



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

THIRD SECTION

**CASE OF KALAY v. TURKEY**

*(Application no. 16779/02)*

JUDGMENT

STRASBOURG

22 September 2005

**FINAL**

*22/12/2005*

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Kalay v. Turkey,**

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

Mr J. HEDIGAN, *President*,

Mr L. CAFLISCH,

Mr R. TÜRMEŒ,

Mr C. BİRSAN,

Mrs M. TSATSA-NIKOLOVSKA,

Mrs A. GYULUMYAN,

Ms R. JAEGER, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 1 September 2005,

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

**PROCEDURE**

1. The case originated in an application (no. 16779/02) 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 Mr Abdullah Kalay, on 12 February 2002.

2. The applicant was represented by Ms F.G.Yolcu and Mr M. Aslan, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged that the period of his detention on remand exceeded a reasonable time requirement of the Convention and that the criminal proceedings brought against him were unreasonably lengthy.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 6 September 2004 the application was communicated to the Government.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1967 and lives in Izmit.

9. On 6 November 1992 the applicant was arrested by police officers from the anti-terrorism branch of the Izmit Security Directorate and was placed in custody on suspicion of membership of an illegal armed organisation, namely the TKP-ML/TIKKO (Communist Party of Turkey/Marxist-Leninist, Turkish Workers and Peasants' Liberation Army).

10. On 11 November 1992 the applicant was brought before the investigating judge at the Kocaeli Criminal Court. The same day, the investigating judge ordered the applicant's detention on remand.

11. On 10 February 1993 the public prosecutor at the Istanbul State Security Court filed an indictment with the same court accusing the applicant and his seven other co-defendants of being a member of an illegal armed organisation and having committed armed robbery. The public prosecutor invoked Articles 168 § 2 and 497 § 2 of the Criminal Code and Article 5 of Law No. 3713 (Anti-terror law).

12. On 23 February 1993, the Istanbul State Security Court pronounced the applicant's continuing detention on the ground that the reasons for his detention on remand had not disappeared.

13. On 19 April 1994 the court decided to join the case with that pending before another court, as some of the defendants had been put on trial for similar charges before this court. Following this decision the number of the co-defendants of the applicant increased to twenty.

14. In the course of the criminal proceedings the applicant made numerous submissions for his release pending trial. He claimed that he was innocent and had been held in detention on remand for an excessive period. The Istanbul State Security Court dismissed these requests at each of the forty-eight hearings held between 17 May 1993 and 12 June 2000. In ordering the applicant's continued detention each time, it relied on "the nature of the offence, the state of the evidence and the duration of the detention".

15. On 12 June 2000 the Istanbul State Security Court convicted the applicant for being a member of an illegal organisation and committing the offence of armed robbery. The court sentenced the applicant to thirty-two years and six months' imprisonment.

16. The judgment was, *ex officio*, subject to appeal. The applicant also appealed against the judgment.

17. On 15 May 2001 the Court of Cassation quashed the applicant's conviction on the ground that the case-file did not enclose the applicant's

statement he made before the Kocaeli Assize Court, and remitted the case to the Istanbul State Security Court.

18. On 3 October 2001 the Istanbul State Security Court held its first hearing after the case was sent back to it. The applicant repeated his request for release from detention on remand during the hearing; the court dismissed his request on account of “the nature of the offence charged and the state of evidence”.

19. On 28 December 2001 the applicant was released from detention on remand.

20. On 22 May 2004, following the abolition of the Istanbul State Security Court, the applicant’s case was transferred to the Istanbul 11<sup>th</sup> Assize Court.

21. The case is still pending before the Istanbul 11<sup>th</sup> Assize Court.

## II. RELEVANT DOMESTIC LAW

22. A full description of the domestic law may be found in the *Demirel v. Turkey* judgment (no. 39324/98, §§ 47-49, 28 January 2003).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

23. The applicant complained that his detention on remand period exceeded the “reasonable time” requirement of Article 5 § 3 of the Convention, which reads insofar as relevant as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

#### A. Admissibility

24. The Court notes that there were two periods of pre-trial detention in the present case.

25. The first period began on 6 November 1992 with the applicant’s arrest and ended on 12 June 2000, the date of the judgment of the Istanbul State Security Court. From that point on, and until the Court of Cassation’s decision of 15 May 2001, the applicant was detained “after conviction by a competent court”, which falls within the scope of Article 5 § 1 (a) of the Convention. However, the application was lodged with the Court on

12 February 2002, which is more than six months from the end of the detention period complained of. Consequently, this part of the complaint is introduced out of time and must be rejected for non-compliance with the six-month rule in accordance with Article 35 §§ 1 and 4 of the Convention.

26. The second period began on 15 May 2001 and ended on 28 December 2001, when the applicant's was released pending trial. The Court considers that this part of the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It concludes therefore that this aspect is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established

### **B. Merits**

27. The Government submitted that the applicant's detention on remand period was not unduly prolonged by the judicial authorities. They maintained that it was justifiable considering the serious nature of the crime the applicant was charged with, the evidence against him and the duration of the detention. They argued that there has been a genuine requirement of public interest which also has justified the continuing detention of the applicant.

28. The applicant maintained that the Istanbul State Security Court relied on the "nature of the offence, the state of the evidence and the duration of the detention" when it rejected his many requests for release pending trial, without having considered the possibility that he would destroy the evidence or that he would abscond.

29. The Court reiterates that it falls in the first place to the national judicial authorities to ensure that, in a given case, the detention of an accused person pending trial does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty, and set them out in their decisions on the applications for release. It is primarily on the basis of the reasons given in these decisions and of the established facts mentioned by the applicant in his appeals that the Court must determine whether or not there has been a violation of Article 5 § 3 of the Convention (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 154).

30. The persistence of reasonable suspicion that the person arrested has committed an offence is a *sine qua non* for the validity of the continued detention, but after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial

authorities continue to justify the deprivation of liberty. When such grounds are “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings (see, among other authorities, *Ilijkov v. Bulgaria*, no. 33977/96, § 77, 26 July 2001, and *Labita v. Italy* [GC], no. 26772/95, §§ 152-153, ECHR 2000-IV).

31. In the instant case, the period to be taken into account began on 15 May 2001 and ended on 28 December 2001. It thus lasted some seven and a half months. It arises from the material in the case file that the Istanbul State Security Court ordered the applicant’s continued detention on remand using identical, stereotyped terms, such as “having regard to the nature of the offence, the state of evidence and the date of detention”.

32. In this context, the Court takes note of the seriousness of the crime attributed to the applicant and the severity of the relevant punishment. However, it recalls that the danger of absconding cannot solely be assessed on the basis of the severity of the sentenced risked (see *Muller v. France*, judgment of 17 March 1997, Reports 1997 II, § 43), but must be analysed with reference to a number of other relevant additional elements, which may either confirm the existence of such a danger or make it appear so slight that it cannot justify detention pending trial (see, among others, *Letellier v. France*, judgment of 26 June 1991, Series A No. 207, p. 319-B, § 43). In this regard, the Court notes the lack of such sufficient reasoning in the domestic court’s decisions to prolong the applicant’s remand in custody.

33. Finally, although, in general, the expression “the state of evidence” may be a relevant factor for the existence and persistence of serious indications of guilt, in the present case it nevertheless, alone, cannot justify the length of the detention of which the applicant complains (see *Letellier*, cited above; *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A; *Mansur v. Turkey*, judgment of 8 June 1995, Series A no. 319-B, § 55, and *Demirel*, cited above, § 59).

34. The Court therefore considers that the period of seven and half months, given the stereotype reasoning of the court, has not been shown to be justified, particularly, in the light of the period of eight and a half years on remand which the applicant had already undergone.

35. Therefore, there has been a violation of Article 5 § 3 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

36. The applicant complained that the criminal proceedings brought against him exceeded the “reasonable time” requirement of Article 6 § 1 of the Convention, which reads insofar as relevant as follows:

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

### **A. Admissibility**

37. The Court considers that this complaint raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It concludes therefore that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

### **B. Merits**

38. The Government submitted that the case was complex, considering the charges attributed to the applicant and the need to organise a large-scale trial involving twenty defendants. They contended that these factors explained the length of the proceedings and that no negligence or delay could be imputed to the judicial authorities.

39. The applicant maintained his allegation.

40. The Court observes that the criminal proceedings against the applicant began on 6 November 1992, with his arrest, and are still pending before the first-instance court. They have thus lasted more than twelve years.

41. The Court reiterates that, it has frequently found violations of Article 6 § 1 of the Convention in cases raising similar issues to the one in the present application (see, for example, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Dereci v. Turkey*, no. 77845/01, 24 May 2005).

42. 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 in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

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

## **III. APPLICATION OF ARTICLE 41 OF THE CONVENTION**

43. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### **A. Damage**

44. The applicant claimed 34,000,000,000 Turkish liras (TRL), in respect of pecuniary damage and TRL 15,000,000,000 in respect of non-pecuniary damage.

45. The Government contested the claim.

46. The Court notes that there is no causal link between the claim for pecuniary damage and the matters found to constitute violations of the Convention. However, it considers that the applicant must have suffered non-pecuniary damage, such as distress. Ruling on an equitable basis, it awards him 9,000 euros (EUR).

### **B. Costs and expenses**

47. By way of costs and expenses in relation to his representation, the applicant claimed TRL 4,000,000,000 in respect of communication and translation costs and TRL 6,000,000,000 for legal expenses. He submitted that this last amount included the visiting and travel expenses of his lawyer, as well as forty hours work relating to the proceedings before the Court. He claimed that his representative had applied the scale recommended by the Istanbul Bar for applications to the Court.

48. The Government disputed these claims.

49. On the basis of the material in its possession and ruling on an equitable basis, the court awards the applicant EUR 3,200 in respect of costs and expenses.

### **C. Default interest**

50. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Declares* the application admissible as regards the second period of detention on remand and the length of the proceedings, and inadmissible as regards the first period of detention on remand;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *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, the following amounts, to be converted into Turkish liras at the rate applicable at the date of the settlement:
    - (i) EUR 9,000 (nine thousand euros) in respect of non-pecuniary damage;
    - (ii) EUR 3,200 (three thousand two hundred euros) in respect of costs and expenses;
    - (iii) any tax that may be chargeable on the above amounts;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER  
Registrar

John HEDIGAN  
President