CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF ŞAHİN ÇAĞDAŞ[1] v. TURKEY

(Application no. 28137/02)

JUDGMENT

This version was rectified on 21 August 2006
under Rule 81 of the Rules of the Court

STRASBOURG

11 April 2006

FINAL

11/07/2006

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

[1] Rectified on 21 August 2006. The name of Şahin Çağdaş read Çağdaş Şahin in the former version of the judgment.

In the case of Şahin Çağdaş[1] 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. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 21 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 28137/02) 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 a Turkish national, Mr Şahin Çağdaş[1] ("the applicant"), on 25 March 2002.

2. The applicant was represented by Mr S. Çetinkaya, a lawyer practising in Izmir. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged that his detention for two months and twenty three-days contravened Article 5 §§ 1 and 5 of the Convention. He complained under Article 6 of the Convention that the written opinions which the Principal Public Prosecutors submitted to the Izmir Assize Court and to the Court of Cassation on the merits of his claim and appeal, respectively, had never been served on him, thus depriving him of the opportunity to put forward his counter-arguments.

4. 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.

5. On 15 March 2005 the Court decided to communicate the application to the Government. In a letter of 18 March 2005, the Court informed the parties that, in accordance with Article 29 §§ 1 and 3 of the Convention, it would decide on both the admissibility and merits of the application.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1966 and lives in İzmir.

8. On 10 May 2000 the applicant was arrested on suspicion of having aided and abetted an illegal organisation, namely the PKK (*the Kurdistan Workers' Party*), in March 1995.

9. On 12 May 2000 a Magistrates' Court in criminal matters ordered the applicant's detention on remand.

10. On 23 May 2000 the Principal Public Prosecutor at the Izmir State Security Court filed an indictment charging the applicant with aiding and abetting an illegal terrorist organisation. In particular, the Public Prosecutor accused the applicant of having been involved in illegal activities in March 1995, notably sheltering members of the PKK, acting as their courier and recruiting new members for the organisation. The charges were brought under Article 169 of the now defunct Criminal Code. The Public Prosecutor asked the State Security Court to increase by half the penalty to be imposed on the applicant in application of Article 5 of Law no. 3713 (the Anti-terrorism Act) and Articles 31, 33 and 40 of the former Criminal Code.

11. On 3 August 2000 the applicant was released pending trial.

12. On 2 November 2000 the Izmir State Security Court discontinued the prosecution against the applicant, holding that the five year statutory time-limit laid down in Articles 102 § 4 and 104 § 2 of the Criminal Code had expired. The court noted that the offence in question had allegedly been committed in March 1995, whereas the indictment had been filed on 23 May 2000, i.e. more than five years after the commission of the alleged offence. It further found that the applicant had not been involved in any illegal activity during this time.

13. On 16 March 2001 the applicant filed a complaint under Law no. 466 with the Izmir Assize Court (*Ağır Ceza Mahkemesi*) against the Treasury, requesting 10,500,000,000 Turkish liras (TRL) by way of compensation for his detention between 10 May and 3 August 2000.

14. On 21 March 2001 the three-judge Izmir Assize Court appointed one of its members (*naip hakim*) to investigate the case and draft a report. On the same day, the judge-rapporteur decided to ask the Principal Public Prosecutor for his written observations on the applicant's claim.

15. On 21 March 2001 the Principal Public Prosecutor, as required by Law no. 466, submitted his opinion to the Izmir Assize Court. The Public Prosecutor noted that the criminal proceedings against the applicant had been discontinued because they had been time-barred, within the meaning of Articles 102 § 4 and 104 § 2 of the Criminal Code. The Public Prosecutor submitted that the applicant should not be granted compensation for non-pecuniary damage since Law no. 466 did not provide for the possibility of compensation for cases concerning the discontinuation of criminal proceedings. This opinion was not served on the applicant.

16. The judge-rapporteur submitted his report to the Izmir Assize Court, recommending that the latter should not to accede to the applicant's claim.

17. On 28 March 2001 the Izmir Assize Court dismissed the applicant's claim for compensation, considering that he was not entitled to compensation under Law no. 466. The court held that section 1 of Law no. 466 provided an exhaustive list of situations for an award of compensation and that the applicant's circumstances did not fall within any of these categories.

18. On 1 October 2001 the applicant appealed to the Court of Cassation. He argued that he was not only unlawfully held in detention but was also deprived of the opportunity to be acquitted of the charges as a result of the Izmir State Security Court's decision to discontinue the proceedings. He therefore asked the Court of Cassation to quash the Assize Court's judgment and to award compensation.

19. On 2 October 2001, according to the relevant rules governing the functioning of the Court of Cassation in litigation of this nature, the case-file of the Izmir Assize Court was referred to the competent division of the Court of Cassation through the intermediary of the office of the public prosecutor at the Court of Cassation.

20. On 8 January 2002 the Principal Public Prosecutor submitted his opinion on the merits of the applicant's appeal. In his written opinion (*tebliğname*) to the Ninth Criminal Division of the Court of Cassation, the Principal Public Prosecutor stated that, having regard to the first-instance proceedings, the evidence collected, the subject matter of the claim and the discretion of the first-instance court, the appeal was unfounded. He advised that the appeal be rejected and that the first-instance judgment be approved, being in compliance with procedural rules and the law.

21. This opinion was not transmitted to the applicant.

22. On 5 February 2002 the Ninth Criminal Division of the Court of Cassation, having regard, *inter alia*, to the opinion of the Principal Public Prosecutor, upheld the judgment of 28 March 2001.

II. RELEVANT DOMESTIC LAW

23. A description of the relevant domestic law at the material time can be found in *Göç v. Turkey* ([GC], no. 36590/97, § 34, ECHR 2002-V).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

24. The applicant complained under Article 6 § 1 of the Convention that his right to a fair hearing had been breached since he had never been given an opportunity to reply to the written opinions which the Principal Public Prosecutors submitted to the Izmir Assize Court and to the Court of Cassation on the merits of his claim and appeal, respectively. The relevant part of Article 6 § 1 of the Convention provides as follows:

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

A. Admissibility

25. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds.

B. Merits

26. The applicant contended that the failure of the national courts to serve on him the Principal Public Prosecutors' observations deprived him of his rights to procedural equality and his rights of defence, with the result that he had had an unfair trial.

27. The Government submitted that, following the referral of the case to the Court of Cassation, it would have been open to any party to the proceedings to obtain from the court's registry any information regarding the state of proceedings. When the applicant became aware of the advisory opinion of the principal public prosecutor, he could have asked for all necessary information, filed additional observations or responded to the prosecutor's opinion. Furthermore, the Principal Public Prosecutor's observations merely consisted of his opinion whether he approved or disapproved the first-instance court's judgment. Accordingly, non-communication to the applicant of the Principal Public Prosecutor's

observations did not infringe the "equality of arms" principle or the applicant's rights under Article 6 of the Convention.

28. The Court notes that it has already examined the same grievance in the past and has found a violation of Article 6 § 1 of the Convention in its *Göç* judgment (cited above, § 58). In that judgment, the Court held that, having regard to the nature of the Principal Public Prosecutor's submissions and to the fact that the applicant was not given an opportunity to make written observations in reply, there had been an infringement of the applicant's right to adversarial proceedings (*loc. cit.* § 55). It further considered that to require an applicant's lawyer to take the initiative and inform himself periodically on whether any new elements have been included in the case file would amount to imposing a disproportionate burden on her or him and would not necessarily have guaranteed a real opportunity to comment on the opinion (*loc. cit.* § 57).

29. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned case.

30. There has accordingly been a violation of Article 6 § 1 of the Convention as regards the non-communication to the applicant of the principal public prosecutors' observations before the Izmir Assize Court and the Court of Cassation.

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 5 OF THE CONVENTION

31. The applicant complained under Article 5 §§ 1 and 5 of the Convention that he had been unlawfully deprived of his liberty for two months and twenty-three days and that the national authorities had failed to redress his Convention grievances.

Admissibility

32. The Government asserted that the applicant's arrest had been based on the presence of a reasonable suspicion that he had committed an offence. Furthermore, the Izmir Assize Court had dismissed the applicant's claims of compensation for the allegedly unlawful deprivation of liberty given that the circumstances of the applicant's case had not been prescribed by Article 1 of Law no.466. Accordingly, the applicant's arrest and detention and the domestic courts' refusal to grant him compensation complied with Article 5 §§ 1 and 5 of the Convention.

33. As regards the first limb of the applicant's complaints, the Court notes that the applicant's custody ended on 3 August 2000. The applicant introduced his application on 25 March 2002, i.e. more than six months

later. It follows that this complaint has been introduced out of time and must be rejected under Article 35 § 4 of the Convention.

34. With regard to the second limb of the applicant's complaints, the Court recalls that under Article 5 § 5 of the Convention the right to compensation for any material or moral damage sustained as a result of detention is conditional upon a breach of one of the paragraphs of Article 5 (see *Wassink v. the Netherlands*, judgment of 27 September 1990, Series A no. 185-A, p. 14, § 38). Accordingly, the Court cannot consider an applicant's claim exclusively based on Article 5 § 5 unless a breach of Article 5 §§ 1 to 4 has been established either directly or in substance, and Article 5 § 5 of the Convention does not entitle the applicant to a particular amount of compensation. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. The applicant claimed the sum of 4,887 euros (EUR) for pecuniary damage.

37. The Government contended that the applicant had failed to submit any evidence in support of his claims.

38. The Court notes that the applicant failed to substantiate that he suffered pecuniary damage as a result of the breach of his Convention rights. Therefore, it disallows the claim under this head.

B. Non-pecuniary damage

39. The applicant claimed the sum of EUR 30,000 for non-pecuniary damage.

40. The Government disputed the applicant's claim.

41. The Court considers that the finding of a violation constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant (see *Parsıl v. Turkey*, no. 39465/98, § 38, 26 April 2005).

C. Costs and expenses

42. The applicant claimed a total of EUR 7,500 for his costs and expenses. He did not produce any supporting documents.

43. The Government submitted that the claims were excessive and unsubstantiated given the absence of receipts or other such documents.

44. Making its own estimate based on the information available, the Court considers it reasonable to award the applicant the sum of EUR 1,000 under this head.

D. Default interest

45. 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 complaint concerning the alleged violation of Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *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, EUR 1,000 (one thousand euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (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 11 April 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	J.-P. COSTA
Registrar	President