



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

FOURTH SECTION

CASE OF MEHMET ŞAH ÇELİK v. TURKEY

(Application no. 48545/99)

JUDGMENT

STRASBOURG

24 July 2007

FINAL

24/10/2007

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 Mehmet Şah Çelik v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr R. TÜRMEŒ,

Mr S. PAVLOVSCHI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

and Mrs F. ARACI, *Deputy Section Registrar*,

Having deliberated in private on 3 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 48545/99) 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 Mr Mehmet Şah Çelik (“the applicant”). The applicant was represented by Mr S. Çınar, a lawyer practising in Diyarbakır.

2. On 26 February 2002 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**

3. The applicant was born in 1979. At the time of his application to the Court, he was incarcerated in the Batman E-type Prison.

4. On 16 December 1994 police officers from the Batman Security Directorate arrested the applicant on suspicion of membership of an illegal organisation, namely the PKK (the Kurdish Workers’ Party), and placed him in custody.

5. During his detention, the applicant signed statements and confessed to being a member of the PKK and to collecting money for that organisation.

6. On 30 December 1994 the applicant was questioned by the public prosecutor attached to the Batman Magistrates’ Court. During his

questioning, he repeated his statement made to the police. On the same day the Batman Magistrates' Court ordered his detention on remand.

7. On 11 January 1995 the prosecutor filed an indictment with the Diyarbakır State Security Court charging the applicant and thirteen co-accused with membership of an illegal armed organisation.

8. On 17 January 1995 the applicant was brought before that court, which ordered that his detention on remand be continued.

9. At the first hearing held on 16 March 1995, the applicant denied all the charges made against him. He submitted that his statements to the police had been taken under duress, and that he had been forced to repeat the same statements before the Batman Magistrates' Court and the Batman Public Prosecutor's Office. The court rejected his request for release pending trial.

10. His requests for release pending trial were rejected by the Diyarbakır State Security Court at each of the hearings. The court examined the applicant's continued detention on its own motion every one and a half months or two months. In ordering his continued detention, the court relied on the nature of the offences charged, the content of the case file, the state of the evidence, and the stage reached in the proceedings, without giving detailed reasoning.

11. At the first hearing, the court requested the following: (i) oral statements of the police officers who had interrogated one of the accused, (ii) a forensic examination of one of the accused, Mr Ferhan Arasan, in order to establish his real age, (iii) defence statements of the accused who were on conditional release, to be taken by a criminal court in the area where they resided, and finally (iv) witness statements and police records on certain allegations made by one of the accused, Mr Mehmet Emin Güngör, regarding the bombing of his house by unknown perpetrators.

12. At the following two hearings, the court heard some of the accused and adjourned the proceedings pending a forensic report on Mr Ferhan Arasan's age.

13. During the following ten hearings, held between 7 September 1995 and 7 November 1996, the court repeatedly ordered the taking of statements of two of the accused who were on conditional release and the preparation of a forensic report.

14. At the fourteenth hearing, held on 19 December 1996, the court ordered the presence of several of the accused (including the applicant) at the following hearing, and adjourned the proceedings pending submission of the forensic report.

15. Over the course of the following twenty-four months the court held thirteen hearings without obtaining new evidence in respect of the applicant, except for one hearing, held on 8 July 1997, at which the applicant and the other accused were questioned as to whether they had any information about the bombing of Mr Mehmet Emin Güngör's house. During that period, the court obtained only the final observations of the prosecutor and the

defendants, and continued to adjourn the proceedings pending submission of the forensic report.

16. On 18 December 1998, noting that the forensic report was still pending, the court severed the proceedings against Mr Ferhan Arasan and issued judgments in respect of the remaining accused. It found the applicant guilty of all charges and sentenced him to eight years and four months' imprisonment. The applicant appealed.

17. On 15 November 1999 the Court of Cassation upheld the judgment of the Diyarbakır State Security Court.

THE LAW

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

18. The applicant complained that his detention on remand exceeded the "reasonable time" requirement as provided for 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."

A. Admissibility

19. The Government raised a preliminary objection, arguing that the applicant had failed to exhaust two separate domestic remedies.

20. They first submitted that the applicant should have appealed the first-instance court's judgment to the Court of Cassation, prior to applying to the Court. Secondly, they submitted that the applicant should have tried to have the decisions ordering his continued detention in remand set aside, using the provisions of Articles 298 and 299 of the – now repealed – Code of Criminal Procedure ("the CCP").

21. As to the first limb of the objections, the Court notes that the extent to which an applicant must exhaust domestic remedies is determined by the nature of his or her particular complaint under the Convention. In the present case, the applicant's complaint relates to the length of his detention in remand. Thus, a cassation appeal – a remedy designed in Turkish law to challenge a first-instance court's final ruling – would have afforded the applicant no practical remedy in respect of his "length of detention" complaint. Accordingly, the Court dismisses this part of the Government's objections.

22. Under the second limb, the Government maintained that the applicant had not availed himself of the “objection” procedure under Articles 298 and 299 of the CCP. The Articles provided, where relevant, as follows:

“Article 298: Objections may not be filed against court orders.

Orders relating to detention ... are exempt from the foregoing paragraph.”

“Article 299: [...]

Objections filed against an order of a [criminal court] shall be reviewed by the [criminal court] whose number immediately follows that of the former.”

23. The applicant admitted that he had been aware of the remedy in question but had not availed himself of it, since he assumed that it was ineffective.

24. 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).

25. The Court reiterates 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 applicant has not had recourse and to satisfy the Court that this remedy was effective and available in theory and in practice at the relevant 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).

26. In the instant case the Court notes that the trial court examined the applicant’s detention on remand at the end of each hearing, either on its own motion or upon the request of the applicant. It therefore had the opportunity to end the applicant’s 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).

27. The Court further notes that, pursuant to Article 298 of the CCP, the applicant could have objected to his 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.

28. 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 application 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, *Gıyasettin 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 v. Turkey*, cited above). It considers that, in these circumstances, an objection against such stereotyped 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 CCP). They therefore lack 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).

29. 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 a 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 that he exhaust the inadequate safeguards.

30. Furthermore, the Court notes the Government's submissions, in the instant case, are very general, merely stating the relevant provision in the law without giving any concrete examples of its application. It 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 objections under this head.

31. The Court considers that this complaint raises serious issues of fact and law under the Convention, the determination of which requires an

examination of the merits. It concludes therefore that this complaint 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.

B. Merits

32. The Government maintained that the applicant's detention was based on the existence of reasonable grounds of suspicion of him 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 applicant was charged was of a serious nature, and that his continued remand in custody was necessary since he had already failed to attend half the hearings and it was highly likely that he would abscond.

33. The applicant maintained his allegations.

34. The Court notes from the material in the case file that the Diyarbakır State Security Court considered the applicant's detention on remand at the end of each hearing, either on its own motion or upon the request of the applicant. 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 almost four years (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).

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

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

36. The applicant also complained that the length of the criminal proceedings brought against him was in breach of the "reasonable time" requirement of Article 6 § 1 of the Convention, which, insofar as relevant, provides as follows:

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

37. The Government submitted that the case was rather complex, having regard to the number of accused and the charges they faced, which also

made it difficult to gather evidence and determine the facts. Moreover, no negligence or delay could be imputed to the judicial authorities. They further maintained that, up until the judgment of 18 December 1998, the State Security Court had held twenty-seven hearings and that the applicant had contributed to the length of the proceedings by refusing to attend thirteen of them.

A. Admissibility

38. 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. The Court therefore declares it admissible.

B. Merits

39. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant in the litigation (see *Humen v. Poland* [GC], no. 26614/95, § 60, 15 October 1999).

40. As regards the period to be taken into account, the Court notes that the proceedings commenced on 16 December 1994, the date of the applicant's arrest, and ended on 15 November 1999, when the Court of Cassation upheld the conviction. They therefore lasted four years and eleven months before two levels of jurisdiction.

41. The Court observes that the proceedings involved fourteen accused and the charges concerned membership of or aiding and abetting a terrorist organisation. However, it considers that the complexity of the proceedings does not in itself suffice to justify their duration.

42. As to the applicant's conduct, the Court finds no causal link between his failure to attend some of the hearings and the protracted nature of the trial. The case file indicates that the applicant was present at the first six hearings, which were held up until 25 January 1996. By that date, the court had already completed the taking of statements.

43. Moreover, the records do not indicate any hearing which had been specifically postponed due to the applicant's absence. On the majority of occasions, the court had adjourned the proceedings pending a response or a report from a government office and/or the Forensic Institute of Istanbul.

44. The Court finds it striking that, from the first hearing until the submission of the parties' final observations in 1998 (see paragraphs 12-16 above), the State Security Court did not order the production of any

document, hear any witness or collect any other evidence with respect to the applicant. The main reason for prolonging the proceedings until 18 December 1998 appears to be the missing forensic report concerning another accused whose age had yet to be established. The court finally ran out of patience and severed the proceedings in respect of that accused, handing down judgments against the remaining accused.

45. Similarly, during ten consecutive hearings between 7 September 1995 and 7 November 1996, the court continued to order, to no avail, the taking of statements of the two accused who were on conditional release and the preparation of the forensic report. During the fourteen months' period, the hearing records indicate that virtually no progress was made in reaching a verdict.

46. The submissions of the Government contain no explanation about these periods of inactivity. Thus, the material at hand leads the Court to conclude that the proceedings were not conducted with the necessary diligence.

47. It follows that the proceedings against the applicant were not conducted within a "reasonable time". There has, accordingly, been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicant sought reparation for the damage he had sustained but left the amount to the discretion of the Court.

50. The Government expressed no opinion on the award of just satisfaction.

51. The Court notes that there is no evidence before it of any pecuniary damage sustained by the applicant. However, the applicant may be taken to have suffered distress in light of its above-mentioned findings of a violation of Article 5 § 3 and Article 6 § 1 of the Convention. Ruling on an equitable basis, it consequently awards him 4,500 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicant did not claim any amount for the costs and expenses incurred before the domestic courts or in the Convention proceedings.

53. Accordingly, the Court makes no award under this head (Rule 60 § 2 of the Rules of Court).

C. Default interest

54. 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 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,500 (four thousand five hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into new Turkish liras at the rate applicable at the date of settlement;
 - (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.

Done in English, and notified in writing on 24 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş ARACI
Deputy Registrar

Nicolas BRATZA
President