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

SECOND SECTION

CASE OF SARI AND ÇOLAK v. TURKEY

(Application nos 42596/98 and 42603/98)

JUDGMENT
[Extracts]

STRASBOURG

4 April 2006

FINAL

04/07/2006

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

In the case of Sarı and Çolak v. Turkey,

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

Jean-Paul Costa, *President*,
András Baka,
Rıza Türmen,
Karel Jungwiert,
Mindia Ugrekhelidze,
Danutė Jočienė,
Dragoljub Popović, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 14 March 2006,

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

PROCEDURE

1. The case originated in two applications (nos. 42596/98 and 42603/98) against the Republic of Turkey lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Mr Mustafa Sarı and Ms Sibel Çolak ("the applicants"), on 3 April 1998.

2. The applicants, who had been granted legal aid, were represented by Mrs E. Çıtak, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not appoint an agent to represent them before the Court.

3. On 1 February 2000 the First Section decided to join the applications, to declare them partly inadmissible and to give the Government notice of the complaints under Article 5 §§ 1 and 3 and Article 8 of the Convention.

4. On 1 November 2001 and 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1 of the Rules of Court). This case was assigned to the newly composed Second Section (Rule 52 § 1).

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

6. Applying Article 29 § 3 of the Convention, the Court decided to rule on the admissibility and merits of the applications at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants, Mr Sarı and Ms Çolak, were born in 1973 and 1977 respectively. At the material time they lived in Ankara.

8. On 17 November 1997, at 11.45 p.m., the applicants were arrested and taken into police custody by officers of the Ankara security police in connection with an investigation into the illegal organisation THKP-C Dev Yol – Devrim Hareketi (Turkish People's Liberation Party-Front – Revolutionary Way – Revolutionary Movement).

9. The applicants' detention in police custody was extended, under section 16 of Law no. 2845 (see paragraph 17 below), initially until 21 November 1997, on the authorisation of the public prosecutor at the Ankara National Security Court, and subsequently until 23 November 1997 (inclusive) by order of a judge of that court.

10. Before the end of their police custody period, on 23 November 1997 at 11.45 p.m., the applicants were questioned by the public prosecutor. They were not brought before a judge until the following morning, that is to say on 24 November 1997. The judge ordered Ms Çolak to be released for the duration of the proceedings and remanded Mr Sarı in custody.

11. By a bill of indictment of 8 December 1997, the public prosecutor committed the applicants to stand trial before the National Security Court. He called for their conviction, under Article 168 § 2 of the Criminal Code, on a charge of belonging to an armed gang.

12. Following a hearing on 9 June 1998 before a trial court, Mr Sarı was granted provisional release.

13. In a judgment of 22 April 1999, after reclassifying the offence, the National Security Court found the applicants guilty of aiding and abetting an armed gang, an offence punishable under Article 169 of the Criminal Code. It sentenced them to three years and nine months' imprisonment each, and banned them from holding public office for three years.

14. The applicants appealed on points of law against that judgment.

15. In a judgment of 23 February 2000, the Court of Cassation quashed the judgment on account of an erroneous classification of the offence.

16. The National Security Court, in a judgment of 7 November 2001, deferred its decision on the applicants' case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. Pursuant to section 9(a) of Law no. 2845 on procedure in the national security courts, the offences provided for under Articles 125, 168 and 169 of the Criminal Code fall within the exclusive jurisdiction of those

courts. At the material time, section 16 of that Law provided that any person arrested in connection with one of those offences had to be brought before a judge within forty-eight hours at the latest, or, if the offence was a joint one committed outside the region under emergency rule, within seven days, not including the time needed to convey the prisoner to the judge.

18. The fourth paragraph of Article 128 of the Code of Criminal Procedure provides that any person who has been arrested, or whose police custody period has been extended on the order of a public prosecutor, is entitled to challenge that measure before the appropriate judge with a view to securing his or her immediate release. Such an application may also be lodged by the person's lawyer, legal representative, close relatives or spouse.

The third paragraph of Article 128 of the Code of Criminal Procedure, amended by Law no. 4744 of 6 February 2002, reads as follows:

> "After an arrest has been made, and upon a decision of the public prosecutor, [the authorities] shall promptly inform a relative, or other person designated by the arrested person, that he or she has been arrested or that his or her police custody period has been extended."

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicants complained that they had been held incommunicado during their time in police custody and claimed that they had not been able to contact their families for more than seven days. They submitted that, as a result, they had not been able to exercise their rights under Article 128 § 4 of the Code of Criminal Procedure. They relied on Article 8 of the Convention, of which the relevant parts read as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety ..., for the prevention of disorder or crime ..."

A. Admissibility

29. The Government submitted that the applicants had not exhausted domestic remedies, referring to the remedy provided for under Article 128 § 4 of the Code of Criminal Procedure (see paragraph 18 above). They argued, in particular, that if the applicants had requested to make contact with their families they would not have been prevented from doing so.

30. The applicants challenged that submission. They pointed out that it was precisely because they had been held incommunicado, without any contact with their families, that they had been prevented from exercising the rights afforded to them under Article 128 of the Code of Criminal Procedure. In their submission, it was the duty of the police custody officers to inform the families of persons held on police premises and thus to allow those rights to be exercised effectively.

31. The Court notes, firstly, that the remedy referred to by the Government would not have been an adequate one in respect of the complaint under Article 8 of the Convention. Moreover, it observes that the Government did not refer to any legislation that may have been applicable at the material time to the question of contact between an individual held in police custody in accordance with Article 5 § 1 (c) of the Convention and his family or other persons outside. Accordingly, it dismisses the objection that domestic remedies were not exhausted.

B. Merits

32. The Court considers, firstly, that the complaint in the present case is not that the State acted but that it failed to act. The situation stems from a lack of legislation governing the right of individuals in police custody to contact their families. The Court thus considers that it must examine the case in the light of the general rule contained in the first paragraph of Article 8 of the Convention, which lays down the right to respect for private and family life.

33. In this connection, the Court would reaffirm the principle that has already been established in substance under Article 8: although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, it does not merely compel the State to refrain from such interference, as there may in addition be positive obligations inherent in an effective "respect" for family life. Whilst the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition, the applicable principles are nevertheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Nuutinen v. Finland*,

no. 32842/96, § 127, ECHR 2000-VIII, and *Kutzner v. Germany*, no. 46544/99, §§ 61-62, ECHR 2002-I).

34. “Respect” for family life implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally (see *Marckx* [*v. Belgium*, 13 June 1979], § 45[, Series A no. 31]). The Court has held that a State has obligations of this type where it has found a direct and immediate link between the measures sought by an applicant and the latter’s private and/or family life (see *Airey v. Ireland*, 9 October 1979, § 32, Series A no. 32; *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91; *López Ostra v. Spain*, 9 December 1994, § 55, Series A no. 303-C; *Guerra and Others v. Italy*, 19 February 1998, § 58, *Reports of Judgments and Decisions* 1998-I; *Botta v. Italy*, 24 February 1998, § 35, *Reports* 1998-I; and *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V).

35. However, the notion of “respect” is not clear-cut, and States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Zehnalová and Zehnal*, cited above).

36. The Court observes that it may be extremely important for a person who has been arrested to be able to communicate with his or her family promptly. The unexplained disappearance of a family member, even for a short period, may cause deep anxiety (see *McVeigh and Others v. the United Kingdom*, nos. 8022/77, 8025/77 and 8027/77, Commission’s report of 18 March 1981 (former Article 31 of the Convention), Decisions and Reports 25, p. 15, and Resolution DH (82) 1 adopted by the Committee of Ministers on 24 March 1982 concerning those applications). In the present case the Court observes that the applicants were held incommunicado for more than seven days, with all the anxiety which that entailed both for them and their families. In addition, the lack of contact with their families meant that they were prevented from exercising their rights under domestic law (see paragraph 18 above).

37. The Court reiterates that, at the material time, there was no legislation governing the right of people in police custody to contact their families or others, as the legislative amendment providing for the notification of detainees’ families was not enacted until 2002. In the present case, although the applicants were unable to prove that they had been refused permission to contact their families, the procedure for arranging such contact had not been clearly established either. The Government, for their part, did not indicate what means had been available to the applicants to make contact with their families rapidly after being taken into custody.

As there was no legislative framework affording practical and effective protection against a violation of Article 8 of the Convention, the Court finds

that, in the circumstances of the case, incommunicado detention for more than seven days was contrary to that Article.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

4. *Holds* that there has been a violation of Article 8 of the Convention;

...

Done in French, and notified in writing on 4 April 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Jean-Paul Costa
President