has awarded in cases concerning unlawful detention (see, to this effect, *Vedat Doğru v. Turkey*, no. 2469/10, § 41, 5 April 2016). In conclusion, the Court considers that, notwithstanding the payment of a sum by way of compensation for the pre-trial detention, the applicant can still claim to be a "victim", within the meaning of Article 34 of the Convention, of a violation of Article 5 § 1. It therefore rejects the Government's objection in this regard.

3. Lawfulness of the deprivation of liberty

43. The applicant alleged that the gendarmes who had arrested him had not been competent to do so, as he had been arrested in an area under police jurisdiction. He also alleged that the reports drawn up after his arrest had been irregular, and lastly he claimed that the identification parades had not

been in accordance with procedure. He stated that he had been remanded in pre-trial detention on the basis of identifications made by young children, who had retracted their statements one month later.

44. The Government maintained that the applicant's allegations were unfounded.

45. The Court emphasises that the present case differs from those concerning irregularities directly affecting the adoption of decisions on pre-trial detention (see, *inter alia*, *Mooren v. Germany* [GC], no. 11364/03, § 83, 9 July 2009). The judge who issued the decision to remand the applicant in pre-trial detention had jurisdiction to do so. After hearing the applicant, and on the basis of the evidence before him, the judge considered that the substantive condition for remand in custody had been met.

46. Turning now to the irregularities relied on by the applicant, the Court notes that they concern the competence of the gendarmes who arrested him, the inaccurate reference to his criminal record in the arrest and search report, the allegedly erroneous information about the circumstances of his arrest in the handwritten report, and the identification parades carried out while he was in police custody.

47. The Court finds that the applicant's first allegation, that the gendarmes who arrested him were not competent to do so, is in no way substantiated. Neither the material in the file nor the arguments put forward by the applicant make it possible to assert that the gendarmes acted in contravention of the relevant domestic law, as regards their competence and territorial jurisdiction, when arresting and taking the applicant into custody.

48. Secondly, as regards the inaccurate reference to the applicant's criminal record in the arrest and search report, the Court considers that it is more a simple clerical error which had no impact on the lawfulness of the applicant's arrest and detention, especially as the error was subsequently rectified while he was in custody (see *Nikolov v. Bulgaria*, no. 38884/97, § 63, 30 January 2003). Indeed, both the record of questioning drawn up during his time in police custody and the record of his hearing before the judge clearly indicated that there was nothing on the applicant's criminal record.

49. As to the handwritten report indicating that the applicant had been arrested during a routine patrol for failing to produce his identity card, the Court notes that the Kartal public prosecutor's office decided to prosecute the gendarmes who had drawn up this report for abuse of authority, but the criminal proceedings were time-barred. The Court considers that it cannot speculate as to what the outcome of those proceedings would have been if they had not been affected by the statute of limitations. In any event, assuming that there was an irregularity in the record, as the applicant asserts, the Court considers that the alleged shortcoming could not be said to amount to such a "gross or obvious irregularity" as to render the arrest and subsequent pre-trial detention unlawful (see *Mooren*, cited above, § 75). It

observes that an official arrest and search report, signed by the applicant, was drawn up properly; this report stated that the applicant had in fact been arrested on suspicion of attempted abduction (paragraph 4 above). The applicant's arrest and detention, and all other investigative acts, were documented in the records; the applicant was informed of the charges against him, and he was notified of his rights as a suspect and underwent medical examinations. At the end of his time in police custody the applicant was brought before the judge, who decided to remand him in pre-trial detention (compare with the serious irregularities observed during the arrest and detention of the applicant in the case of *Venskutė v. Lithuania*, no. 10645/08, §§ 75-81, 11 December 2012).

50. Lastly, the Court notes that the applicant complained that the identification parades in question had not been reliable, without, however, explaining why those identification parades had not been in accordance with procedure. In his criminal complaint of 8 January 2003, the applicant claimed that he had been presented alongside the victims' fathers (see paragraph 18 above). However, the criminal investigation conducted by the Kartal public prosecutor revealed that the applicant had been presented alongside gendarmes in civilian clothes. The applicant did not repeat this allegation before the Court. In the Court's view, examination of the file did not reveal any procedural irregularity which could, under national law, have resulted in the identification parades concerned being invalid.

51. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

4. Existence of a reasonable suspicion that the applicant had committed an offence

52. The applicant complained that there had been no reasonable suspicion that he had committed an offence.

53. The Government maintained that the applicant's allegations were unfounded.

54. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

55. The Court notes that the applicant was arrested in connection with a series of sexual assaults and attempted abductions, on the basis of his physical resemblance to the perpetrator of those offences. Indeed, following an anonymous call reporting the presence of an individual who resembled the person depicted on the photofit of the alleged perpetrator of the sexual assaults, gendarmes went to the area indicated by the caller and proceeded

to arrest the applicant. During his hearing, the applicant himself admitted that he resembled the person depicted on the photofit of the alleged perpetrator. While it is true that the DNA test revealed that the applicant was not responsible for the sexual assaults (see paragraph 6 above), it had no effect as regards the attempted abductions of the children, since during the identification parade organised during the applicant's time in police custody, the two victims and the witness had identified the applicant as the perpetrator of the abduction attempts (compare with *Fernandes Pedroso v. Portugal*, no. 59133/11, § 102, 12 June 2018, where the applicant complained in particular that he had been identified from a photograph, in the absence of an identification parade). Accordingly, having regard to the particular nature of the facts giving rise to the applicant's deprivation of liberty, the nature of the alleged offences, and the information in the file, the Court considers that the applicant's arrest and detention were based on sufficient evidence to persuade a neutral and objective observer that the applicant could have committed the offence charged (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182, and *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001 X).

56. The Court considers that the applicant's subsequent acquittal, after the victims' retraction of the statements which they had made during the identification parade, cannot retroactively call into question whether there was a reasonable suspicion, at the time of his initial pre-trial detention, that he had committed an offence (see, to this effect, *Capeau v. Belgium* (dec.) no. 42914/98, 6 April 2004). Accordingly, the Court considers that the applicant can be regarded as having been arrested and detained on the basis of a reasonable suspicion that he had committed an offence within the meaning of Article 5 § 1 of the Convention (see *Murray v. the United Kingdom*, 28 October 1994, § 63, Series A no. 300-A).

57. Consequently, there has been no violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

58. Invoking Article 3 of the Convention, the applicant claimed to have been subjected to degrading and humiliating treatment while in police custody, and he complained that the perpetrators of such acts had not been punished.

59. The Government argued that the applicant had failed to comply with the six-month rule.

60. The Court notes that following the investigation conducted *ex proprio motu* by the Kartal public prosecutor, a decision not to prosecute was issued on 26 December 2002 regarding the treatment that the applicant complained of before the Court, and the appeal lodged against that decision

was dismissed on 4 March 2003, more than six months before the present application was lodged. The additional decision not to prosecute was issued on 17 October 2003, and the appeal lodged against that decision was dismissed on 18 March 2004, again, more than six months before the lodging of this application.

61. The Court observes that the applicant also submitted his allegations of ill-treatment in the context of the ensuing action for damages in the administrative courts, when he lodged an application with the Istanbul Administrative Court (paragraph 30 above). It notes however that in the present case it was not the purpose of this action to review the allegations of the applicant under Article 3 of the Convention. It further notes in this regard that the Istanbul Administrative Court made no mention of these allegations in its decision. Moreover, since these proceedings could only result in the granting of compensation, they were not an adequate and effective remedy, within the meaning of Article 35 § 1, which should be taken into account for the purposes of the six-month time-limit (see among others, *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 136, 19 December 2017).

62. Accordingly, this complaint has been lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

63. The applicant complained that the amount of compensation awarded to him for his detention had been insufficient, and that he should have been awarded default interest on that amount. He invoked Article 1 of Protocol No. 1.

64. The Court considers it appropriate to examine the first part of this complaint – relating to the inadequacy of the amount of compensation – in the light of Article 5 § 5 of the Convention. It points out that the right to compensation under Article 5 § 5 of the Convention presupposes that a violation of one of the other paragraphs of that provision has been established by a national authority or by the Court (see *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X). In the present case, as a violation of one of the other paragraphs of this provision has not been established, that provision is not applicable. Accordingly, this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a), and must be rejected in accordance with Article 35 § 4.

65. In so far as the applicant complained that he had not been awarded default interest on that amount, the Court notes that the compensation awarded to him was paid on 3 October 2012 and included default interest at the statutory rate. In the light of the default interest applied to the applicant's claim, the Court finds that the applicant suffered no real loss. It

follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint concerning the alleged lack of reasonable suspicion that the applicant had committed an offence (Article 5 § 1 (c) of the Convention) admissible and the remainder of the application inadmissible ;
2. *Holds*, by six votes to one, that there has been no violation of Article 5 § 1 of the Convention;

Done in English, and notified in writing on 15 September 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President

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

J.F.K.
S.H.N.

DISSENTING OPINION OF JUDGE BOŠNJAK

1. I respectfully disagree with the majority in their finding that there existed a reasonable suspicion justifying the applicant's detention and that, accordingly, there has been no violation of Article 5 § 1 of the Convention.
2. The applicant was arrested on the basis of his alleged resemblance to a perpetrator of multiple sexual offences and two abduction attempts, all committed against children. It appears that at the time of the applicant's arrest, it was assumed that all of the above-mentioned offences had been committed by the same offender.
3. During the applicant's police custody, DNA testing was carried out and an identification parade was organised. DNA testing showed no match with the DNA belonging to the perpetrator of the sexual assaults. Bearing in mind the hypothesis of the investigating authorities that all the criminal offences had been committed by one single person, this would also, logically, rule out the possibility that the applicant had carried out the abduction attempts.
4. However, the identification parade provided evidence that, in principle, could weigh heavily against the applicant in respect of the abduction attempts. In particular, the two victims said the applicant strongly resembled the perpetrator, while a witness identified him with certainty. Although this could generally persuade a neutral and objective observer that there might have been two separate offenders and that the applicant could have committed the two attempted abductions, I do not believe that such a conclusion can be reached under the specific circumstances of the case.
5. The identification parade involved presenting the applicant alongside two gendarmes in civilian clothes. It appears that the applicant bears a distinctive and rather rare mark, similarly to the perpetrator of the set of the offences, which had been a factor in the applicant's arrest. It is reasonable to assume that neither of the two gendarmes taking part in the identification parade had any similar mark. In these circumstances, it is understandable that among the three participants in the parade the applicant was picked out by both victims and the witness, with the victims mentioning "a strong resemblance", a fact that was undisputed by anyone involved. However, while a pure resemblance on the basis of a distinctive physical characteristic which is not common in the population may

constitute a general probability that the person arrested is a perpetrator of a crime, this in itself, if unsupported by specific and concrete elements demonstrably linking the suspect to the crime in question, cannot constitute a reasonable suspicion. To illustrate this point: if, say, the mark present on the applicant's body were to be found in the population at the ratio of one in one hundred thousand people, more than 150 people could be arrested and detained in Istanbul alone as suspects of the abovementioned crimes. It would be manifestly unreasonable to pursue such an investigative tactic, but above all such measure would be clearly incompatible with the right to liberty and security within the meaning of Article 5 § 1 of the Convention.

6. This, of course, is not to say that a physical resemblance between the suspect and the perpetrator cannot be used in evidence in deciding to detain someone. However, in order for a suspicion to be reasonable, as explained above, further specific and concrete elements must exist linking the suspect to the crime. Contrary to the majority's assertion concerning the information on file (see para. 55 of the judgment), there was nothing in this case to back up the suspicion against the applicant. According to the letter addressed by the commander of the gendarmerie station to the public prosecutor at the end of the police custody, the investigation file contained the following elements: inspection report of the scene, sketch of the scene, an authorisation to extend the duration of police custody, victims' statements, complainants' statements, witness statements, record of the applicant's interrogation, forensic request, arrest and search report, report on the start and end of the police custody, photocopy of the applicant's identity card and an information note. It is clear that none of these elements could constitute a specific link between the applicant and the crimes he was suspected of having committed. Instead, it is fair to say that the statements given by the victims and one witness averring the applicant's resemblance to the perpetrator were the only evidence against the applicant when the judge of the Kartal Criminal Court ordered the applicant's detention.
7. Furthermore, the commander of the gendarmerie station, apparently privy to the circumstances in which the identification parade was carried out, warned the public prosecutor that the victims, the witness and their families had probably acted under the influence of press publications and had identified the applicant purely because of his resemblance to the person depicted on the photofit. To put it simply, the commander was apparently not convinced that they had arrested the right person.

8. A police officer conducting investigative measures in a given case often tends to find or interpret evidence against the suspect. Such a tendency is rarely coupled with a bad faith. Rather it is subconscious and is intrinsically linked to the nature of any investigative activity. This is why the police are not considered to have a completely neutral stance regarding the suspect and are not entitled, in a democratic society, to adopt decisions regarding personal liberty. Instead, such decisions must be taken exclusively by an independent and impartial magistrate, meeting the necessary requirement of neutrality.
9. If, as in the present case, an experienced senior police officer conducting investigative measures had serious doubts regarding the value of the sole piece of evidence that weighed against the applicant, I find it hard to conceive how that evidence could persuade a neutral and objective observer that the applicant could have committed the offence for which he was detained. Accordingly, I believe that the criterion of reasonable suspicion was not met.
10. In their finding that a reasonable suspicion existed, the majority are further having regard to (a) the particular nature of the facts giving rise to the applicant's deprivation of liberty and (b) the nature of the alleged offences. I do not agree that any of these could justify the applicant's detention. As regards the facts leading to the applicant's deprivation of liberty, it is undisputed that he was arrested following an anonymous call reporting that he resembled the photofit of the alleged perpetrator. It does not appear that at that or any other moment, the applicant was observed to be engaged in any activity giving rise to a suspicion that he had committed any of the offences for which he was later arrested. Therefore, it is difficult to see how the facts surrounding the applicant's arrest could support a reasonable suspicion. The same holds for the nature of the alleged offences. While those offences were undoubtedly very serious, it is unacceptable to lower the standards of protection, and in particular that of a reasonable suspicion, simply because the nature of the offence is of particular importance.
11. In short, I hold that there was no reasonable suspicion that the applicant had committed a criminal offence and that, accordingly, there has been a violation of Article 5 § 1 of the Convention.