



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

SECOND SECTION

CASE OF İPEK AND OTHERS v. TURKEY

(Applications nos. 17019/02 and 30070/02)

JUDGMENT

STRASBOURG

3 February 2009

FINAL

03/05/2009

This judgment may be subject to editorial revision.

In the case of İpek 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 Sally Dollé, *Section Registrar*,

Having deliberated in private on 13 January 2009,

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

PROCEDURE

1. The case originated in two applications (nos. 17019/02 and 30070/02) 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 three Turkish nationals, Mr Çetin İpek, Mr Murat Özpamuk and Mr Seyithan Demirel (“the applicants”), on 9 February 2002 and 30 April 2002 respectively.

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

3. On 17 October 2006 the Court joined the cases, declared them partly inadmissible and decided to communicate the applicants’ complaints under Article 5 §§ 1, 3, 4 and 5 to the Government. It also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1985 and live in Diyarbakır. At the time of the events they were sixteen years old.

5. According to the official documents, in connection with an ongoing investigation against an illegal armed organisation, namely the PKK (the Workers’ Party of Kurdistan), the police received information that the

second applicant, a suspected member of that organisation, had arrived from the rural area in order to conduct activities in cities on behalf of the organisation. Having established the second applicant's address in Diyarbakır, the police conducted a search of the premises, on 1 December 2001 at 1.20 a.m., and arrested the second applicant. The other applicants, who were also present during the house during the search, were similarly arrested and taken into police custody in order to establish any link they might have had with the organisation. The police did not find anything illegal or incriminating during the search.

6. On the same night, at around 2.15 a.m., the applicants were taken for a medical examination at the Diyarbakır State Hospital.

7. According to the custody records, the police informed the fathers' of first and the third applicant and the second applicant's mother of their arrest and detention.

8. On 2 December 2001 the police searched the house of the first applicant but did not find anything illegal or incriminating.

9. Upon the request of the police, the Diyarbakır public prosecutor (hereinafter the prosecutor) extended the applicants' detention for two days on 3 December 2001.

10. On the same day, the applicants were questioned by the police. Since they were accused of offences falling within the jurisdiction of the State Security Courts, they could not benefit from the assistance of a lawyer despite their age.

11. The custody records noted the end of the applicants' custody at 10.40 a.m. on 4 December 2001.

12. Later the same day, the applicants were taken for a medical examination at the Bağlar Medical Clinic.

13. Afterwards, the applicants were first brought before the prosecutor and then to the Diyarbakır State Security Court (hereinafter the SSC). The latter, after having heard them, ordered their remand in custody.

14. On 5 December 2001 the prosecutor, relying mainly on the basis of the applicants' statements obtained during the pre-trial investigation, filed a bill of indictment with the SCC accusing the second applicant of membership of an illegal organisation and the other applicants of aiding and abetting that organisation. The charges were brought under Articles 168 and 169 of the Turkish Criminal Code respectively.

15. At the first hearing held before the SSC, on 5 February 2002, the applicants were released pending trial.

16. No further documentation has been submitted by the parties regarding these proceedings before the SSC.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law and practice

17. A description of the relevant domestic law at the material time can be found in the *Ahmet Mete v. Turkey* judgment, no. 77649/01, §§ 17-18, 25 April, and the *Daş v. Turkey* judgment (no. 74411/01, § 18, 8 November 2005).

B. Relevant international material

18. The recommendation of the Committee of Ministers to Member States of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Rec (2003)20), adopted on 24 September 2003 at the 853rd meeting of the Ministers' Deputies, in so far as relevant, reads as follows:

“15. Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor. They should not be detained in police custody for longer than forty-eight hours in total and for younger offenders every effort should be made to reduce this time further. The detention of juveniles in police custody should be supervised by the competent authorities.”

19. Article 37 of the Convention on the Rights of the Child (CRC), in so far as relevant, reads as follows:

“States Parties shall ensure that: ...

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

20. The applicants complained of violations of Article 5 §§ 1, 3, 4 and 5 of the Convention, which read insofar as relevant as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. 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.

5. 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

21. The Government asked the Court to dismiss the application for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. In this connection, they maintained, firstly, that the applicants could have challenged the legality of their detention in custody pursuant to Article 19 of the Constitution in conjunction with Article 128 of the Code of Criminal Procedure. Secondly, the Government submitted that the applicants could also have sought compensation pursuant to Law no. 466 pertaining to the payment of compensation to persons unlawfully arrested or detained. In the alternative, the Government maintained that the applicants had failed to comply with the six-month rule.

22. The applicants rejected the Government’s arguments.

23. As regards the first limb of the Government’s objections, the Court observes that it has already examined and rejected it in similar cases (see, for example, *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, and *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. In view of the above, the Court rejects the Government's objection.

24. As to the second limb of the Government's objections, the Court reiterates that, according to its established case-law, where no domestic remedy is available, the six-month period runs from the date of the act alleged to constitute a violation of the Convention; however, where it concerns a continuing situation, the period of six-months runs from the end of the situation concerned (see, for example, *Cengiz Polat v. Turkey*, no. 40593/04, § 44, 11 December 2007). In the instant case, the applicants were remanded in custody on 4 December 2001 and lodged an application with the Court on 9 February 2002 and 30 April 2002 respectively. Accordingly, the application was lodged within six months of the date on which the act complained of ended. In view of the above, the Court also rejects the Government's objection under this head.

25. Moreover, the Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. Article 5 § 1

26. The applicants submitted that there had been no reasonable suspicion warranting their arrest.

27. The Government disagreed. They maintained that the applicants were taken into custody on suspicion of being members of a terrorist organisation and conducting activities in urban areas on behalf of that organisation.

28. The Court reiterates that, in order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c), it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 53, Series A no. 145-B). Neither is it necessary that the person detained should ultimately have been charged or brought before a court. The object of detention for questioning is to further a criminal investigation by confirming or dispelling suspicions which were the grounds for detention (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A).

29. However, the requirement that the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary

arrest and detention. The fact that a suspicion is held in good faith is insufficient. The words “reasonable suspicion” mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182). The Court stresses in this connection that, in the absence of a reasonable suspicion, the arrest or detention of an individual must never be imposed for the purpose of making him confess, testify against others or elicit facts or information which may serve to ground a reasonable suspicion (see *Cebotari v. Moldova*, no. 35615/06, § 48, 13 November 2007).

30. The Court notes in this context that the second applicant was arrested in the course of an investigation into an illegal armed organisation of which he was suspected of being a member, and of having gone to the city in order to conduct activities on its behalf. In these circumstances, the suspicion against him may be considered to have reached the level required by Article 5 § 1 (c), as the purpose of the deprivation of liberty was to confirm or dispel the suspicions about his involvement in this illegal organisation. In the light of the foregoing, the Court concludes that there has been no violation of Article 5 § 1 of the Convention in respect of Mr Özpamuk (see *Saraçoğlu and Others v. Turkey*, no. 4489/02, § 28, 29 November 2007).

31. As regards the other applicants, however, it appears that they were arrested merely because they were at the second applicant’s house at the time of the search. Against this background and in the absence of any information or documents demonstrating the contrary, the Court considers that, at the time of their arrest, these applicants were not detained on reasonable suspicion of having committed an offence, or to prevent their committing an offence, within the meaning of Article 5 § 1 (c) of the Convention (see *Tuncer and Durmuş v. Turkey*, no. 30494/96, § 50, 2 November 2004). There has accordingly been a violation of this provision in respect of Mr İpek and Mr Demirel.

2. Article 5 § 3

32. The applicants complained that their detention in police custody had exceeded the reasonable time requirement.

33. The Government argued that the length of the applicants’ detention of about three days and nine hours in police custody was in conformity with the legislation in force at the time and compatible with the Convention case-law. In particular, they submitted that the complexity of the case, their relation with a terrorist organisation and the state of evidence led to the continuation of the applicants’ custody period and that the necessary due diligence was displayed in the present case.

34. The Court observes that Article 5 § 3 requires that an arrested individual be brought promptly before a judge or judicial officer, to allow

detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. While promptness has to be assessed in each case according to its special features (see, among others, *Aquilina v. Malta*, [GC], no. 25642/94, § 48, ECHR 1999-III), the strict time constraint imposed by this requirement of Article 5 § 3 leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual, and the risk of impairing the very essence of the right protected by this provision (see, for example, *McKay v. the United Kingdom* [GC], no. 543/03, § 33, ECHR 2006-...).

35. The Court has accepted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see *Brogan and Others*, cited above, § 61, *Murray*, cited above, § 58; *Aksoy v. Turkey*, 18 December 1996, § 78, *Reports of Judgments and Decisions* 1996-VI, *Demir and Others v. Turkey*, 23 September 1998, § 41, *Reports* 1998-VI, and *Dikme v. Turkey*, no. 20869/92, § 64, ECHR 2000-VIII). This does not mean, however, that the investigating authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see *Murray*, cited above, § 58).

36. The Court reiterates that it has held, on many occasions, that the strict time constraint imposed for detention without judicial control is a maximum of four days (see *McKay*, cited above, § 47, *in fine*). In the instant case the applicants were brought before a judge approximately three days and nine hours after their arrest. As such, the length of the applicants' detention in police custody is, *prima facie*, compatible with the requirements of Article 5 § 3. However, for the particular reasons stated below, the Court considers that the delayed presentation of the applicants to a judge does not appear to have been sufficiently prompt, within the meaning of that provision. Firstly, the Court attaches great importance to the fact that the applicants were minors at the time of their arrest. However, this fact does not appear to have been taken into consideration by the investigative authorities, particularly the prosecutor, who extended the applicants' detention for two additional days. Secondly, these minors were incarcerated for more than three days in the absence of any safeguards - such as access to a lawyer - against possible arbitrary conduct by the State authorities. Finally, during this time, the only investigative measures taken by the police with regard to the applicants appears to have been limited to questioning them on 3 December 2001 - some two days after their arrest and a day before they were brought before a judge. If other investigative measures were undertaken, the Government have failed to indicate them to the Court. In such circumstances, the Court, especially in view of the applicants' young age, finds that none of the arguments put forward, in

general terms, by the Government is sufficient to justify their detention in police custody for more than three days, even in the context of terrorist investigations.

37. In these circumstances, the Court finds no special difficulties or exceptional circumstances which would have prevented the authorities from bringing the applicants before a judge much sooner (see, *mutatis mutandis*, *Kandzhov v. Bulgaria*, no. 68294/01, § 66, 6 November 2008¹, *Koster v. the Netherlands*, 28 November 1991, § 25, Series A no. 221, and *Rigopoulos v. Spain* (dec.), no. 37388/97, ECHR 1999-II).

38. There has therefore been a violation of Article 5 § 3 of the Convention.

3. Article 5 § 4

39. 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.

40. 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.

41. 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, and *Saraçoğlu and Others*, cited above, § 46). The Court finds no particular circumstances in the instant case which would require it to depart from such earlier findings.

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

4. Article 5 § 5

43. 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.

44. The Government repeated 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.

45. 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).

¹ The judgment is not final yet.

46. 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 an unlawful deprivation of liberty using the remedy foreseen by Section 1 § 1 of Law no. 466 (see *Çetinkaya and Çağlayan v. Turkey*, nos. 3921/02, 35003/02 and 17261/03, § 46, 23 January 2007). In the absence of any documents regarding the outcome of the criminal proceedings against them, the Court cannot speculate whether the applicants had the possibility of bringing a case for compensation relying on Section 1 § 6 of Law no. 466. However, since it has already held that the national courts, when awarding compensation under the terms of Section 1 § 6, base their assessment solely on the conditions required by that law and not whether the deprivation of liberty was in contravention of 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, and *Saraçoğlu and Others*, cited above, § 52), the Court also finds that the applicants did not have an enforceable right to compensation, under the provisions of Section 1 § 6 of Law no. 466, for their deprivation of liberty in breach of Article 5 §§ 1 (for the first and the third applicant), 3 and 4 of the Convention, as required by Article 5 § 5 of the Convention.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

48. In their additional observations the first and the second applicant further complained under Article 6 of the Convention that they had been denied legal assistance in the initial stages of the proceedings.

49. The Court observes that these applicants, who are represented by a lawyer experienced in Convention proceedings, have failed to submit any documents demonstrating that the requirements of Articles 34 and 35 of the Convention have been met in relation to this complaint.

50. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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

52. The applicants Mr İpek and Mr Özpamuk each claimed, in total, 50,000 euros (EUR) in respect of non-pecuniary damage. Mr Demirel claimed EUR 35,000 in respect of non-pecuniary damage.

53. The Government contested the amounts.

54. The Court considers that the applicants should be awarded compensation for non-pecuniary damage since they undoubtedly suffered considerable distress on account of the facts of the case. Making an assessment, on an equitable basis, it awards Mr İpek and Mr Demirel, each, EUR 1,500, and Mr Özpamuk EUR 1,000 in this respect.

B. Costs and expenses

55. The applicants Mr İpek and Mr Özpamuk claimed EUR 4,788 for legal fees, including those incurred before the domestic courts. Mr Demirel claimed EUR 2,565 for legal fees. The applicants further asked to be awarded an amount corresponding to the legal aid given by the Council of Europe, in respect of costs and expenses. The applicants submitted legal fees' agreement concluded with their legal representative, the Diyarbakır Bar Association's scale of fees' and a time sheet prepared by their legal representative.

56. The Government contested the amount.

57. 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 documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the applicants, jointly, the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

58. 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 §§ 1 (c), 3, 4 and 5 admissible and the remainder of the applications inadmissible;
2. *Holds* that there has been no violation of Article 5 § 1 (c) of the Convention in respect of the applicant Mr Özpamuk;
3. *Holds* that there has been a violation of Article 5 § 1 (c) of the Convention in respect of the applicants Mr İpek and Mr Demirel;
4. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
5. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
6. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
7. *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 Turkish liras at the rate applicable at the date of settlement:
 - i) EUR 1,500 (one thousand five hundred euros) each to Mr İpek and Mr Demirel and EUR 1,000 (one thousand euros) to Mr Özpamuk, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - ii) EUR 2,000 (two thousand 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;
8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

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

Sally Dollé
Registrar

Françoise Tulkens
President