



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

SECOND SECTION

**CASE OF M. TOSUN v. TURKEY**

*(Application no. 33104/04)*

JUDGMENT

STRASBOURG

18 November 2008

**FINAL**

*18/02/2009*

*This judgment may be subject to editorial revision.*



In the case of M. Tosun v. Turkey,  
The European Court of Human Rights (Second Section), sitting as a  
Chamber composed of:

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 21 October 2008,

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

## PROCEDURE

1. The case originated in an application (no. 33104/04) 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 Mustafa Tosun (“the applicant”), on 22 July 2004.

2. The applicant was represented by Mr Sabri Kuşkonmaz, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 15 January 2008 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the applicant’s right to release pending trial and his right to a fair trial within a reasonable time. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

## THE FACTS

### THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1974 and lives in Istanbul.

5. On 10 November 1995 the applicant was arrested on suspicion of attempting to undermine the constitutional order, an offence under Article 146 of the Criminal Code then in force. He was subsequently transferred to a prison where he was detained pending the introduction of criminal proceedings against him.

6. On 4 December 1995 the prosecutor at the Istanbul State Security Court filed an indictment with that court, charging the applicant and a number of other persons with the above-mentioned offence.

7. On 24 December 2002 the Istanbul State Security Court (hereafter “the trial court”) found the applicant guilty as charged and sentenced him to life imprisonment. The applicant appealed.

8. On 8 December 2003 the Court of Cassation quashed the judgment and criminal proceedings against the applicant recommenced before the trial court.

9. Following the abolition of the State Security Courts, the Istanbul Court of Assize took over the case. On 18 May 2006 the applicant was released on bail from prison where he had been detained since November 1995. The retrial is still pending before the Istanbul Court of Assize. According to the information provided by the applicant, the most recent hearing was held on 1 May 2008.

## THE LAW

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

10. The applicant complained under Article 5 § 3 of the Convention that the length of his detention on remand had been excessive. Article 5 § 3 of the Convention 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.”

11. The Government contested that argument.

#### A. Admissibility

12. 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. It must therefore be declared admissible.

#### B. Merits

13. The Government submitted that the applicant’s detention during his trial had been in the interests of public safety and necessary on account of the risks of his reoffending or destroying the evidence against him.

14. The applicant maintained his allegations.

15. The Court observes that the applicant's detention, for the purposes of Article 5 § 3 of the Convention, began on 10 November 1995 when he was arrested and taken into police custody, and continued until he was convicted by the trial court on 24 December 2002 (see *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, p. 23 § 9). From 24 December 2002 until his conviction was quashed by the Court of Cassation on 8 December 2003, the applicant was detained "after conviction by a competent court", within the meaning of Article 5 § 1 (a) and therefore that period of his detention falls outside the scope of Article 5 § 3 (see *Cahit Solmaz v. Turkey*, no. 34623/03, § 34, 14 June 2007 and the cases cited therein). From 8 December 2003 until his release on bail on 18 May 2006, the applicant was once again kept in pre-trial detention for the purposes of Article 5 § 3 of the Convention. It follows that the applicant spent a total of nine years, seven months and twenty-four days as a remand prisoner.

16. 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, most recently, *Münire Demirel v. Turkey*, no. 5346/03, § 29, 20 May 2008 and the cases cited therein).

17. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present case.

18. In light of the foregoing, the Court finds that the length of the applicant's detention on remand was excessive.

19. There has accordingly been a violation of Article 5 § 3 of the Convention.

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

20. Lastly, the applicant complained that the length of the criminal proceedings against him had been in breach of the reasonable time requirement in Article 6 § 1 of the Convention which provides, in so far as relevant, as follows:

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

21. The Government rejected that claim and argued that the proceedings were complex and that the applicant's delays in the submission of his written defence to the trial contributed to the length of the proceedings. In the Government's opinion, the trial court displayed diligence in conducting the case and held hearings at regular intervals.

22. The Court observes that the criminal proceedings against the applicant began on 10 November 1995 when he was arrested, and are still

pending before the first instance court. They have thus been pending for almost thirteen years before two levels of jurisdiction.

### **A. Admissibility**

23. 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. It must therefore be declared admissible.

### **B. Merits**

24. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case. Particular regard must be had to the complexity of the case and the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

25. The Court agrees with the Government that the subject matter of the case is complex, requiring, as it does, the determination of serious allegations against the applicant and a number of other defendants. Nevertheless, having regard to the total length of the proceedings before the trial court so far – i.e. almost thirteen years – which cannot be explained by the delays allegedly caused by the applicant in the submission of his defence, the Court is not convinced that the criminal proceedings in question have been conducted within a reasonable time.

26. In light of the foregoing, the Court holds that the “reasonable time” requirement of Article 6 § 1 has been exceeded. Consequently, there has been a violation of Article 6 § 1 of the Convention.

## **III. APPLICATION OF ARTICLE 41 OF THE CONVENTION**

27. 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**

28. The applicant claimed 50,000 euros (EUR) in respect of pecuniary and EUR 50,000 in respect of non-pecuniary damage.

29. The Government argued that the sums claimed were excessive and were not supported by documentary evidence.

30. The Court observes that the applicant has not produced any documents in support of his claim for pecuniary damage. It accordingly dismisses it. However, the Court accepts that the applicant must have suffered certain non-pecuniary damage which cannot be sufficiently compensated by the finding of a violation alone. Having regard to comparable cases, and making an assessment on an equitable basis, the Court awards him EUR 13,500 under this head.

### **B. Costs and expenses**

31. The applicant did not make a claim for any costs and expenses. Accordingly, the Court considers that there is no call to award the applicant any sum on that account.

### **C. Default interest**

32. 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 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 13,500 (thirteen thousand five hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage, 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 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 18 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé  
Registrar

Françoise Tulkens  
President