



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

SECOND SECTION

CASE OF ADIRBELLİ AND OTHERS v. TURKEY

(Application no. 20775/03)

JUDGMENT

STRASBOURG

2 December 2008

FINAL

02/03/2009

This judgment may be subject to editorial revision.

In the case of Adırbelli and Others 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,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 13 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 20775/03) 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 eight Turkish nationals, Mr Yetgin Adırbelli, Mr Havil Adırbelli, Mr Gülek Adırbelli, Mr Metin Goran, Mr Mehmet Goran, Mr Ali Nas, Mr Beşir Gasyak, and Mr Resul (Malğaz) Kervanoğlu¹ (“the applicants”), on 12 April 2003.

2. The applicants were represented by Mr T. Elçi, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) were represented by their Agent.

3. On 14 September 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. At the time of the events giving rise to the application, the applicants were members of the People’s Democratic Party (DEHAP) in Şırnak.

¹ By a judgment of İdil Civil Court dated 11 December 2003, which became final on 23 January 2004, the applicant’s surname was changed from “Malğaz” to “Kervanoğlu”.

5. On 27 January 2003 a soldier was killed in an armed attack on the İdil Second Military Battalion.

6. Following the incident, the İdil and Şırnak public prosecutors initiated investigations.

7. On 28 January 2003 the İdil public prosecutor requested the İdil Magistrates' Court to authorise the security forces to conduct searches at the applicants' houses, under Article 94 of the former Code of Criminal Procedure.

8. On the same day, by decision no. 2003/7, the court granted the request and authorised the security forces to conduct one search during the daytime at the applicants' homes with a view to obtaining evidence.

9. On 28 January 2003, between 7 and 8.30 a.m., the applicants and ten other persons were arrested in their houses by officers from the anti-terrorist branches of the İdil and Şırnak police headquarters. According to the house search, seizure and arrest reports, they were arrested "in connection with the armed attack and in accordance with a decision of the İdil Magistrates' Court (decision no. 2003/7)". During the house search, the security forces seized music compact discs from the houses of Beşir Gasyak and Resul Kervanoğlu. Amongst those discs found in the former's house, certain allegedly contained separatist propaganda. Nothing was found in the other applicants' houses.

10. On 29 January 2003 the deputy director of the İdil police headquarters sent a letter to the İdil public prosecutor requesting that the applicants' detention period be extended for a further two days. In his letter, the deputy director maintained that the applicants were considered to have been involved in the armed attack on the police. On the same day, the İdil public prosecutor extended the period of the applicants' detention as requested.

11. Ali Nas and Beşir Gasyak made statements to the police on 29 January 2003; Havil Adırbelli, Resul Kervanoğlu and Metin Goran did so on 30 January 2003 and Yetgin Adırbelli, Gülek Adırbelli and Mehmet Goran on 31 January 2003. They were asked whether they had been involved in the armed attack of 27 January 2003. Beşir Gasyak was also questioned about the Kurdish music compact discs that had been found in his house. The applicants all maintained that they had been in their homes at the time of the incident and that they had had no involvement in the armed attack.

12. During their detention in police custody, on 30 January 2003 Havil Adırbelli, Metin Goran, Ali Nas, Beşir Gasyak and Resul Kervanoğlu had a meeting with their representative, Mr Elçi, upon their request. Yetgin Adırbelli, Gülek Adırbelli and Mehmet Goran did not request a lawyer.

13. In a letter dated 31 January 2003 the deputy director of the İdil police headquarters sent a letter to the İdil public prosecutor's office informing the latter of the police operation. According to this letter, the

police had files on six of the applicants. In particular, there had been investigations in respect of Havil Adırbelli, Ali Nas, Beşir Gasyak and Gülek Adırbelli in the 1980s and 1990s as they had been suspected of aiding and abetting the PKK (the Kurdistan Workers' Party), an illegal organisation. Furthermore, Yetgin Adırbelli had been arrested on suspicion of being in possession of a firearm and there had been an investigation in respect of Metin Goran as he had been suspected of forgery.

14. On the same day, the applicants were brought before the İdil public prosecutor. The prosecutor decided to release Yetgin Adırbelli, Havil Adırbelli, Gülek Adırbelli, Mehmet Goran, Metin Goran, Ali Nas and Resul Kervanoğlu and to refer Beşir Gasyak to the single judge of the İdil Magistrates' Court, who subsequently ordered his release.

15. On 28 February 2003 the İdil public prosecutor decided to refer the investigation to the public prosecutor's office at the Diyarbakır State Security Court, holding that the latter had jurisdiction to conduct the investigation.

16. On 12 March 2003 the public prosecutor at the Diyarbakır State Security Court issued a decision not to prosecute, on the ground that there was insufficient evidence to initiate criminal proceedings against the applicants.

II. RELEVANT DOMESTIC LAW

17. Article 94 of the former Code of Criminal Procedure, in force at the material time, provided as follows:

“Premises, including home, goods and chattels, and the physical person of a suspect, the accomplices of a suspect, or a person receiving stolen property may be searched.

Such searches may be made for the purpose of making an arrest, or where there are grounds to believe that necessary evidence may be discovered.”

18. Section 1 of Law no. 466 on the payment of compensation to persons unlawfully arrested or detained, which was in force at the material time, provided as follows:

“Compensation shall be paid by the State in respect of all damage sustained by persons

(1) who have been arrested, or detained under conditions or in circumstances incompatible with the Constitution or statute law;

...

(6) who, after being arrested or detained in accordance with the law, are not subsequently committed for trial ..., or are acquitted or discharged after standing trial; ...”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

19. The applicants complained under Article 5 § 1 (c) of the Convention that their arrest and detention in police custody had been unlawful. They further contended, under Article 5 § 3 of the Convention, that they had been held in police custody for an excessive length of time since, during their detention, they had only been asked whether they had had any involvement in the armed attack. The applicants alleged, lastly, a violation of Article 5 §§ 4 and 5 of the Convention as a result of the unlawfulness and length of their detention.

A. Admissibility

20. The Government submitted that the applicants had failed to exhaust the domestic remedies available to them, within the meaning of Article 35 § 1 of the Convention. In this connection they argued that the applicants could have challenged their detention in police custody under Article 128 of the former Code of Criminal Procedure. They further claimed that the applicants could have sought compensation under Law no. 466 for having been unlawfully arrested or detained.

21. The Court observes that it has already examined and rejected the Government's preliminary objection in similar cases (see *Öcalan v. Turkey* [GC], no. 46221/99, §§ 66-71, ECHR 2005-IV; *Ayaz and Others v. Turkey*, no. 11804/02, §§ 23-24, 22 June 2006; *Hacı Özen v. Turkey*, no. 46286/99, § 71, 12 April 2007). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in those applications.

22. In view of the above, the Court rejects the Government's preliminary objections.

23. The Court notes that this part of the application 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

1. The applicants' complaint under Article 5 §§ 1 (c) and 3 of the Convention

24. The applicants submitted that there had been no reasonable suspicion warranting their arrest. They alleged, in particular, that they had been taken into custody due to their membership of DEHAP and that the police had had no evidence against them.

25. The Government maintained that the applicants had been arrested in the context of an investigation into the armed attack on the İdil Second Military Battalion which had resulted in the death of a private. They further contended that the applicants had not been questioned about their affiliation to DEHAP.

26. The Court reiterates that having a “reasonable suspicion” presupposes the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182). However, facts which raise a suspicion need not be of the same level of clarity as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage in the process of criminal investigation (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A).

27. In that context terrorist crime poses particular problems, as the police may be called upon, in the interests of public safety, to arrest a suspected terrorist on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in court without jeopardising the informant. However, although Contracting States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of “reasonableness” to the point where the safeguard secured by Article 5 § 1 (c) is impaired. Even in those circumstances, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested persons were reasonably suspected of having committed the alleged offence (see *Fox, Campbell and Hartley*, cited above, § 34; *O'Hara v. the United Kingdom*, no. 37555/97, § 35, ECHR 2001-X; *Tuncer and Durmuş v. Turkey*, no. 30494/96, § 48, 2 November 2004).

28. In the present case the Court notes at the outset that the applicants alleged that they had been arrested because of their membership of DEHAP and that the Government denied the veracity of this allegation. The Court observes that the applicants were not questioned, at any stage of the investigation, about their membership of this political party. Therefore, it is

not for the Court to speculate as to whether the applicants' membership of DEHAP was the ground for their arrest.

29. Nevertheless, the Court observes that, although requested twice, the Government did not submit the documents concerning the evaluation made by the anti-terrorist branch of the İdil police headquarters which led to the applicants' arrest. Nor does the decision of the İdil Magistrates' Court authorising the security forces to conduct a search of the applicants' houses contain any information regarding the reasons established by the security forces and the public prosecutor for suspecting the applicants of having participated in the armed attack. Moreover, although the İdil Magistrates' Court authorised the searches with a view to obtaining evidence and no evidence was found at the applicants' homes linking them to the armed attack of 27 January 2003, they were still arrested and placed in police custody.

30. In the light of the above and in the absence of a satisfactory explanation on the part of the Government for the applicants' arrest and detention, the Court does not discern any facts or information which could satisfy an objective observer that the applicants might have taken part in the armed attack in question. It therefore finds that the applicants were not detained on reasonable suspicion of having committed an offence within the meaning of Article 5 § 1 (c) of the Convention. There has accordingly been a violation of this provision.

31. The Court does not consider it necessary to examine separately the applicants' complaint under Article 5 § 3 of the Convention in view of its finding that their arrest and detention in police custody were not "lawful" under Article 5 § 1 of the Convention (see, *mutatis mutandis*, *Emrullah Karagöz v. Turkey*, no. 78027/01, § 63, ECHR 2005-X (extracts); *Ječius v. Lithuania*, no. 34578/97, § 75, ECHR 2000-IX).

2. The applicants' complaint under Article 5 § 4 of the Convention

32. The applicants alleged under Article 5 § 4 that there were no effective remedies in domestic law to challenge the lawfulness of their arrest and detention in police custody.

33. The Government contended that Article 128 of the Code of Criminal Procedure, which was in force at the material time, provided an effective remedy by which to challenge the lawfulness of detention in police custody.

34. The Court points out that, in several cases raising similar questions to those in the present case, it rejected the Government's aforementioned submission and found a violation of Article 5 § 4 of the Convention (see, among others, *Öcalan*, cited above, § 76; *Özçelik v. Turkey*, no. 56497/00, § 34, 20 February 2007; *Saraçoğlu and Others v. Turkey*, no. 4489/02, § 46, 29 November 2007). The Court finds no particular circumstances in the instant case which would require it to depart from such earlier findings.

35. In conclusion, the Court holds that there has been a violation of Article 5 § 4 of the Convention.

3. The applicants' complaint under Article 5 § 5 of the Convention

36. The applicants complained under Article 5 § 5 that they had not had a right to compensation in respect of the unlawfulness of their arrest and detention in police custody.

37. The Government submitted that, by virtue of Article 19 of the Constitution, a person deprived of his or her liberty had the right to initiate proceedings before a judicial authority, which was obliged to give a speedy ruling on the case and order his or her immediate release. They argued that, in cases of illegal detention, a request for compensation could be submitted within three months of the final decision of the trial court, pursuant to Law no. 466 on compensation payable to persons unlawfully arrested or detained.

38. The Court notes that an action for compensation under Law no. 466 could be brought for damage suffered as a result of, inter alia, an unlawful deprivation of liberty (Section 1 § 1) or a lawful detention if the person is not subsequently committed for trial, or is acquitted or discharged after standing trial (Section 1 § 6).

39. The Court observes at the outset that the applicants' detention in police custody was in conformity with the domestic law. Consequently, they could not seek compensation for unlawful deprivation of liberty using the remedy foreseen by Law no. 466 (see *Çetinkaya and Çağlayan v. Turkey*, nos. 3921/02, 35003/02 and 17261/03, § 46, 23 January 2007).

40. The Court further observes that the applicants had the possibility of bringing a case for compensation relying on Section 1 § 6 of Law no. 466. It however notes that in awarding compensation under the terms of Law no. 466, the national courts based their assessment solely on the fact that there was a decision not to prosecute and did not examine whether the deprivation of liberty was in contravention with the first four paragraphs of Article 5 (see *Sinan Tanrıkulu and Others v. Turkey*, no. 50086/99, § 50, 3 May 2007; *Medeni Kavak v. Turkey*, no. 13723/02, § 34, 3 May 2007; *Saraçoğlu and Others v. Turkey*, no. 4489/02, § 52, 29 November 2007).

41. In the light of the above, the Court concludes that the applicants did not have an enforceable right to compensation, under the provisions of Law no. 466, for their deprivation of liberty in breach of Article 5 §§ 1 and 4 of the Convention, as required by Article 5 § 5 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

43. The applicants complained, without relying on any Article of the Convention, that they had been denied legal assistance while in police custody and during their questioning before the İdil public prosecutor.

44. The Court considers that this complaint should be examined from the standpoint of Article 6 § 3 (c) of the Convention.

45. The Government submitted that those applicants, who had requested to have a lawyer, had had a meeting with their representative while detained.

46. The Court observes at the outset that Havit Adırbelli, Metin Goran, Ali Nas, Beşir Gasyak and Resul Kervanoğlu had met their representative, upon their request, during their detention in police custody, and that Yetgin Adırbelli, Gülek Adırbelli and Mehmet Goran did not request such a meeting.

47. Nevertheless, the Court recalls that a person cannot claim to be a victim of a violation of the right to a fair hearing under Article 6 of the Convention in respect of criminal proceedings which ended with an acquittal or discontinuance (see *Cahit Demirel v. Turkey* (dec.), no. 18623/03, 11 September 2007).

48. The Court observes in the instant case that on 12 March 2003 the public prosecutor at the Diyarbakır State Security Court decided not to bring criminal proceedings against the applicants. Consequently, the applicants cannot claim to be a victim of an alleged violation of Article 6 § 3 (c) of the Convention within the meaning of Article 34 of the Convention.

49. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicants claimed 6,000 euros (EUR) each in respect of non-pecuniary damage.

52. The Government disputed the applicants' claims.

53. The Court has found a violation of Article 5 §§ 1, 4 and 5 of the Convention. The Court considers, on the one hand, that the finding of a

violation in respect of Article 5 §§ 4 and 5 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicants. However, on the other hand, the Court accepts that the non-pecuniary damage suffered on account of the violation of Article 5 § 1 of the Convention cannot be compensated solely by the finding of a violation. Having regard to its case-law, and making its assessment on an equitable basis, the Court awards each of the applicants EUR 1,500 in this respect.

B. Costs and expenses

54. The applicants also claimed EUR 1,566 for the costs and expenses incurred in the proceedings before the Court. In this connection they submitted a time sheet indicating eight hours and forty minutes' legal work carried out by their legal representative and a table of costs and expenditure incurred for the presentation of the application before the Court.

55. The Government maintained that the applicants' claim under this heading was unsubstantiated.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of 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 considers it reasonable to award the applicants, jointly, the sum of EUR 900 for the proceedings before the Court.

C. Default interest

57. 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 applicants' complaints under Article 5 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* that there is no need to examine separately the complaint under Article 5 § 3 of the Convention;
4. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

5. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
6. *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 amounts, to be converted into the national currency of the respondent Government at the rate applicable at the date of settlement:
 - i) EUR 1,500 (one thousand five hundred euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - ii) EUR 900 (nine hundred euros) jointly, plus any tax that may be chargeable to the applicants, for 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;
7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 2 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President