



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

FOURTH SECTION

CASE OF ARI AND ŞEN v. TURKEY

(Application no. 33746/02)

JUDGMENT

STRASBOURG

2 October 2007

FINAL

02/01/2008

This version was rectified on 31 March 2008 under Rule 81 of the Rules
of the Court.

In the case of Ari and Şen v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr R. TÜRMESEN,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI, *judges*,

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

Having deliberated in private on 11 September 2007,

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

PROCEDURE

1. The case originated in an application (no. 33746/02) 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 two Turkish nationals, Mr Ali Baba Ari¹ and Mr Ali Şen (“the applicants”), on 20 June 2002.

2. The applicants were represented by Mr and Mrs Kırdök, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. On 12 July 2006 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

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1962 and 1963 respectively. The first applicant is currently detained in the Bolu F-Type Prison and the second applicant is detained in the Edirne F-Type Prison.

¹ Rectified on 31 March 2008. The first applicant’s name read “Alibaba Ari” in the former version of the judgment.

5. On 24 and 28 October 1993 respectively the applicants were taken into custody by police officers from the anti-terror branch of the Istanbul Security Directorate on suspicion of membership of an illegal organisation, the TKP-ML (Communist Party of Turkey/Marxist-Leninist).

6. On 8 November 1993 a single judge at the Istanbul State Security Court ordered the applicants' detention on remand.

7. On 6 January 1994 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicants and eight other persons. The applicants were charged with attempting to undermine the constitutional order, contrary to Article 146 § 1 of the Criminal Code and Article 5 of the Law on the Prevention of Terrorism (Law no. 3713).

8. On 27 January 1994 the 4th Chamber of the Istanbul State Security Court held the first hearing in the case.

9. On 27 November 1997 the public prosecutor at the Istanbul State Security Court submitted his opinion on the merits of the case against the applicants, requesting that they be convicted of the original charge.

10. On 3 June 2002 the applicants again requested to be released pending trial before the first-instance court. On the same day, the court dismissed their request.

11. On 4 June 2002 the applicants filed an objection against the decision of 3 June 2002.

12. On 5 June 2002 the 5th Chamber of the Istanbul State Security Court dismissed the applicants' objection, having regard to the nature of the offence, the state of the evidence and the content of the case-file.

13. Between 27 January 1994 and 23 October 2002 the 4th Chamber of the Istanbul State Security Court held 44 hearings. At the end of each hearing, the first-instance court, relying on the state of the evidence and the nature of the offence, refused to release the applicants.

14. On 23 October 2002 the Istanbul State Security Court convicted the applicants as charged and sentenced them to life imprisonment.

15. On 5 May 2003 the Court of Cassation upheld the judgment of 23 October 2002.

THE LAW

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

16. The applicants complained that their detention on remand exceeded the “reasonable time” requirement of Article 5 § 3 of the Convention, which in so far as relevant reads 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.”

17. The Government contested that argument.

A. Admissibility

1. Victim status

18. The Government maintained that the applicants could not be considered victims of Article 5 § 3 of the Convention, as the time they had spent in detention had been deducted from the sentence eventually imposed by the domestic court.

19. The Court takes note that, pursuant to Article 63 of the Criminal Code, any period of imprisonment served before the finalisation of a judgment depriving an individual of personal liberty shall be deducted from the sentence. However, the taking into account of detention on remand as part of a later sentence cannot eliminate a violation of Article 5 § 3 (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, § 69; *Kimran v. Turkey*, no. 61440/00, § 41, 5 April 2005; *Hıdır Durmaz v. Turkey*, no. 55913/00, § 34, 5 December 2006). Accordingly, the Government's objection that the applicants could not be considered as victims should be rejected.

2. Exhaustion of domestic remedies

20. 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, they maintained that the applicants had failed to object to their continued remand in detention pursuant to Articles 298 and 299 of the Criminal Procedure Code.

21. The Court recalls that it has already examined and rejected the Government's preliminary objections in similar cases (see *Koştı v. Turkey*, no. 4321/01, §§ 18-24, 3 May 2007). It finds no particular circumstances in the instant case which would require it to depart from this jurisprudence. As a result, it rejects the Government's preliminary objection under this head.

3. *Six-months*

22. The Government also maintained under Article 35 of the Convention that the application should be rejected for non-compliance with the six months time-limit. In their view, the applicants should have brought their application to the Court sooner, had they considered that there were no effective remedies under domestic law.

23. The Court reiterates that where no domestic remedy is available, the six months' time-limit contained in Article 35 § 1 of the Convention in principle runs from the date of the act complained of in the application.

24. However, special considerations could apply in exceptional cases where applicants first avail themselves of a domestic remedy and only at a later stage become aware, or should have become aware, of the circumstances which make that remedy ineffective. In such a situation, the six months period might be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances (*Devrim Turan v. Turkey*, no. 879/02, §§ 32-33, 2 March 2006).

25. In the present case, on 4 June 2002 the applicants filed an objection against the decision of the 4th Chamber of the Istanbul State Security Court prolonging their detention on remand. On 5 June 2002 their request was rejected by the 5th Chamber of the Istanbul State Security Court. As the application was lodged on 20 June 2002, the Court accepts that the application has been brought within the six months time-limit. As a result, it rejects this part of the Government's objections.

26. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

27. The Court notes that, in the instant case, the period to be taken into consideration began on 24 and 28 October 1993 respectively with the arrest of the applicants and ended on 23 October 2002, with the judgment of the Istanbul State Security Court. It thus lasted nine years. During this period, the domestic courts prolonged the applicants' detention on remand using identical, stereotyped terms, such as "having regard to the nature of the offence and the state of evidence".

28. The Court has frequently found violations of Article 5 § 3 of the Convention in cases raising similar issues to those in the present application (see, for example, *Atıcı v. Turkey*, no. 19735/02, 10 May 2007; *Solmaz v. Turkey*, no. 27561/02, ECHR 2007-... (extracts); *Dereci v. Turkey*, no. 77845/01, 24 May 2005; *Tacıroğlu v. Turkey*, no. 25324/02, 2 February 2006).

29. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, it considers that in the instant case the length of the applicants' pre-trial detention was excessive and contravened Article 5 § 3 of the Convention.

30. There has accordingly been a violation of this provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicants claimed 9,000 euros (EUR) each in respect of non-pecuniary damage.

33. The Government contested this claim.

34. Ruling on an equitable basis, the Court awards EUR 7,000 to each of the applicants under this head.

B. Costs and expenses

35. The applicants also claimed 9,900 New Turkish liras (YTL) – approximately EUR 5,620 – for the legal fees and YTL 300 – approximately EUR 168 – for costs and expenses.

36. The Government contested these claims.

37. Making its own estimate based on the information available, the Court awards the applicants EUR 1,000 jointly for the costs and expenses incurred before the Court.

C. Default interest

38. 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*
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with 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 and free of any taxes or charges that may be payable:
 - (i) EUR 7,000 (seven thousand euros) to each of the applicants in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros) to the applicants jointly in respect of costs and expenses;
 - (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;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

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

Fatoş ARACI
Deputy Registrar

Nicolas BRATZA
President