



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

SECOND SECTION

**CASE OF CAN AND GÜMÜŞ v. TURKEY**

*(Applications nos. 16777/06 and 2090/07)*

JUDGMENT

STRASBOURG

31 March 2009

**FINAL**

***30/06/2009***

*This judgment may be subject to editorial revision.*



**In the case of Can and Gümüş 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 10 March 2009,

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

**PROCEDURE**

1. The case originated in two applications (nos. 16777/06 and 2090/07) 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 Mehmet Kadri Can and Mr Mehmet Ziya Gümüş (“the applicants”), on 5 April 2006 and 28 December 2006 respectively. The Turkish Government (“the Government”) were represented by their Agent. On 16 October 2007 the Court decided to give notice of the applications to the Government. It also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 3).

**THE FACTS**

2. The applicants were born in 1974 and 1975, respectively, and are detained in Diyarbakır prison.

3. The applicants were taken into police custody on suspicion of membership of *Hizbullah*, an illegal organisation, on 8 March 1995 and 29 June 1999. On 5 April 1995 and 16 July 1999 they were remanded in custody.

4. On unspecified dates criminal proceedings were brought against the applicants on charges of carrying out activities for the purpose of bringing about the secession of part of the national territory, as well as membership of *Hizbullah*. Subsequently, the cases against the applicants were joined before the Diyarbakır State Security Court.

5. Following the promulgation of Law no. 5190 of 16 June 2004, the cases were transferred to the Diyarbakır Assize Court.

6. On 31 March 2005 the Diyarbakır Assize Court convicted the applicants of attempting to undermine the constitutional order and sentenced them to life imprisonment. On 11 December 2006 the Court of Cassation quashed this judgment. On 9 November 2007 the Diyarbakır Assize Court once again convicted the applicants. According to the information in the case file, the proceedings against the applicants are still pending before the Court of Cassation.

7. During the proceedings, the first-instance courts examined the applicants' continued detention at the end of every hearing, either on their own motion or upon the applicants' request. On each occasion, the courts ordered the applicants' continued detention on remand having regard to the nature of the offence, the state of evidence and the content of the file.

## THE LAW

### I. JOINDER

8. In view of the similarity of the cases in terms of both fact and law, the Court finds it appropriate to join and examine them together.

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

9. The first applicant contended under Article 5 § 3 of the Convention that his detention on remand had exceeded the "reasonable time" requirement. He also complained without invoking any Article of the Convention, that there had been no remedy in domestic law by which he could challenge the lawfulness of his detention. The second applicant complained under Article 6 § 1 of the Convention that the length of his detention during judicial proceedings had been excessive. He further complained under Article 13 of the Convention that there had been no remedy in domestic law by which he could challenge the lawfulness of his detention.

10. The Court considers that these complaints should be examined from the standpoint of Article 5 §§ 3 and 4 of the Convention alone.

11. The Government contested the applicants' allegations and, in particular, challenged their victim status. However, the Court has rejected this objection in previous cases (see, for example, *Durmaz v. Turkey*, no. 55913/00, §§ 33-34, 5 December 2006). The Court finds no particular

circumstances in the instant case which would require it to depart from such jurisprudence. It therefore finds that these complaints are admissible.

12. As regards the applicants' complaint about the unreasonable length of their detention pending judicial proceedings, the Court finds that the applicants were remanded in custody pending trial for nearly eleven years, in the case of the first applicant, and some six years and seven months in the case of the second applicant (deduction having been made of the periods during which they were detained after conviction).

13. The Court has frequently found violations of Article 5 § 3 of the Convention in cases disclosing comparable lengthy periods of pre-trial detention (see, for example, *Çarkçı v. Turkey*, no. 7940/05, § 21, 26 June 2007; *Dereci v. Turkey*, no. 77845/01, § 21, 24 May 2005; *Tacıroğlu v. Turkey*, no. 25324/02, § 24, 2 February 2006). 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. Having regard to its case-law on the subject, the Court concludes that the length of the applicants' detention on remand was excessive, in breach of Article 5 § 3 of the Convention.

14. As regards the applicants' complaint of an absence of an effective remedy under Article 5 § 4 of the Convention, again the Court refers to its constant case-law that the Turkish legal system did not offer a remedy which was genuinely adversarial or which could offer reasonable prospects of success (see *Koştı and Others v. Turkey*, no. 74321/01, § 22, 3 May 2007; *Bağrıyanık v. Turkey*, no. 43256/04, §§ 50 and 51, 5 June 2007; *Doğan Yalçın v. Turkey*, no. 15041/03, § 43, 19 February 2008). It finds no reason to depart from that conclusion in the present case. Consequently, the Court finds that there has also been a violation of this provision.

### III. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

15. The applicants complained under Article 6 § 1 of the Convention that the criminal proceedings brought against them had not been determined within a reasonable time. The first applicant further submitted, without relying on any Article of the Convention, that there had not been an effective remedy in domestic law whereby he could challenge the length of the criminal proceedings against him. The second applicant relied on Article 13 in relation to the same complaint.

16. The Government contested these claims.

17. The Court considers that these complaints should be examined under Articles 6 § 1 and 13 of the Convention in respect of both applicants, and finds them admissible.

18. The periods to be taken into consideration are, approximately fourteen years for the first applicant and nine years and eight months for the second applicant, before two levels of jurisdiction.

19. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present applications (see, for example, *Sertkaya v. Turkey*, no. 77113/01, § 21, 22 June 2006; *Hasan Döner v. Turkey*, no. 53546/99, § 54, 20 November 2007; *Uysal and Osal v. Turkey*, no. 1206/03, § 33, 13 December 2007). It finds no reason to depart from such a conclusion in the present case. Consequently, there has been a breach of Article 6 § 1 of the Convention due to the excessive length of the criminal proceedings against the applicants.

20. Moreover, the Court has previously found violations of Article 13 of the Convention in respect of the lack of an effective remedy under Turkish law whereby applicants could have contested the length of the proceedings at issue (see *Bahçeyaka v. Turkey*, no. 74463/01, §§ 26-30, 13 July 2006; *Tendik and Others*, no. 23188/02, §§ 34-39, 22 December 2005). It finds no reason to hold otherwise in the present case.

21. There has accordingly been a violation of Article 13 of the Convention.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

22. The applicants claimed 18,000 euros (EUR) each in respect of pecuniary and non-pecuniary damage.

23. The Government contested these claims.

24. As regards the alleged pecuniary damage the Court observes that the applicants did not produce any document in support of their claim, which the Court, accordingly, dismisses.

25. The Court notes that it has found violations of Article 5 §§ 3 and 4 and Articles 6 § 1 and 13 of the Convention. The Court considers, on the one hand, that the finding of a violation in respect of Article 5 § 4 and 13 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicants. On the other hand, the Court accepts that non-pecuniary damage suffered on account of the violations of Articles 5 § 3 and 6 § 1 of the Convention cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the first applicant, Mehmet Kadri Can, his claim in full. It further awards the second applicant, Mehmet Ziya Gümüş, EUR 10,000 under this head.

26. The applicants did not seek the reimbursement of costs and expenses relating to the proceedings before the Court and this is not a matter which the Court has to examine of its own motion (see *Tutar v. Turkey*, no. 11798/03, § 31, 10 October 2006).

27. 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.

28. Finally, according to the information submitted by the parties, the criminal proceedings against the applicants are still pending. In these circumstances, the Court considers that an appropriate means for putting an end to the violation of Article 6 § 1 of the Convention would be to conclude the criminal proceedings against the applicants as speedily as possible, while taking into account the requirements of the proper administration of justice (see, *mutatis mutandis*, *Yakışan v. Turkey*, no. 11339/03, § 49, 6 March 2007).

### FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 5 §§ 3 and 4 of the Convention;
4. *Holds* that there has been a violation of Articles 6 § 1 and 13 of the Convention;
5. *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 the national currency of the respondent Government at the rate applicable at the date of settlement:
    - (i) EUR 18,000 (eighteen thousand euros) to Mehmet Kadri Can, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 10,000 (ten thousand euros) to Mehmet Ziya Gümüş, plus any tax that may be chargeable, in respect of non-pecuniary damage;
  - (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;

6. *Dismisses* the remainder of the second applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos  
Deputy Registrar

Françoise Tulkens  
President