



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

SECOND SECTION

CASE OF EMRULLAH KARAGÖZ v. TURKEY

(Application no. 78027/01)

JUDGMENT
[Extracts]

STRASBOURG

8 November 2005

FINAL

12/04/2006

In the case of Emrullah Karagöz v. Turkey,

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŒ,

Mr V. BUTKEVYCH,

Mrs D. JOČIENĖ,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 18 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 78027/01) 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 Emrullah Karagöz (“the applicant”), on 13 November 2001.

2. The applicant, who had been granted legal aid, was represented by Mr T. Elçi, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 5 and 13 of the Convention.

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 February 2003 the Chamber declared the application admissible and decided to join to the merits its examination of the Government's preliminary objections.

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 Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1978 and lives in Diyarbakır.

9. On 28 October 2001 he was arrested by gendarmes and taken into custody at the Diyarbakır gendarmerie command.

10. On 30 October 2001 the gendarmes took a statement from him. He was suspected of having assisted and supported the PKK (Workers' Party of Kurdistan), an illegal organisation under Turkish law. He allegedly signed his statement while blindfolded. At the end of his detention in the gendarmes' custody, he was examined by a forensic medical expert. No signs of ill-treatment were observed on his body.

11. On 1 November 2001, after being interviewed by the public prosecutor, the applicant was brought before a judge of the Diyarbakır National Security Court, who ordered his detention pending trial. Before both the prosecutor and the judge the applicant denied the accusations against him. He was subsequently taken to Diyarbakır Prison.

A. The applicant's periods of detention at the gendarmerie command

12. On 1 November 2001, ruling on applications by the governor of the state of emergency region and the public prosecutor, and on the basis of Article 3 (c) of Legislative Decree no. 430 on additional measures to be taken in connection with the state of emergency, the judge granted leave for the applicant to be sent back to the gendarmerie command for questioning for a period not exceeding ten days. The applicant was returned to the gendarmes' custody at 10.45 p.m. that day.

13. On 6 November 2001 the National Security Court dismissed an objection by the applicant's family, on the ground that the length of his detention was consistent with the limits laid down in domestic law.

14. On 10 November 2001 the judge extended the applicant's detention at the gendarmerie command by ten days, again on the basis of Legislative Decree no. 430.

15. On 15 November 2001 an objection by the applicant's representative was dismissed by the National Security Court.

16. On 20 November 2001 the applicant was taken back to prison.

17. On 20 and 21 November 2001 the governor of the state of emergency region and the public prosecutor, again on the basis of Legislative Decree no. 430, asked the judge to extend the applicant's detention at the gendarmerie command by a further ten days.

18. On 21 November 2001 the judge refused that request on the ground that the case file did not contain any evidence to substantiate it and that such an omission was attributable to the authorities.

19. The public prosecutor lodged an objection against that decision.

20. On 22 November 2001 the National Security Court allowed the objection and observed that the applicant was the subject of three other investigations. It granted a further ten-day extension and leave for the applicant to be taken from prison for questioning.

21. On the same day the applicant was handed over to the gendarmes.

22. On 1 December 2001 the judge extended the applicant's detention at the gendarmerie command by a further ten days.

23. On 12 December 2001 the applicant was taken back to Diyarbakır Prison.

24. Each time the applicant left and returned to the prison, he was examined by a doctor. The reports subsequently drawn up did not mention any signs of blows to the applicant's body.

B. The proceedings against the applicant

25. In an indictment of 6 April 2001, the public prosecutor brought criminal proceedings against the applicant under Article 168 of the Criminal Code, by which it is an offence to be a member of an armed gang.

26. At a hearing on 26 June 2001, the National Security Court ordered the applicant's provisional release.

27. On 27 August 2001 he was acquitted in the absence of any evidence other than his initial statement to the gendarmes.

28. On 20 September 2001 the judgment became final.

C. Investigation into the applicant's complaint

29. On 9 November 2001 the applicant's representative lodged a criminal complaint with the public prosecutor at the National Security Court against the gendarmes, alleging that they had ill-treated the applicant in order to obtain a confession from him. He asked for the applicant to be given a thorough medical examination. He further submitted that the applicant's recurring periods of detention at the gendarmerie command had breached both the provision of the Constitution governing the maximum length of detention in police custody and Article 5 of the Convention.

30. On 13 November 2001 the public prosecutor at the National Security Court ruled that he did not have jurisdiction and forwarded the file to the Diyarbakır public prosecutor's office.

31. On 13 December 2001 the applicant was interviewed by the Diyarbakır public prosecutor. He asserted that he had been sprayed with cold water, had been insulted, threatened and beaten, had had his testicles

squeezed and had been placed naked in front of a fan blowing cold air. He lodged a criminal complaint against the gendarmes involved in questioning him. He also requested a medical examination and treatment.

32. In a letter of 21 December 2001 to the Diyarbakır public prosecutor, the applicant's representative reiterated his allegations of torture and asked for his client to be examined at a specialist medical department.

33. On 14 February 2002 the public prosecutor ordered thorough medical examinations to be carried out at the urology department and a testicular scintigram and pelvic ultrasound scan to be carried out at the nuclear medicine department of Dicle University in order to detect any signs of ill-treatment.

34. In a document of 27 March 2002, addressed to the Diyarbakır provincial governor, the public prosecutor sought leave to bring proceedings against the gendarmes in whose custody the applicant had been held.

35. A urological ultrasound scan of 18 April 2002 and a testicular scintigram of 13 May 2002 did not reveal any abnormalities.

36. A preliminary investigation was opened by the Diyarbakır Provincial Administrative Council in respect of the gendarmerie commander.

37. On 1 May 2002 the Administrative Council decided, in the absence of sufficient evidence, not to open an investigation with a view to prosecuting the official in question.

38. On 22 May 2002 the applicant lodged an objection against that decision with the Diyarbakır Administrative Court.

39. On 31 December 2002 the Diyarbakır Administrative Court upheld the decision. The Diyarbakır public prosecutor's office subsequently discontinued the proceedings.

40. On 7 February 2003 the applicant appealed to the Siverek Assize Court against the decision to discontinue the proceedings.

41. On 26 March 2003 the appeal was dismissed in view of the decision by the Diyarbakır provincial governor's office.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Review of the lawfulness of detention

42. As amended by Law no. 4709 of 17 October 2001, Article 19 of the Constitution provides:

“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 the formalities and conditions prescribed by law: ...

The arrested or detained person must be brought before a judge within forty-eight hours at the latest or, in the case of offences committed by more than one person, within four days ...

The close relatives of persons who have been arrested or detained shall be notified immediately of their circumstances. ...

Compensation must be paid by the State for damage sustained by persons who have been victims of treatment contrary to the above provisions, in accordance with the general rules governing the right to compensation.”

43. In addition, Article 144 of the Code of Criminal Procedure provides that anyone who has been arrested or detained pending trial may confer in private with his or her legal representative, who does not need to have been given an authority to act.

B. Legislation in force during the state of emergency

44. Legislative Decree no. 430 of 16 December 1990 on additional measures to be taken in connection with the state of emergency strengthened the powers of the governor of the state of emergency region. Article 3 (c) provides that, on a proposal by the governor, at the request of the public prosecutor and by order of a judge, persons who are detained after being convicted or pending trial may be taken from prison for questioning for a period not exceeding ten days. They must undergo a medical examination on leaving and returning to prison.

45. No court action may be brought against decisions of the governor of the state of emergency region.

Article 8 of the legislative decree provides:

“No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This shall be without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification.”

46. The Constitutional Court dismissed applications for review of Article 8 of Legislative Decree no. 430, finding that they were inadmissible *ratione materiae* on the ground that the legislative decree was not subject to constitutional review, in two judgments delivered on 3 July 1991 and 26 May 1992, published in the Official Gazette on 8 March 1992 and 18 December 1993 respectively.

47. Since 30 November 2002 the state of emergency in force in two provinces of south-eastern Turkey (Diyarbakır and Şırnak) has been permanently lifted. As a result, Legislative Decree no. 430 has ceased to apply since that date.

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 (c), 3 AND 4 OF THE CONVENTION

51. The applicant alleged that his detention at the gendarmerie command from 1 November to 12 December 2001 had given rise to a violation of paragraphs 1 (c) and 3 of Article 5 of the Convention, 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;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and 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. Article 5 § 1 (c) of the Convention

52. The applicant asserted that, after being detained in Diyarbakır Prison pending trial, he had been sent back to the gendarmerie command for questioning, on the basis of Legislative Decree no. 430. He submitted that he had been detained incommunicado at the gendarmerie command, entirely at the mercy of the gendarmes responsible for questioning him.

53. The Government contended that the applicant's detention at the gendarmerie command had complied with the domestic legislation in force and could not be treated as a standard case of detention in police custody.

54. The Court notes at the outset that it was common ground that the applicant had been detained at the gendarmerie command after having been placed in pre-trial detention.

55. The Court reiterates that on the question whether detention is “lawful”, including whether it complies with “a procedure prescribed by law”, the Convention requires that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from

arbitrariness (see *Wassink v. the Netherlands*, judgment of 27 September 1990, Series A no. 185-A, p. 11, § 24). The Court has accepted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see the following judgments: *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B, p. 33, § 61; *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A, p. 27, § 58; *Aksoy v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2282, § 78; *Sakık and Others v. Turkey*, 26 November 1997, *Reports* 1997-VII, pp. 2623-24, § 44; and *Demir and Others v. Turkey*, 23 September 1998, *Reports* 1998-VI, p. 2653, § 41). That does not mean, however, that the authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence (see, among other authorities, *Demir and Others*, *ibid.*).

56. The Court notes that the applicant was taken into police custody for the first time on 28 October 2001 at the Diyarbakır gendarmerie command, where he remained until 1 November 2001. On that date he was brought before the public prosecutor and the judge, who ordered his detention pending trial. He was subsequently transferred to prison. A few hours after being admitted to prison, he was handed over to the gendarmes and taken back to the gendarmerie command, as authorised by the judge under Legislative Decree no. 430.

57. He therefore found himself in a situation equivalent to police custody which, moreover, lasted from 1 November to 12 December 2001, a period of more than forty days. That being so, the Court dismisses the Government's preliminary objection (see also paragraph 59 below).

58. The Government contended in their observations that the applicant had been sent back for questioning in the context of separate judicial investigations. However, it appears from the evidence that on 21 November 2001 the judge refused the second application for the applicant to be detained at the gendarmerie command, pointing out that no documentary evidence concerning any other investigation had been submitted (see paragraph 18 above). That refusal was set aside by the National Security Court on the basis of Legislative Decree no. 430.

59. In any event, the Court observes that the applicant's transfer to the gendarmerie command after being placed in pre-trial detention escaped effective judicial review. It further considers that handing a remand prisoner over to gendarmes for questioning amounts to circumventing the applicable legislation on the periods that may be spent in police custody. That was what happened in the applicant's case when he was subjected to further questioning a few hours after being placed in pre-trial detention. Furthermore, his detention in the gendarmes' custody was extended until

12 December 2001 for no apparent reason. That in itself must be regarded as a breach of the requirements of lawfulness in Article 5 § 1 (c) of the Convention since all the safeguards that should be provided during questioning, especially access to legal advice, were rendered inoperative.

60. There has therefore been a violation of Article 5 § 1 of the Convention.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

...

Done in French, and notified in writing on 8 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President