

In the case of Mitap and Müftüoglu v. Turkey (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Gölcüklü,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr C. Russo,
Mr S.K. Martens,
Mr I. Foighel,
Mr J.M. Morenilla,
Mr P. Jambrek,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 23 November 1995 and 21 February 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 6/1995/512/595-596. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 23 January 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in two applications (nos. 15530/89 and 15531/89) against the Turkish Republic lodged with the Commission under Article 25 (art. 25) by two Turkish nationals, Mr Nasuh Mitap and Mr Abdullah Oguzhan Müftüoglu, on 14 September 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 para. 3 and Article 6 para. 1 (art. 5-3, art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated

the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Macdonald, Mr C. Russo, Mr S.K. Martens, Mr I. Foighel, Mr J.M. Morenilla and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 18 September and 16 October 1995 respectively. The Delegate of the Commission did not submit any observations.

5. On 8 November 1995 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President, who had given the applicants and their lawyer leave to use the Turkish language (Rule 27 para. 3), the hearing took place in public in the Human Rights Building, Strasbourg, on 20 November 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M. Özmen,
Mrs D. Akçay,
Mrs I. Boivin,

Deputy Agent,
Advisers;

(b) for the Commission

Mr B. Marxer,

Delegate;

(c) for the applicants

Mr A. Atak, avukat (lawyer),

Counsel.

The Court heard addresses by Mr Marxer, Mr Atak, Mr Özmen and Mrs Akçay.

7. On 12 January 1996 the Agent of the Government produced a copy of an extract from the Martial Law Court's judgment of 19 July 1989 and informed the Registrar that the Court of Cassation had given judgment on 28 December 1995. The Agent communicated a copy of this judgment on 16 February 1996.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

8. Mr Mitap and Mr Müftüoğlu are Turkish citizens born in 1947 and 1944 respectively. Mr Mitap is an economist and Mr Müftüoğlu a lawyer.

9. After being arrested by the Ankara police they were placed in police custody, Mr Mitap on 22 January 1981 and

Mr Müftüoglu the following day, on the ground that they were members of the central committee of the Dev-Yol (Revolutionary Way) organisation (see paragraph 12 below). They were held in police custody until 23 April 1981.

A. The proceedings concerning the applicants' detention

10. On 23 April 1981 the Ankara Martial Law Court (sikiyönetim mahkemesi) remanded both applicants in custody.

11. After 28 January 1987, the date of the Turkish declaration relating to Article 25 (art. 25) of the Convention, Mr Mitap and Mr Müftüoglu made eight unsuccessful applications for conditional release.

B. The proceedings on the merits

12. On 26 February 1982 the military prosecutor filed the bill of indictment with the Martial Law Court. In this document, which, according to the Government, set out charges against seven hundred and twenty-three defendants, the applicants were accused of being founder members and leaders of an organisation whose object was to undermine the constitutional order and replace it with a Marxist-Leninist regime. They were also suspected of calling for committees to be set up to organise resistance against attacks by extreme right-wing activists and of instigating a number of acts of violence. The prosecution sought the death penalty under Article 146 para. 1 of the Criminal Code.

13. In a judgment of 19 July 1989 the Martial Law Court found the applicants guilty as charged and sentenced them to life imprisonment (that is eighteen years assuming good conduct) for offences under Article 146 para. 1 of the Criminal Code, permanently debarred them from employment in the civil service and placed them under judicial guardianship for the duration of their imprisonment. It also decided to deduct from their sentences the length of time they had spent in detention pending trial. It took from 19 July 1989 until 1993 for the reasons for the judgment to be set down in writing.

14. As the applicants' sentences exceeded fifteen years' imprisonment, their cases were automatically referred to the Military Court of Cassation (askeri yargitay).

15. They were released on parole on 23 July 1991.

16. Following promulgation of the Law of 27 December 1993, which abolished the jurisdiction of the martial law courts, the Court of Cassation (yargitay) acquired jurisdiction over the case and the file was transmitted to it. In a judgment of 28 December 1995 it upheld the above-mentioned penalties.

II. THE TURKISH DECLARATION OF 22 JANUARY 1990 RELATING TO ARTICLE 46 (art. 46) OF THE CONVENTION

17. On 22 January 1990 the Turkish Minister for Foreign Affairs deposited with the Secretary General of the Council of Europe the following declaration, relating to Article 46 (art. 46) of the Convention:

"On behalf of the Government of the Republic of Turkey and acting in accordance with Article 46 (art. 46) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, I hereby declare as follows:

The Government of the Republic of Turkey acting in accordance with Article 46 (art. 46) of the European

Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory ipso facto and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 (art. 1) of the Convention, performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey.

This Declaration is made on condition of reciprocity, including reciprocity of obligations assumed under the Convention. It is valid for a period of 3 years as from the date of its deposit and extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

This declaration was renewed, in almost identical terms, for a three-year period beginning on 22 January 1993.

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Mitap and Mr Müftüoglu applied to the Commission on 14 September 1989. They alleged that there had been a violation of Article 5 para. 3 (art. 5-3) of the Convention on account of the length of their detention pending trial and of Article 6 para. 1 (art. 6-1) because their case had not been heard (a) within a reasonable time, (b) by a tribunal established by law, or (c) fairly by an independent and impartial tribunal.

19. The Commission declared the applications (nos. 15530/89 and 15531/89) admissible on 10 October 1991. In its report of 8 December 1994 (Article 31) (art. 31), it expressed the unanimous opinion that there had been breaches of Article 5 para. 3 and of Article 6 para. 1 (art. 5-3, art. 6-1) as regards the first and third complaints but not the second. The full text of the Commission's opinion is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

20. In their memorial the Government asked the Court:

"In chief,

(a) to hold that the Commission lacked jurisdiction *ratione temporis* on account of the Turkish declaration under Article 25 (art. 25) and also on account of the non-exhaustion of domestic remedies; and

(b) to rule that the Court lacks jurisdiction *ratione temporis* on account of the Turkish declaration recognising its compulsory jurisdiction under Article 46 (art. 46);

in the alternative,

to hold that there has been no breach of the Convention."

AS TO THE LAW

21. The applicants complained (1) of the excessive length of their detention pending trial, (2) of the excessive length of the criminal proceedings against them and (3) that the Martial Law Court had not been established by law, that it was not independent and impartial and that they had not had a fair trial.

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

22. As their main submission the Government raised two objections to admissibility, based on lack of jurisdiction *ratione temporis* and failure to exhaust domestic remedies.

23. They contended, primarily, that when, on 28 January 1987, Turkey had recognised the Commission's competence regarding "allegations made in respect of facts, including judgments which are based on such facts which have occurred subsequent to" that date, its intention had been to remove from the ambit of the Commission's review not only facts which had occurred before the date on which the declaration made under Article 25 (art. 25) of the Convention was deposited but also judgments based on those facts even where these were subsequent to the date of deposit. The Commission had accordingly lacked competence *ratione temporis* as regards both the complaints that the Ankara Martial Law Court had not been established by law, that it was not independent and that it was not impartial and the complaint concerning the fairness of the proceedings before that court, since the case concerned two laws enacted in 1963 and 1971. The above objection ought also to exclude from consideration of the complaints relating to the length of detention and of the proceedings the period preceding Turkey's recognition of the Commission's competence.

The Government contended, in the alternative, that the Court lacked jurisdiction *ratione temporis* to examine the complaints relating to the length of detention pending trial and the complaints based on Article 6 para. 1 (art. 6-1), with the exception of those concerning the length of the proceedings. This would involve discussing the nature of a court which had been set up in accordance with the two laws of 1963 and 1971 mentioned above and which had given judgment on 19 July 1989, whereas Turkey had not recognised the Court's jurisdiction until 22 January 1990.

24. Mr Mitap and Mr Müftüoğlu maintained that the Court had jurisdiction to deal with the case because their detention had ended on 23 July 1991 (see paragraph 15 above) and the proceedings were still pending.

25. The Commission ruled that it was competent as from 28 January 1987 to deal with each of the complaints submitted. Its Delegate argued that, if the Court were to take a similar approach, it could examine only complaints based on facts that had occurred after 22 January 1990, and on that basis only the complaint relating to the length of the proceedings could be entertained. On the other hand, the Court could deal with the other complaints if it were to take the view that the applicants had not been properly convicted until 1993, when they were able to read the reasons for the Martial Law Court's judgment (see paragraph 13 above).

26. The Court points out that Turkey has accepted its

jurisdiction only in respect of facts or events that have occurred since 22 January 1990, when the relevant declaration was deposited (see paragraph 17 above).

Of the applicants' three complaints (see paragraph 21 above) only the second, relating to the excessive length of the criminal proceedings in issue, satisfies that condition. The applicants' detention pending trial - the length of which formed the subject of their first complaint - ended with the Martial Law Court's judgment of 19 July 1989, that is well before 22 January 1990, while the third complaint concerns that judgment and the part of the proceedings which it brought to a close. In that respect, since the pronouncement of judgment is an essential element of the concept of a judicial decision, the decisive factor is the date on which the Martial Law Court gave judgment, namely 19 July 1989.

27. It follows in the first place that as the two complaints in question fall outside the Court's jurisdiction, it can likewise not deal with the objection that the Commission lacked competence *ratione temporis* (see paragraph 23 above), or with the other objections relating to them raised by the Government.

28. Further, it follows that the Court can only deal with the complaint relating to the length of the criminal proceedings as from 22 January 1990. However, in doing so, it will take account of the state of the proceedings at the time when the above-mentioned declaration was deposited (see, among other authorities, the *Yagci and Sargin v. Turkey* and *Mansur v. Turkey* judgments of 8 June 1995, Series A nos. 319-A and 319-B, p. 16, para. 40, and p. 48, para. 44).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

29. Mr Mitap and Mr Müftüoglu complained of the length of the proceedings against them. They relied on Article 6 para. 1 (art. 6-1) of the Convention, which provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

30. The Government contested this view, whereas the Commission accepted it.

A. Period to be taken into consideration

31. The proceedings began on 22 and 23 January 1981, when the applicants were arrested and placed in police custody; they ended on 28 December 1995 with the judgment of the Court of Cassation. They thus lasted just under fifteen years.

However, having regard to the conclusion in paragraph 28 of this judgment, the Court can only consider the period of nearly six years that elapsed after 22 January 1990, the date on which the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited. Nevertheless, it must take into account the fact that by the critical date the proceedings had already lasted nine years.

B. Reasonableness of the length of the proceedings

32. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the

applicant's conduct and that of the competent authorities (see, among many other authorities, the Yagci and Sargin judgment and the Mansur judgment previously cited, p. 20, para. 59, and p. 51, para. 61).

33. The Government pleaded the complexity of the case and the nature of the charges Mr Mitap and Mr Müftüoğlu faced. In particular, the case had concerned six hundred and seven criminal offences, some of which were extremely serious, and there had been seven hundred and twenty-three defendants. These defendants, who included the applicants, were alleged to have committed the offences as members of a terrorist organisation whose strength, activities and connections the authorities had to establish.

Pursuant to the relevant legislation, the Martial Law Court had followed an expedited procedure and made every necessary effort to speed up the trial. Between 18 October 1982 and 19 July 1989 it had held five hundred and twelve hearings, at a rate of three per week. The investigation, during which all the accused were questioned, had lasted five years. The public prosecutor, to whom the file was sent on 11 November 1987, had not been able to complete his one thousand seven hundred and sixty-six pages of written submissions before 23 March 1988. The hearings for oral argument, which began on 11 May 1988, had lasted ten months. Lastly, the file comprised approximately one thousand loose-leaf binders and the summary of the judgment ran to no fewer than two hundred and sixty-four pages. These circumstances explained the length of the proceedings. No negligence or delay was imputable to the judicial authorities.

34. The applicants asserted that the large number of accused was due to the artificial relation established between separate facts and that they had not been involved in any of the six hundred and seven offences. Moreover, the authorities had omitted to use certain techniques which could have expedited the proceedings. Lastly, the Martial Law Court had not taken any steps to gather evidence against them. The expression "reasonable time" could not be used in connection with proceedings that had lasted approximately fifteen years.

35. In the Commission's opinion the case had been complex and the length of the proceedings had mainly been due to the fact that the military criminal judicial authorities had organised a very large-scale trial. Nevertheless, the proceedings had been punctuated by lengthy periods of inactivity, including the three years it had taken the Martial Law Court to set down the reasons for its judgment in writing. It followed that a reasonable time had been exceeded because of the way the said authorities had handled the case.

36. The Court notes that the proceedings in the Military Court of Cassation, to which the case was automatically referred on 19 July 1989, and then in the Court of Cassation, ended on 28 December 1995; they thus lasted more than six years. It acknowledges that the case was complex, but has not been informed of any circumstance capable of justifying such a lengthy period, especially as account must be taken of the fact that the proceedings at first instance lasted approximately eight years and six months.

37. In conclusion, the length of the criminal proceedings in issue contravened Article 6 para. 1 (art. 6-1).

III. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

38. Under Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

39. Mr Mitap and Mr Müftüoğlu each claimed 500,000 French francs (FRF) for pecuniary damage and the same amount for non-pecuniary damage. They asserted that they had been unable to carry on their occupations and had had no idea how long the trial would last or what its outcome would be.

40. The Government and the Delegate of the Commission considered that, as there was no causal connection between any violations and the damage alleged, the applicants had not sustained any pecuniary damage. On the question of non-pecuniary damage, the Delegate suggested that compensation should be awarded. The Government disagreed, on the ground that the Court of Cassation had not yet given judgment at the time.

41. On the question of pecuniary damage, the Court agrees with the Government and the Delegate of the Commission.

As for non-pecuniary damage, it points out in the first place that its jurisdiction *ratione temporis* began to run in this case on 22 January 1990. Having regard to the particular circumstances of the case, it considers that the applicants sustained considerable non-pecuniary damage which the finding of a violation in paragraph 37 above cannot make good. Under this head it awards each of them FRF 80,000.

B. Costs

42. The applicants also claimed reimbursement of the costs incurred in presenting their case before the Convention institutions, which they put at FRF 260,500 in total.

43. The Government considered the above sum excessive. In the opinion of the Delegate of the Commission, with the exception of FRF 15,000 claimed for the first journey made by Mr Mitap and Mr Müftüoğlu's lawyers in order to lodge the applications, the expenses incurred did not seem unreasonable, and the amount should be fixed on an equitable basis.

44. Having regard to its case-law and the information in its possession, the Court decides on an equitable basis to award the applicants jointly FRF 60,000, minus the sum of FRF 44,821 received from the Council of Europe in legal aid, that is FRF 15,179.

C. Default interest

45. Not having sufficient information about the statutory rate of interest applicable in Turkey to the currency in which the sums awarded are made out, the Court considers it appropriate to base itself on the statutory rate applicable in France on the date of adoption of the present judgment, namely 6.65% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that, not having jurisdiction *ratione temporis*, it cannot deal with
 - (a) the applicants' complaints relating to the length of their detention pending trial; the lawfulness, independence and impartiality of the Martial Law Court; and the fairness of the proceedings before it; or
 - (b) the objections raised on these points by the Government;
2. Holds that there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention on account of the length of the criminal proceedings;
3. Holds that the respondent State is to pay each applicant, within three months, 80,000 (eighty thousand) French francs in respect of non-pecuniary damage and both applicants jointly 15,179 (fifteen thousand one hundred and seventy-nine) French francs in respect of costs, and that simple interest at an annual rate of 6.65% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;
4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 March 1996.

Signed: Rolv Ryssdal
President

Signed: Herbert Petzold
Registrar