



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

SECOND SECTION

CASE OF ELĜAY v. TURKEY

(Application no. 18992/03)

JUDGMENT

STRASBOURG

20 January 2009

FINAL

20/04/2009

This judgment may be subject to editorial revision.

In the case of ElĖay 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,

András Sajó,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 16 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 18992/03) 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 a Turkish national, Mr Turgay ElĖay (“the applicant”), on 22 April 2003.

2. The applicant was represented by Mrs M. Avcı, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 11 September 2007 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the applicant’s right to take proceedings to challenge the lawfulness of his detention and to have an enforceable right to compensation. It 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. The applicant was born in 1983 and lives in Istanbul.

5. On 10 July 2002 the applicant was arrested and placed in the anti-terrorist branch of the Istanbul police headquarters after, during a road check, police officers saw a photograph of Abdullah Öcalan and the slogans

“Biji Serok Apo” (“Long live President Apo”) and “Biji Kurdistan” (“Long live Kurdistan”) on the screen of the applicant’s mobile telephone.

6. On the same day, the applicant made statements to the police and, subsequently, to the Gebze Magistrates’ Court, which ordered his detention on remand, having regard to the state of the evidence, the applicant’s statements to the police and the nature of the alleged offence, namely, membership of the PKK (the Kurdistan Workers’ Party), an illegal organisation.

7. On 11 July 2002 the applicant lodged an objection to the remand order. No decision has been taken regarding the applicant’s objection.

8. On the same day, the Gebze public prosecutor issued a decision finding that he lacked jurisdiction. The investigation file was subsequently transferred to the public prosecutor’s office at the Istanbul State Security Court.

9. On 1 August 2002 the public prosecutor at the Istanbul State Security Court charged the applicant with membership of an illegal organisation, under Article 168 § 2 of the former Criminal Code.

10. On 12 August 2002 the Istanbul State Security Court ordered the applicant’s continued detention, having regard to the nature of the alleged offence, the state of the evidence and the date of the initial order for the applicant’s detention.

11. On 25 October 2002 the State Security Court held the first hearing in the case. The applicant’s representative requested the first-instance court to release the applicant. The court accepted the request and ordered the applicant’s release pending trial.

12. On 5 September 2003 the Istanbul State Security Court acquitted the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. A description of the domestic law and practice at the relevant time may be found in *Bağrıyanık v. Turkey* (no. 43256/04, § 19, 5 June 2007) and *Saraçoğlu and Others v. Turkey* (no. 4489/02, § 19, 29 November 2007).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

14. The applicant complained under Article 5 § 4 of the Convention that there had been no effective domestic remedy by which to challenge the

lawfulness of the first-instance court's detention orders. Article 5 § 4 of the Convention reads as follows:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Admissibility

15. The Government argued that the application should be declared inadmissible for non-compliance with the six-month rule laid down in Article 35 § 1 of the Convention. They submitted in this connection that the applicant should have lodged his application within six months of his objection to the detention order of 10 July 2002.

16. The Court considers that the applicant's alleged inability to have access to an effective remedy whereby he could challenge the lawfulness of his detention should be considered to continue throughout his detention on remand. Therefore, the six-month period should start running only from the day of release. The Court observes in this connection that the applicant's detention ended on 25 October 2002, when the trial court ordered his release pending trial, and that he lodged his application with the Court in time, on 22 April 2003. The Court therefore rejects the Government's objection.

17. 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

18. The applicant complained that there had been no effective remedy by which to challenge the first-instance court's orders to extend his remand in custody.

19. The Government did not make any submission on the merits of this complaint.

20. The Court observes at the outset that the applicant unsuccessfully requested to be released pending trial before the State Security Court. The trial court therefore had the opportunity to end the applicant's detention on remand and to avoid or redress the alleged breach of the Convention (see *Acunbay v. Turkey*, nos. 61442/00 and 61445/00, § 48, 31 May 2005; *Mehmet Şah Çelik v. Turkey*, no. 48545/99, § 26, 24 July 2007).

21. Moreover, on 11 July 2002 the applicant filed an objection against the order of 10 July 2002 for his continued detention, in respect of which no decision was taken by the domestic courts. The Court notes that, in any event, it has already found that the remedy provided for by Articles 297-304

of the former Code of Criminal Procedure, whereby applicants could object to decisions ordering their continued detention, offered little prospect of success in practice, and that it did not provide for a procedure which was genuinely adversarial for the accused (see *Koştı and Others v. Turkey*, no. 74321/01, § 22, 3 May 2007; *Bağrıyanık*, cited above, §§ 50 and 51; *Doğan Yalçın v. Turkey*, no. 15041/03, § 43, 19 February 2008).

22. In the present case, there is no element which would require the Court to depart from its previous findings. The Court therefore concludes that there was no remedy in domestic law, within the meaning of Article 5 § 4, by which the applicant could have challenged the lawfulness of his detention.

23. The Court accordingly concludes that there has been a violation of Article 5 § 4 of the Convention.

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

24. The applicant complained under Article 5 § 5 of the Convention that he had had no right to compensation in domestic law for the alleged violation of his right guaranteed by Article 5 § 4 of the Convention. Article 5 § 5 reads as follows:

“Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. Admissibility

25. The Government maintained that this complaint should be rejected for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They submitted that the applicant should have brought a case under Law no. 466 on the Payment of Compensation to Persons Unlawfully Arrested or Detained.

26. The Court considers that the Government’s objection is inextricably linked to the substance of the applicant’s complaint under this head. It follows that this issue should be joined to the merits of the case.

27. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It is also not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

28. The applicant submitted that he did not have any remedy in domestic law whereby he could seek compensation for the violation of his right under

Article 5 § 4 of the Convention. He submitted that the remedy provided for by Law no. 466 was not an effective one in this respect.

29. The Government contended that the applicant could have sought compensation pursuant to section 1(6) of Law no. 466, which stated that compensation would be paid to a person who, after being arrested or detained in accordance with the law, had been, *inter alia*, acquitted.

30. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (*Wassink v. the Netherlands*, judgment of 27 September 1990, Series A no. 185-A, p.14, §38). The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court (*Saraçoğlu and Others*, cited above, § 50).

31. The Court notes that in the present case it has found that the applicant's right to challenge the lawfulness of his detention in police custody were infringed (see paragraph 23 above). It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether or not Turkish law afforded the applicants an enforceable right to compensation for the breaches of Article 5 in this case.

32. In this connection, the Court observes that the applicant had the possibility of bringing a claim for compensation, relying on Section 1(6) of Law no. 466, as the criminal proceedings against him had ended with his acquittal. However, it notes that, in awarding compensation under the terms of Law no. 466, the national courts based their assessment solely on the fact that there had been an acquittal. The national courts' assessment was an automatic consequence of the acquittal and did not amount to the establishment of any violation of paragraphs 1 to 4 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*, cited above, § 52).

33. It follows that, in the applicant's case, Law No. 466 does not provide an enforceable right to compensation for the breach of his right under Article 5 § 4 of the Convention, as required by Article 5 § 5.

34. The Court accordingly dismisses the Government's preliminary objection (see paragraph 26 above) and concludes that there has been a violation of Article 5 § 5 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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.”

36. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

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 § 4 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 5 of the Convention.

Done in English, and notified in writing on 20 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President