



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

THIRD SECTION

CASE OF KARATAY AND OTHERS v. TURKEY

(Application no. 11468/02)

JUDGMENT

STRASBOURG

15 February 2007

FINAL

15/05/2007

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 Karatay and Others v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr R. TÜRMEŖ,

Mr C. BİRSAN,

Mrs A. GYULUMYAN,

Mr E. MYJER,

Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 25 January 2007,

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

PROCEDURE

1. The case originated in an application (no. 11468/02) 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 three Turkish nationals, Mr Fırat Karatay, Fesih Karatay and Mr Şeyhmus Karatay (“the applicants”), on 16 January 2002.

2. The applicants were represented by Mr A. Terece, a lawyer practising in İzmir. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicants complained under Article 5 § 3 of the Convention about the length and the lawfulness of their detention on remand. They complained that during their detention they were never brought before a judge, which deprived them of the possibility of effectively arguing for their release pending trial.

4. On 3 November 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

5. The applicants were born in 1975, 1973 and 1949 respectively and live in Mardin.

6. On 5 December 2000, a textile company in Çukurova filed a petition with the office of the Bornova Public Prosecutor, complaining about the fraudulent acts of Fırat Karatay, the first applicant.

7. On 4 February 2001 the Bornova Public Prosecutor requested the Bornova Criminal Court of First Instance to issue an arrest warrant, for all three applicants, on suspicion of having committed fraud. On 8 February 2001 the public prosecutor filed an indictment with the same court, charging the applicants and four others with embezzlement under Articles 510 of the Criminal Code.

1. The applicants' arrest and detention

8. On 25 April 2001 the third applicant was arrested and placed in detention at the Kızıltepe Prison, by the judge at the Kızıltepe Criminal Court. The judge did not take his statements, but merely informed the applicant of the charges against him and noted his personal data.

9. On 14 May 2001, considering the state of the evidence and the nature of the offence, the Bornova Criminal Court ordered the continuation of the third applicant's detention on remand in his absence and demanded his presence for the following hearing.

10. In a letter dated 28 May 2001, addressed to the Bornova Criminal Court the third applicant requested to be released pending trial.

11. At the hearings of 11 June 2001 and 9 July 2001 the applicant was not brought before the court. The court ordered the third applicant's continued detention on remand reiterating the same reasoning. It further requested his transfer from the Kızıltepe Prison to Buca Prison in order to facilitate his presence before the court. In the meantime, the Kızıltepe Public Prosecutor informed the Bornova Criminal Court that the first and second applicants had been arrested and detained on remand on 7 July 2001 and 1 May 2001, respectively.

12. In a letter dated 9 July 2001, addressed to the Bornova Criminal Court the first applicant confessed to his guilt.

13. On 25 July 2001 the applicants' lawyer, who was present before the Bornova Criminal Court for the first time, requested the applicants' release pending trial. Taking into consideration the state of the evidence and the nature of the offence, the Bornova Criminal Court dismissed the lawyer's request, and requested the applicants' transfer to Buca Prison.

14. At the same hearing the applicants' lawyer requested the court not to transfer the third applicant from one prison to another due to his health problems. Subsequently, the court sent a letter rogatory to the Kızıltepe Criminal Court of First Instance in order to take the third applicant's statements.

15. At the hearings of 22 August 2001 and 21 September 2001 the court repeated its previous requests concerning the first and second applicants'

transfer to the court and ordered, once again, the continuation of all three applicants' detention on remand.

16. On 19 October 2001 the applicants' lawyer complained before the court that although the applicants had been detained on remand for quite some time their statements had still not been taken by the court. He argued that this situation was in breach of the applicants' rights guaranteed under the Convention. Furthermore, in view of the length of their detention and the health problems of the third applicant, he requested the applicants' release pending trial. The court dismissed the lawyer's request in view of the state of the evidence and the nature of the offence. It also reiterated its order to transfer all three applicants to Buca Prison.

17. At the hearing of 21 November 2001 the applicants' lawyer maintained that the reason the prison authorities were not transferring the applicants to the Buca prison was because fuel expenses were not covered by the budget. He maintained that if the applicants are released, he would personally ensure the applicants' presence before the court. The court decided to send a letter rogatory to Kızıltepe Criminal Court to take the applicants' statements and then to release them.

18. On 6 December 2001 the applicants gave their statements before the Kızıltepe Criminal Court. The first applicant confessed to his guilt, while the others refuted the allegations. The court ordered their release pending trial as requested by the Bornova Criminal Court, in its decision dated 21 November 2001.

2. The proceedings against the first and third applicants, before the Karşıyaka Criminal Court of First Instance

19. The textile company filed another complaint with the office of the Izmir Public Prosecutor, in relation to the first and the third applicants, regarding the same incident.

20. On 11 April 2001 the Izmir Criminal Court of First Instance filed an indictment against the first and the third applicants for embezzlement. On 28 June 2001 the court decided that it lacked jurisdiction to examine the case and sent the case file to the Karşıyaka Criminal Court of First Instance.

21. On 12 November 2001 the Kızıltepe Criminal Court of First Instance took the applicants' statements by way of rogatory letter issued by the Karşıyaka Criminal Court. The applicants alleged that they were not aware of the fact that a second case had been brought against them, at the time they gave these statements

22. At the hearing of 9 October 2002 the Karşıyaka Criminal Court of First Instance acquitted the third applicant due to lack of evidence and found the first applicant guilty as charged and sentenced him to five years and four months' imprisonment. Both the applicants and their lawyers were informed of the second case when the decision of 9 October 2002 was notified to them.

23. On 31 October 2002 the applicants appealed against the decision of the Karşıyaka Criminal Court.

24. On 24 April 2003 the first applicant was arrested and subsequently imprisoned in accordance with the decision dated 9 October 2002. On 26 January 2004 the Court of Cassation quashed the decision of the first instance court.

25. When the case was resumed before the first instance court, the applicants' lawyer requested to join this case with the one pending before the Bornova Criminal Court, as they concerned the same subject matter. Furthermore, he requested the first applicant's release pending trial. The Karşıyaka Criminal Court refused the lawyer's request to release the applicant in view of the state of the evidence and the nature of the offence.

3. Joined cases before the Bornova Criminal Court of First Instance

26. On 1 July 2004 the two cases were joined before the Bornova Criminal Court of First Instance.

27. At the hearings held on 2 July, 27 July and 27 August 2004 the court ordered the continuation of the first applicant's detention on remand on account of the state of evidence and the seriousness of the charges, and taking into account the date of his arrest.

28. On 23 September 2004 the court ordered his release pending trial.

29. On 17 January 2005 the Criminal Court decided to acquit the second and third applicants and convicted the first applicant. It sentenced him to five years and four months' imprisonment.

30. Following the first applicant's appeal, the case is pending before the Court of Cassation.

THE LAW

31. The applicants complained under Article 5 § 3 of the Convention about the length and unlawfulness of their detention on remand. They complained, in particular, that they were deprived of any possibility of effectively arguing in support of their release, as they were not brought promptly before a judge.

32. The Court considers that the wording "brought promptly" in Article 5 § 3 implies that the right to be brought before an appropriate officer relates to the time when a person is first deprived of his liberty under Article 5 § 1 (c). The obligation on Contracting States under Article 5 § 3 is therefore limited to bringing the detainee promptly before an appropriate officer at that initial stage, although Article 5 § 4 of the Convention may in certain cases require that the person be subsequently brought before a judge for the purpose of effectively contesting the lawfulness of his detention

when it lasts for a long time (*Ječius v. Lithuania*, no. 34578/97, § 84, ECHR 2000-IX). Thus, it is of the opinion that the latter complaint ought to be considered under Article 5 § 4 of the Convention.

33. Article 5 §§ 3 and 4 reads as follows:

“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.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

I. ADMISSIBILITY

34. The Government submitted that the application should be rejected for failure to exhaust domestic remedies as required by Article 35 § 1 of the Convention. The Government argued that the applicants could have, pursuant to Article 128 of the Code of Criminal Procedure, challenged the length of their detention in police custody.

35. The Court notes that the remedy invoked by the Government concerns the detention in police custody, while the subject matter of the present application is the length and lawfulness of the applicants' detention on remand. It therefore rejects the Government's preliminary objection.

36. The Court further concludes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

37. The applicants complained that their detention pending trial exceeded the “reasonable time” requirement of Article 5 § 3 of the Convention.

38. The Government contested that argument.

39. The Court reiterates that it falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a public interest justifying a departure from the rule in Article 5 of the Convention, and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of

Article 5 § 3 (see *Muller v. France*, judgment of 17 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 388, § 35).

40. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also be satisfied that the national authorities displayed “special diligence” in the conduct of the proceedings (*ibid.*).

41. In the instant case, the Court notes that the applicants were placed in detention on remand on 7 July 2001, 1 May 2001 and 25 April 2001, respectively. All three of them were released pending trial on 21 November 2001. The first applicant was also detained on remand, within the meaning of Article 5 § 3 of the Convention, between 26 January 2004, the date on which the Court of Cassation quashed his conviction and 23 September 2004, when he was released pending trial once again. Consequently, the period to be taken into consideration for the first applicant lasted approximately one year, whereas the second and third applicants' detention on remand lasted almost seven months.

42. The Bornova Criminal Court considered the applicants' continued detention at the end of each hearing, either of its own motion or at the request of the applicants' lawyer. However, the Court notes from the material in the case file that the Bornova Criminal Court ordered the applicants' continued detention pending trial using identical, stereotyped terms, such as “having regard to the nature of the offence and the state of the evidence”. Although, in general, the expression “the state of the 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; *Mansur v. Turkey*, judgment of 8 June 1995, Series A no. 319-B, § 55, and *Demirel v. Turkey*, no. 39324/98, § 59, 28 January 2003).

43. In the light of these considerations, the Court finds that the length of the applicants' detention pending trial violated Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

44. The applicants argued that the review proceedings were not truly adversarial. They maintained that as they were not brought before the court which ordered their continued detention on remand and they had not been

given any access to the investigation files, they could not properly question the lawfulness of their continued detention on remand.

45. The Government did not submit any observations on the merits of this complaint.

46. In the Court's view, the applicants' complaint under this heading concerns their detention which lasted until 21 November 2001, when they were released pending trial and the proceedings before the Bornova Criminal Court. It observes that after that date the first and second applicants were already released pending trial and the third applicant, who was the only one detained at the time, was present before the court to challenge the lawfulness of his arrest. The Court will therefore be dealing only with this period of detention on remand.

47. The Court recalls that Article 5 § 4 of the Convention entitles arrested or detained persons to take proceedings bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty (*Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 34-35, § 65). The domestic court dealing with such matters must provide the "guarantees of a judicial procedure". The proceedings must be adversarial and must always ensure equality of arms between the parties - the prosecutor and the detainee (*Grauzinis v. Lithuania*, no. 37975/97, § 31, 10 October 2000).

48. These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party is aware that observations have been filed and is given an opportunity to comment thereon (see, *mutatis mutandis*, *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, pp. 27-28, § 67).

49. In the instant case, the Bornova Criminal Court had jurisdiction to examine the applicants' case. However, following their arrest the applicants were brought before the Kızıltepe Criminal Court which subsequently

ordered their detention on remand. The Court observes that, until they were released pending trial, this was the only occasion that the applicants were brought before a judicial authority. Yet, even on that occasion the Kızıltepe Criminal Court merely informed the applicants of the charges against them and noted their personal data (paragraph 8 above).

50. The Court notes that the Bornova Criminal Court ordered the prolongation of their detention in the applicants' absence, by examining the case file which did not contain their statements. It further notes that the Government did not explain why the applicants were not transported from the Kızıltepe Prison to the court house where the proceedings were pending.

51. The Court observes that even at the hearing of 21 November 2001, when the Bornova Criminal Court ordered the Kızıltepe Criminal Court to take the applicants' statements and subsequently release them, it did not specify any reason for their release. Therefore, although the applicants' lawyer was present during some of the hearings where the court reviewed the applicants' detention on remand, in the absence of any reasoning he did not have any possibility to effectively challenge its lawfulness.

52. In view of the above, the Court concludes that the applicants were not given the guarantees appropriate to the kind of deprivation of liberty in question. Accordingly there has been a breach of Article 5 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicants maintained that their arrest and detention had a negative effect on their business. Thus, the first applicant claimed 5,000 euros (EUR) in respect of pecuniary damage, while the second and third applicants claimed EUR 10,000. Furthermore they claimed EUR 10,000, EUR 15,000 and EUR 20,000 respectively, for non-pecuniary damage.

55. The Government contended that the claim for pecuniary damages was unsubstantiated. Moreover, they claimed that the applicants' claim for non-pecuniary damage were excessive. They submitted that, if the Court were to find a violation, the judgment would in itself constitute sufficient just satisfaction for the purposes of Article 41.

56. The Court considers that the applicants' claim for pecuniary damages is not substantiated; it therefore rejects this claim. On the other hand, it awards the first applicant EUR 2,000 and the second and third applicants each EUR 1,500 in respect of non-pecuniary damage.

B. Costs and expenses

57. The applicants also claimed EUR 7,000 for costs and expenses incurred before the domestic authorities and the Court. In support of their claim, the applicants submitted the Istanbul Bar Association's recommended minimum fees list for 2006. However, they did not submit any receipt or invoice.

58. The Government disputed the applicants' claim.

59. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and was reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicants, jointly, the global sum of EUR 1,500 covering costs under all heads.

C. Default interest

60. 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;
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 5 § 4 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:

- (i) EUR 2,000 (two thousand euros) to the first applicant for non-pecuniary damage,
- (ii) EUR 1,500 (one thousand five hundred euros) each to the second and third applicants for non-pecuniary damage,
- (iii) EUR 1,500 (one thousand five hundred euros) jointly for costs and expenses,
- (iv) 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 amount 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President