



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

SECOND SECTION

CASE OF YAŞAR v. TURKEY

(Application no. 46412/99)

JUDGMENT

STRASBOURG

24 January 2006

FINAL

24/04/2006

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 Yaşar 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 R. TÜRMEK,

Mr K. JUNGWIERT,

Mr M. UGREKHEDIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 31 March 2005 and on 5 January 2006,

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

PROCEDURE

1. The case originated in an application (no. 46412/99) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Mahmut Yaşar (“the applicant”), on 13 February 1998.

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

3. The applicant complained, in particular, about his alleged ill-treatment during his police custody, the excessive length of his detention on remand and the criminal proceedings that were brought against him. In respect of his complaints, he invoked Articles 3, 5, 6, 13 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second 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.

6. By a decision of 31 March 2005, the Court declared the application partly admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

THE FACTS

8. The applicant was born in 1974 and lives in Diyarbakır.

9. On 1 June 1994 the applicant was taken into custody by policemen from the Anti-Terrorism Branch of the Diyarbakır Security Directorate on suspicion of his membership of an illegal organisation, namely the Workers' Party of Kurdistan ("the PKK").

10. On 2 June 1994 the applicant was examined by a doctor at the Bismil Health Clinic who reported that there was no sign of ill-treatment on the applicant's body.

11. In his police statement dated 6 June 1994, which was allegedly taken under duress, the applicant stated he had disseminated propaganda and collected money in support of the PKK, of which he was a member. He further admitted that he owned an unlicensed gun.

12. On 7 June 1994 the applicant was once again taken to the Diyarbakır State Hospital for a medical examination. The report indicated that he did not bear any signs of ill-treatment.

13. On the same day, the applicant was further interrogated by the public prosecutor at the Diyarbakır State Security Court. Before the public prosecutor, the applicant denounced his police statement, alleging that it had been made under duress. While admitting that he owned an unlicensed gun, he denied being a member or engaging in the activities of the PKK. The applicant was subsequently brought before the investigating judge at the Diyarbakır State Security Court, where he repeated his statement taken by the prosecutor. Taking into account the seriousness of the allegations, the judge ordered the applicant's detention on remand.

14. By an indictment dated 13 June 1994, the public prosecutor at the Diyarbakır State Security Court initiated criminal proceedings against the applicant. He accused the applicant of membership of the PKK, and called for the applicant's conviction under Article 168 § 2 of the Criminal Code.

15. The trial commenced before the Diyarbakır State Security Court. In the subsequent nine hearings the court, taking into account the nature of the alleged offence and the state of the evidence, refused to release the applicant on bail.

16. On 4 September 1996, during the tenth hearing, the court ordered the applicant's release pending trial.

17. The same day, while waiting to be released from the Gaziantep Prison, the applicant was taken into police custody by members of the

Gaziantep Security Directorate. On 7 September 1996 the applicant was handed over to police officers from the Diyarbakır Security Directorate and he was taken to the building of the Rapid Action Force for interrogation.

18. The applicant alleges that he was ill-treated there. He submits that he was stripped naked, beaten, hosed with cold water, hung by his arms and subjected to electric shocks. The police officers questioned him about his involvement with the PKK. They read out an internal PKK report, which was allegedly written by the applicant. The officers told the applicant that this document had been found among the belongings of a PKK member, who had been killed during a clash with the security forces. The officers also questioned the applicant about four armed attacks which had taken place in Bismil in 1994. On 18 September 1996, together with the applicant, the officers made on-site inspections of the crime scenes. The applicant states that he was forced to sign the incident reports which had been prepared by the police officers. The police also took samples of the applicant's handwriting.

19. On 19 September 1996 the applicant was taken to the Diyarbakır State Hospital for a medical check. The doctor reported that there were no signs of ill-treatment on the applicant's body. He was subsequently brought before the investigating judge at the Diyarbakır State Security Court where he denied having participated in any armed attacks. The applicant also denounced his police statement, alleging that it had been extracted from him under duress. The applicant further denied writing the PKK report. Considering the seriousness of the allegations against him, the investigating judge ordered the applicant's detention on remand.

20. On 26 September 1996 the prosecutor at the Diyarbakır State Security Court filed an indictment, accusing the applicant and four other persons of aiding and abetting the PKK and of having carried out a number of armed activities on behalf of that organisation. In support of these accusations, the prosecutor referred to the PKK report that was allegedly drawn up by the applicant and the incident reports dated 18 September 1996. The prosecutor asked the court to prosecute and convict the applicant pursuant to Article 125 of the Criminal Code.

21. On 3 October 1996 the Diyarbakır State Security Court commenced the second set of criminal proceedings against the applicant.

22. On 4 November 1996, during the second hearing, the applicant denied the accusations against him and stated that he had not written the PKK report. He asked the court to obtain a forensic report. The court, taking into account the nature of the alleged offence and the state of the evidence, decided that the applicant should be kept in detention on remand.

23. Subsequently, on 23 December 1996, 24 February 1997, 28 April 1997, 17 June 1997 and 28 August 1997, the court refused to release the applicant, relying on the seriousness of the offence and the evidence in the case file.

24. On 3 November 1997, during the seventh hearing, the trial court decided to join the two ongoing criminal proceedings against the applicant. The court further ordered that the applicant's detention on remand be continued.

25. On 8 December 1997, during the eighth hearing, the court decided to send the PKK report and samples of the applicant's handwriting to the Forensic Institute for examination. Taking into account the seriousness of the offence and the evidence in the case file, the Court ordered that the applicant's detention on remand be continued.

26. On 10 February 1998 the applicant submitted a letter to the trial court. Referring to Articles 5 and 6 of the Convention, he requested to be released. The court refused this request.

27. The applicant's two further requests for release were also rejected for similar reasons by the trial court during the tenth and eleventh hearings, which took place on 16 April 1998 and 16 June 1998.

28. On 8 July 1998 the Forensic Institute finalised its report, finding that the document submitted by the Diyarbakır State Security Court for examination had been written by the applicant. It appears that this forensic report was not brought to the attention of the trial court until the thirteenth hearing, which was held on 20 October 1998.

29. The following six hearings, which took place between 25 December 1998 and 14 September 1999, were all postponed as one of the prosecution witnesses failed to appear before the trial court to give evidence. At the end of each hearing, the court extended the applicant's detention on remand, taking into account the nature of the offence and the state of the evidence.

30. On 15 February 2000 the State Security Court delivered its judgment. While noting that the applicant had alleged that his police statement had been taken under duress, the court did not determine this issue in its judgment. The court considered that there was insufficient evidence to conclude that the applicant had carried out the armed attacks as alleged in the indictment. However, it held that there was sufficient evidence to conclude that he was a member of the PKK. Accordingly, the court sentenced the applicant to twelve years and six months' imprisonment, pursuant to Article 168 § 2 of the Criminal Code.

31. On 22 January 2001 the Court of Cassation quashed the judgment on the ground that the first-instance court had not carried out a thorough examination of the case before reaching its decision.

32. On 13 April 2001 the Diyarbakır State Security Court commenced the re-trial of the applicant.

33. During the subsequent nine hearings that took place on 5 July 2001, 18 September 2001, 27 November 2001, 5 February 2002, 2 April 2002, 4 June 2002, 25 July 2002, 12 September 2002 and 22 October 2002, the court, relying on the state of the evidence and the nature of the offence, refused to release the applicant.

34. On 10 December 2002 the court delivered its judgment. It noted the applicant's complaint that he had been forced to make confessions during police custody. However, having regard to the content of the case file, the court found it established that the applicant was a member of the PKK. It accordingly sentenced him to twelve years and six months' imprisonment, pursuant to Article 168 § 2 of the Criminal Code. Taking into account the period he had already spent in detention on remand, the court decided to release the applicant.

35. On 3 March 2003 the applicant appealed against the judgment. In challenging the decision of the first-instance court, the applicant's representative referred to the ill-treatment to which the applicant had been subjected in custody. In particular, he maintained that the applicant had been stripped naked, beaten, hosed with cold water, subjected to electric shocks and hung by his arms.

36. On 17 December 2003 the Court of Cassation, upholding the Diyarbakır State Security Court's reasoning and assessment of evidence, rejected the applicant's appeal.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

37. The applicant complained that he had been subjected to various forms of ill-treatment and torture in police custody, in violation of Article 3 of the Convention, which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

38. Without submitting any medical reports in support of his allegations, the applicant maintained that during his custody at the Diyarbakır Security Directorate he had been stripped naked, beaten, hosed with cold water, hung from his arms and subjected to electric shocks.

39. The Government refuted the allegations. They submitted that the applicant had failed to substantiate them or introduce any evidence in support of his claims that he had been subjected to treatment contrary to Article 3 of the Convention. The Government further stated that the applicant had been examined by a doctor on two occasions; at the beginning and at the end of his police custody, and the forensic reports indicated no trace of ill-treatment on his body.

40. While reiterating that Article 3 enshrines one of the most fundamental values of democratic societies, the Court recalls that in assessing evidence in a claim of a violation of Article 3 of the Convention,

it adopts the standard of proof “beyond reasonable doubt” (*Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (*Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

41. The Court is sensitive to the subsidiary nature of its task and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, where allegations are made under Article 3 of the Convention, as in the present case, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 32, and *Avşar*, cited above, § 283).

42. In the instant case, the ill-treatment complained of by the applicant consisted of being stripped naked, beatings, electric shock treatment, hosing with cold water, and Palestinian hanging. Nonetheless, a number of elements in the case raise doubts as to whether the applicant suffered severe ill-treatment when he was detained in police custody in the Diyarbakır Security Directorate, during his two periods of police custody, namely between 1 and 7 June 1994 and subsequently between 7 and 19 September 1996.

43. Firstly, the medical reports dated 2 June 1994, 7 June 1994 and 19 September 1996 reveal no traces of ill-treatment on his body (see paragraphs 10, 11 and 19 above). Furthermore, the applicant has adduced no material which could call into question the findings in those reports and add probative weight to his allegations.

44. In conclusion, since the evidence before it does not enable it to find beyond all reasonable doubt that the applicant was subjected to ill-treatment, the Court does not find it proven that there has been a violation of Article 3 of the Convention (*Talat Tepe v. Turkey*, no. 31247/96, § 54, 21 December 2004).

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

45. The applicant complained that the length of his detention on remand exceeded the reasonable time requirement of Article 5 § 3 of the Convention, which reads 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.”

46. The Government submitted that the applicant’s detention on remand was in line with the domestic law. They further maintained that the

applicant's detention was reviewed at regular intervals. However, in view of the seriousness of the charges brought against him and the evidence in the case file, the court prolonged his detention pending trial.

A. Period to be taken into consideration

47. The Court notes that the applicant was initially placed in detention on remand on 7 June 1994 by the decision of the investigating judge at the Diyarbakır State Security Court. He was released pending trial on 4 September 1996, but immediately on the same day re-arrested on further charges by the police. On 19 September 1996 the investigating judge ordered his detention on remand. As the applicant's arrest on the day of his release was not connected to the criminal proceedings that were pending before the Diyarbakır State Security Court, the Court concludes that it should examine these two periods of detention separately.

48. Having regard to the above, the Court observes that in the instant case the first period of detention commenced on 7 June 1994 and ended on 4 September 1996, when the applicant was released pending trial. However, the application was lodged with the Court on 13 February 1998, which is more than six months from the date of the facts giving rise to the alleged violation. As a result, when examining the reasonableness of the length of the applicant's detention on remand, the Court will only take into account the period between 19 September 1996 and 10 December 2002.

B. The reasonableness of the length of detention

49. 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 the 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).

50. The persistence of reasonable suspicion that the person arrested has committed an offence is a prerequisite of the validity of such 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 (see, among other authorities, *Ilykov*

v. Bulgaria, no. 33977/96, § 77, 26 July 2001, and *Labita v. Italy* [GC], no. 26772/95, §§ 152-153, ECHR 2000-IV).

51. In the instant case, the State Security Court examined the applicant's continued detention on thirty-one occasions, either on its own motion or upon the applicant's request. In his petition dated 10 February 1998, the applicant again requested his release, referring to Articles 5 and 6 of the Convention (see paragraph 26 above).

52. The Court notes from the material in the case file that the 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 content of the file" at the end of most of the hearings. 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 v. France*, judgment of 26 June 1991, Series A no. 207, *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, and *Demirel v. Turkey*, no. 39324/98, § 59, 28 January 2003).

53. The Court considers that the period of six years and three months, given the stereotype reasoning of the courts, has not been shown to have been justified.

54. In these circumstances, the Court concludes that the length of the applicant's detention contravened Article 5 § 3 of the Convention.

55. Therefore, there has been a violation of this provision.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

56. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, provided in Article 6 § 1 of the Convention, which reads as follows:

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

57. The Government contested that argument. They stated that the length of the proceedings in the instant case could not be considered as unreasonable in view of the number of the accused persons, the complexity of the case and the nature of the offence with which the applicant was charged.

58. The Court notes that the period to be taken into consideration began on 1 June 1994, when the applicant was taken into police custody, and ended on 17 December 2003 with the decision of the Court of Cassation. It has thus lasted nine years and six months at two levels of jurisdiction, which each examined the applicant's case twice.

59. The Court recalls in the first place that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case, with reference to the criteria established by its case-law, particularly the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute (see, amongst many others, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

60. The Court considers that, even though the case involved a certain degree of complexity, it cannot be said that this in itself justified the total length of the proceedings.

61. As regards the conduct of the applicant, the Court observes that it does not appear from the case file that he contributed to the prolongation of the proceedings.

62. Concerning the conduct of the authorities, the Court notes that there was a significant period of delay which is attributable to the authorities. In this respect, it observes that it took the first instance court almost six years to render its decision dated 15 February 2000. From the documents in the case file it appears that, at its hearing on 8 December 1997, the first instance court ordered a forensic examination of the applicant's handwriting samples and that this report was submitted to the court only on 20 October 1998, i.e. almost ten months later. Furthermore, six hearings between 25 December 1998 and 14 September 1999 were postponed as one of the prosecution witnesses failed to appear before the trial court to give evidence.

63. Recalling that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to decide cases within a reasonable time (see *Arvelakis v. Greece*, no. 41354/98, § 26, 12 April 2001), the Court considers that the domestic court could have applied stricter measures to speed up the proceedings. It therefore finds that the proceedings in the instant case were unnecessarily prolonged as the national court failed to act with the necessary diligence.

64. In view of the above, the Court considers that the length of the proceedings cannot be considered to have complied with the reasonable time requirement laid down in Article 6 § 1.

65. There has accordingly been a violation of this provision.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

66. The applicant complained that there were no effective remedies in domestic law in respect of his allegations of ill-treatment, in breach of Article 13 of the Convention, which reads:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

67. The Court reiterates that the nature of the right safeguarded under Article 3 has implications for Article 13. Where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment by agents of the State, the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigatory procedure (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, § 98).

68. On the basis of the evidence adduced in the present case, the Court has not found it proved beyond reasonable doubt that the applicant had been ill-treated by police officers. As it has held in previous cases, however, that does not preclude the complaint in relation to Article 3 from being an “arguable” one for the purposes of Article 13 (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, p. 2442, § 112).

69. The Court notes that the applicant submitted his ill-treatment allegations to the national authorities. In this respect, the Court refers to the applicant’s statements taken by the public prosecutor and the investigating judge after his first police custody on 7 June 1994, and his statements dated 19 September 1996 taken by the public prosecutor and the investigating judge following his second police custody. Finally, in a petition dated 3 March 2003 the applicant’s representative once again raised this complaint before the Court of Cassation, and explained in detail the treatment to which he had allegedly been subjected (paragraph 35 above). As a result, it is clear that the authorities were aware of the applicant’s allegations of ill-treatment in police custody. However no investigation was initiated into these allegations.

70. In the light of the foregoing, the Court does not consider that the authorities fulfilled their obligation to provide the applicant, who had been kept in detention since 1994, with an effective remedy concerning his allegations of ill-treatment.

71. There has accordingly been a violation of Article 13 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

72. The applicant maintained that, because of his Kurdish origin, he had been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 3, 5, 6, and 13.

73. The Government refuted the allegations.

74. The Court notes that at no stage of the proceedings did the applicant raise his allegation of discrimination before the domestic courts. Consequently, the Court does not consider it necessary to enter into the merits of this complaint because it must anyway be rejected pursuant to Article 35 § 1 and 4 of the Convention for failure to exhaust domestic remedies.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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

76. The applicant requested the Court to award 50,000 euros (EUR) in respect of non-pecuniary damage and EUR 20,000 in respect of pecuniary damage.

77. The Government submitted that these claims were unsubstantiated.

78. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim. However, it accepts that the applicant must have suffered non-pecuniary damage, such as distress and frustration in the circumstances of the case, which cannot be sufficiently compensated by the finding of a violation alone. Taking into account the circumstances of the case and having regard to its case-law, the Court awards the applicant EUR 10,000 for non-pecuniary damage.

B. Costs and expenses

79. The applicant claimed EUR 6,600 for the costs and expenses incurred before the domestic courts and EUR 4,520 for those incurred before the Court.

80. The Government contested the applicant's claim.

81. On the basis of the material in its possession and ruling on an equitable basis, the Court awards the applicant EUR 3,000 in respect of costs and expenses, less the sum of EUR 685 received in legal aid from the Council of Europe.

C. Default interest

82. 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. *Holds* that there has been no violation of Article 3 of the Convention;
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* that there has been a violation of Article 13 of the Convention;
5. *Holds* that the domestic remedies in respect of the complaint under Article 14 of the Convention have not been exhausted;
6. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into New Turkish Liras at the rate applicable at the date of the settlement and exempt from all taxes and duties:
 - (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros) in respect of costs and expenses, less EUR 685 (six hundred and eighty-five euros) granted by way of legal aid;
 - (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;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President