



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

SECOND SECTION

CASE OF KOŞTİ AND OTHERS v. TURKEY

(Application no. 74321/01)

JUDGMENT

STRASBOURG

3 May 2007

FINAL

03/08/2007

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 Koşti and Others v. Turkey,

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

Mrs F. TULKENS, *President*,

Mr A.B. BAKA,

Mr R. TÜRMEŖ,

Mr M. UGREKHELIDZE,

Mr V. ZAGREBELSKY,

Ms D. JOČIENĖ,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 3 April 2007,

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

PROCEDURE

1. The case originated in an application (no. 74321/01) 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 three Turkish nationals, Mr Osman Koşti, Mr Mehmet Koşti and Mr Hışman Öngör (“the applicants”), on 27 May 2001.

2. The applicants were represented by Mr M. Vefa, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the purpose of the proceedings before the Court.

3. On 25 August 2005 the Court declared the application partly inadmissible and decided to communicate to the Government the complaint concerning the length of the applicants' remand in custody and the criminal proceedings brought against them. 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

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1981, 1983 and 1981 respectively and live in Şanlıurfa.

5. The applicants were arrested and taken into custody on 19 and 20 February 1999 respectively on suspicion of their involvement in the

throwing of Molotov cocktails at various public buildings. On 23 February 1999 the Suruç Magistrates' Court ordered their remand in custody. The applicants were aged sixteen (Mehmet Koşti) and eighteen (the other applicants) at the time of the events.

6. On 23 March 1999 the public prosecutor at the Diyarbakır State Security Court filed a bill of indictment against the applicants and four other persons, accusing them of throwing Molotov cocktails at the Suruç primary school and the Suruç public garage on 18 February 1999 and of attempting to throw Molotov cocktail at the Suruç Atatürk primary school with a view to supporting the activities of an illegal organisation, namely the PKK (the Kurdistan Workers' Party). The charges were brought under Article 168 § 2 of the Turkish Criminal Code.

7. On 7 April 1999 the criminal proceedings against the applicants and four other accused commenced before the Diyarbakır State Security Court.

8. On 12 May 1999 the court heard the applicants who refuted the allegations against them and their earlier submissions given before the police, public prosecutor and the Magistrates' Court. They also challenged the accuracy of the arrest protocol and the report on the reconstruction of the events. The court decided to secure the testimony of those who had attended the arrest and the reconstruction of events and the submissions of the accused who were not detained. It further ordered that the birth date of Hışman Öngör and another accused be determined since they had claimed that they were actually born in 1986.

9. Between 12 May 1999 and 22 December 2000, the Diyarbakır Security Court held fifteen hearings where it took various procedural decisions and postponed the trial as the procedure concerning the determination of the age of two accused had not been completed.

10. At the hearings held on 22 December 2000 and 20 February 2001 respectively, the court requested the prosecution and the defendants to submit their observations on the merits of the case. On 10 April 2001 the applicants' lawyer requested an extension for the submission of the applicants' observations. This request was accepted by the court.

11. Throughout the proceedings the applicants' lawyer repeatedly requested that the applicants be released pending trial. He maintained, *inter alia*, that they were juveniles and that their acts could not be considered to constitute an offence under Article 168 § 2 of the Criminal Code. The first instance court dismissed the applicants' requests until 29 May 2001, having regard to the nature of the offence with which they were charged and the state of the evidence.

12. On 29 May 2001 the court decided to defer sentencing the applicants and their co-accused, pursuant to Law no. 4616. It therefore ordered the release of the applicants from detention.

13. The public prosecutor appealed.

14. On 20 September 2001 the Court of Cassation upheld the decision of the first instance court.

II. THE RELEVANT DOMESTIC LAW

15. The relevant domestic law and practice in force at the material time are outlined in the *Çobanoğlu and Budak* judgment¹ v. *Turkey*, (no. 45977/99, §§ 29-30, 30 January 2007).

THE LAW

I. ADMISSIBILITY

16. The Government asked the Court to dismiss the application for failure to exhaust domestic remedies, under Article 35 § 1 of the Convention. In this regard, the Government maintained that the applicants failed to object to their continued remand in detention pursuant to Article 298 of the Code of Criminal Procedure (CCP). They further submitted that the applicants failed to raise the substance of the complaint concerning the length of the proceedings before the domestic courts.

17. The applicants did not specifically deal with the Government's objections under this head.

18. As regards the first limb of the Government's objection, the Court reiterates that under the terms of Article 35 § 1 of the Convention it can only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. However, only available and adequate remedies must be tried under Article 35 § 1 of the Convention. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they lack the requisite accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective (see, among others, *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, no. 41964/98, § 64, 27 June 2006).

19. The Court recalls that, in the area of exhaustion of domestic remedies, the burden of proof is on the Government claiming non-exhaustion to indicate to the Court with sufficient clarity the remedy to which the applicants have not had recourse and to satisfy the Court that this remedy was effective and available in theory and in practice at the relevant

¹ The judgment is not final yet.

time, that is to say that it was accessible, was capable of providing redress in respect of the applicants' complaints and offered reasonable prospects of success (see *Cennet Ayhan and Mehmet Salih Ayhan*, cited above, § 65). Furthermore, the Court notes that the application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to establish. Accordingly, the Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Acunbay v. Turkey*, nos. 61442/00 and 61445/00, § 45, 31 May 2005).

20. In the instant case the Court notes that the trial court examined the applicants' detention on remand at the end of each hearing, either of its own motion or upon the request of the applicants. It therefore had the opportunity to end the applicants' alleged lengthy detention and to avoid or to redress an alleged breach of the Convention (see *Acunbay*, cited above, § 48, and *Tamer and Others v. Turkey*, no. 235/02, § 28, 22 June 2006).

21. The Court further notes that, pursuant to Article 298 of the CCP (since repealed), the applicants could have objected to their continued remand in custody as indicated by the Government. However, the Court cannot agree with the Government that this remedy was effective and offered reasonable prospects of success in practice for the following reasons.

22. The Court has examined several cases against Turkey in which it has found a violation of Article 5 § 3 of the Convention based on the fact that, *inter alia*, the State Security Courts used the same formal reasons for the applicants' continued detention without explaining their specific relevance in each case (see, for example, *Hasan Ceylan v. Turkey*, no. 58398/00, 23 May 2006, *Pakkan v. Turkey*, no. 13017/02, 31 October 2006, *Giyasettin Altun v. Turkey*, no. 73038/01, 24 May 2005, *Tutar v. Turkey*, no. 11798/03, 10 October 2006, *Mehmet Güneş v. Turkey*, no. 61908/00, 21 September 2006, *Acunbay*, cited above, and *Tamer and Others*, cited above). It considers that, in these circumstances, an objection against such stereotype reasoning would have had little prospect of success before another instance. Moreover, as a rule, the objection proceedings in question are not adversarial and are decided in the absence of an oral hearing (Article 302 § 1 of the CCP). They therefore lack the guarantees appropriate to the kind of deprivation of liberty in question (see, for example, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II, and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3302, § 162).

23. The Court notes that there is a distinction between the requirement of exhaustion of domestic remedies under Article 35 § 1 and the requirements of Article 5 § 3 of the Convention aimed at providing safeguards against arbitrary deprivation of liberty. However, where its

consistent case-law shows that such safeguards fail or are deficient, it would be contrary to the very principle of the Convention and would lead to excessive formalism under Article 35 § 1 to demand of the applicant the pursuit of inadequate safeguards.

24. Furthermore, the Court notes that the Government's submissions in the instant case remain very general, only citing the relevant provisions in the law. The Court reiterates that it is not for the Convention bodies to cure of their own motion any shortcomings or lack of precision in the respondent Government's arguments (see, in particular, *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 77, § 35). In the light of the above, the Court rejects the Government's objection under this head.

25. As to whether the applicants had failed to complain about the length of the proceedings before the domestic courts, the Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Mete v. Turkey*, no. 39327/02, §§ 18-19, 25 October 2005). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned application. It therefore also rejects this aspect of the Government's objection.

26. The Court considers that the application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

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

27. The applicants complained that their remand in custody exceeded the “reasonable time” requirement as provided in Article 5 § 3 of the Convention, which reads insofar as relevant 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.”

28. The Government maintained that the applicants' detention was based on the existence of reasonable grounds of suspicion of them having committed an offence, and that the custodial measure had been reviewed periodically by the competent authority, with special diligence, in accordance with the requirements laid down by the applicable law at the relevant time. They pointed out that the offence with which the applicants were charged was of a serious nature, and that their continued remand in custody was necessary to prevent crime and to preserve public order.

29. The applicants maintained their allegations.

30. The Court notes from the material in the case file that the State Security Court considered the applicants' detention on remand at the end of each hearing, either on its own motion or upon the request of the applicants. On each occasion it prolonged that detention using identical, stereotyped terms, such as "having regard to the nature of the offence, the state of evidence and the content of the file". 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 a length of preventive detention of over two years and three months, in particular, having regard to the young age of the applicants (see, in particular, *Selçuk v. Turkey*, no. 21768/02, §§ 34-36, 10 January 2006, *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).

31. Consequently there has been a violation of Article 5 § 3 of the Convention.

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

32. The applicants complained that the length of the criminal proceedings exceeded the "reasonable time" requirement under Article 6 § 1 of the Convention, the relevant part of 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..."

33. The Government maintained that, in the circumstances of the present case, the length of the criminal proceedings could not be considered unreasonably long.

34. The applicants maintained their allegations.

35. The Court observes that the period to be taken into consideration began on 19 February 1999, when the applicants were arrested and taken into custody and ended on 20 September 2001, when the Court of Cassation upheld the judgment of the first instance court. The period under consideration thus lasted two years and seven months before two instances.

36. After examining the overall duration of the proceedings, and taking into account that the case was of some complexity, the number of accused and the fact that the case was dealt with at two levels of jurisdiction, the Court does not consider that the length of the proceedings in the present case was excessive even if it had been somewhat prolonged by the decision of the first instance court to adjourn a number of hearings pending the establishment of the ages of some of the accused. In this connection the Court reiterates that while Article 6 § 1 requires that judicial proceedings be

conducted expeditiously, it also lays emphasis on the more general principle of the proper administration of justice (see, for example, *Gast and Popp v. Germany*, no. 29357/95, p. 487, § 75, ECHR 2000-II). The Court further observes that no significant delay resulted at the appeal stage.

37. Having regard to the particular circumstances of the case, the Court finds that the “reasonable time” requirement laid down in Article 6 § 1 of the Convention was complied with in the present case. Consequently, the Court concludes that there has been no violation of Article 6 § 1 as regards the length of the proceedings.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicants claimed, in total, 60,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

40. The Government contested the amounts.

41. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards each applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

42. The applicants also claimed, in total, EUR 16,802 for the costs and expenses incurred before the domestic courts and the Court.

43. The Government contested the amounts.

44. 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 were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,000, jointly, for the proceedings before the Court.

C. 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 remainder of the application admissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* that there has been no violation of Article 6 § 1 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 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 settlement:
 - (i) EUR 3,000 (three thousand euros) each in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros) jointly, in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (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 applicants' claim for just satisfaction.

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

S. DOLLÉ
Registrar

F. TULKENS
President