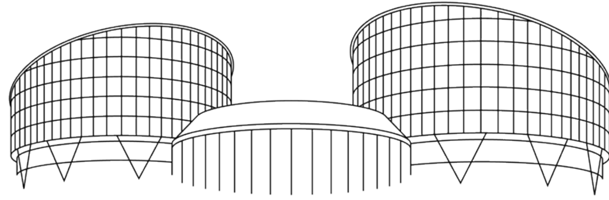

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF CAHİT DEMİREL v. TURKEY

(Application no. 18623/03)

JUDGMENT

STRASBOURG

7 July 2009

FINAL

07/10/2009

This judgment may be subject to editorial revision.

In the case of Cahit Demirel 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 Françoise Elens-Passos, *Deputy Section Registrar,*

Having deliberated in private on 16 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 18623/03) 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 Cahit Demirel (“the applicant”), on 29 April 2003.

2. The applicant was represented by Mr M. Beştaş and Mrs M. Beştaş, lawyers practising in Diyarbakır. 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 release pending trial, to take proceedings to challenge the lawfulness of his detention and to a fair hearing 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

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1972 and lives in Batman.

5. On 1 April 1996 the applicant was arrested by gendarmerie officers while he was leaving Batman. He was then transferred to the Anti-Terrorist Branch of the Batman Police Headquarters on suspicion of involvement in

the activities of the PKK (the Workers' Party of Kurdistan), an illegal organisation.

6. On 18 April 1996 the applicant was brought before the Batman public prosecutor and the judge at the Batman Magistrates' Court. The judge remanded the applicant in custody.

7. On an unspecified day the Batman public prosecutor issued a decision of non-jurisdiction and sent the case file to the public prosecutor's office at the Diyarbakır State Security Court.

8. On 22 May 1996 the public prosecutor filed a bill of indictment against the applicant, along with other persons, charging him with membership of the PKK under Article 168 § 2 of the former Criminal Code.

9. On 30 July 1996 the Diyarbakır State Security Court held the first hearing on the merits of the case.

10. On 25 December 2001 the Fourth Chamber of the Diyarbakır State Security Court convicted the applicant as charged and sentenced him to twelve years and six months' imprisonment.

11. Throughout the proceedings, the applicant and his representative requested several times that the applicant be released pending trial. At the end of each hearing the State Security Court rejected the applicant's requests, having regard to the nature of the offence, the state of the evidence and the content of the case file.

12. On 9 October 2002 the Court of Cassation quashed the judgment of the first-instance court. The case was subsequently remitted to the Diyarbakır State Security Court.

13. On 13 May 2003 the Diyarbakır State Security Court ordered the applicant's release pending trial.

14. On 23 March 2004 the State Security Court once again convicted the applicant under Article 168 § 2 of the former Criminal Code and sentenced him to twelve years and six months' imprisonment.

15. On 19 October 2004 the Court of Cassation quashed the judgment of 23 March 2004.

16. Pursuant to Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, abolishing State Security Courts, the case against the applicant was transferred to the Diyarbakır Assize Court.

17. On 2 May 2005 the Diyarbakır Assize Court decided that the proceedings against the applicant should be terminated on the ground that the statutory time-limit under Article 102 of the Criminal Code had expired. This decision to terminate the case became final as neither the applicant nor the public prosecutor appealed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. The relevant domestic law and practice in force at the material time are outlined in *Çobanoğlu and Budak v. Turkey* (no. 45977/99, §§ 29-30, 30 January 2007).

THE LAW

I. ADMISSIBILITY

19. The Court notes that 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.

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

20. The applicant complained under Article 5 § 3 of the Convention that he had been detained pending trial for an excessive length of time. Relying on Article 5 § 4 of the Convention, he complained that there had been no effective remedy to challenge the first-instance court orders for his continued detention.

A. Article 5 § 3 of the Convention

21. The Government submitted that there had been a genuine public interest in the detention of the applicant, who had been charged with a terrorism-related offence. They maintained that his detention had also been necessary to prevent him from committing a further offence, absconding and removing evidence.

22. The applicant maintained his allegations and contested the Government's submissions.

23. The Court notes that, when calculating the period to be taken into consideration, the multiple, consecutive detention periods served by the applicant should be regarded as a whole. While assessing the reasonableness of the length of the applicant's pre-trial detention, it should make a global evaluation of the accumulated periods of detention under Article 5 § 3 of the Convention (see *Solmaz v. Turkey*, no. 27561/02, §§ 36-37, ECHR 2007-... (extracts)). Consequently, after deducting the period when the applicant was detained after conviction under Article 5 § 1 (a) of the Convention – namely the period between 25 December 2001 and 9 October 2002 – from the total

time that he was deprived of his liberty, the period to be taken into consideration in the instant case is nearly six years and four months.

24. The Court further notes from the material in the case file that the State Security Court considered the applicant's detention at the end of every hearing. On each occasion it extended that detention using identical, stereotyped terms, such as "having regard to the nature of the offence, the state of the evidence and the content of the case file".

25. The Court considers that, in general, the expression "the state of the evidence" may be a relevant factor for the existence and persistence of serious indications of guilt. The Court further acknowledges the seriousness of the offence with which the applicant was charged and the severity of the sentence which he faced if found guilty. In this respect, the Court agrees that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding (see *Getiren v. Turkey*, no. 10301/03, § 107, 22 July 2008). However, in the Court's view, neither the state of evidence nor the gravity of the charges can by themselves serve to justify a length of preventive detention of over six years and four months (see *Mehmet Yavuz v. Turkey*, no. 47043/99, § 39, 24 July 2007).

26. In this connection, the Court observes that the Diyarbakır State Security Court failed to indicate to what extent the applicant's release would have posed a risk after the passage of time, in particular in the later stages of the proceedings. Furthermore, the first-instance court never gave consideration to the application of a preventive measure, such as a prohibition on leaving the country or release on bail, other than the continued detention of the applicant (see *Mehmet Yavuz*, cited above, § 40).

27. The foregoing considerations are sufficient to enable the Court to conclude that the length of the applicant's detention, given the stereotypical reasoning of the first-instance court, has not been shown to have been justified.

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

B. Article 5 § 4 of the Convention

29. The Government did not make any submissions regarding the applicant's contentions under Article 5 § 4 of the Convention.

30. The applicant maintained his allegations.

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

32. The Court further notes that it has already found that the remedy provided by Articles 297-304 of the former Code of Criminal Procedure, whereby the applicant could object to the decisions ordering his continued detention, offered little prospect of success in practice, and that it did not provide for a procedure that was genuinely adversarial for the accused (see *Koşti 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).

33. 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 within the meaning of Article 5 § 4 by which the applicant could challenge the lawfulness of his pre-trial detention.

34. There has accordingly been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

35. The applicant complained of the length of the criminal proceedings brought against him. He relied on Article 6 § 1, which provides as relevant:

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

36. The Government maintained that, in the circumstances of the present case, the criminal proceedings could not be considered to have been unreasonably long. In this respect, they referred to the number of defendants who had been on trial for terrorist-related offences. The Government further submitted that the applicant and the other defendants had contributed to the prolongation of the proceedings by requesting extensions for the submission of their defence statements.

37. The applicant maintained his allegations.

38. The Court observes that the period to be taken into consideration began on 1 April 1996, when the applicant was arrested and taken into police custody, and ended on 2 May 2005, when the Diyarbakır Assize Court decided to discontinue the proceedings. The period under consideration thus lasted nine years and one month before two levels of jurisdiction.

39. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: 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).

40. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (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).

41. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present application. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

42. There has accordingly been a breach of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

43. Article 46 of the Convention reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

44. The Court observes at the outset that up until 1 January 2009 68 judgments against Turkey, in which the main legal question was the length of the applicants' pre-trial detention and in which a violation of Article 5 § 3 of the Convention was found, became definitive[1]. The Court further notes that in a number of judgments against Turkey it has also found a violation of Article 5 § 4 of the Convention due to the absence of a domestic remedy which was genuinely adversarial or which could offer reasonable prospects of success whereby the applicants could challenge the lawfulness of their pre-trial detention (see paragraph 32 above). Moreover, more than 140 applications against Turkey in which the applicants allege a violation of Article 5 §§ 3 or 4 in relation to their pre-trial detentions are currently pending before the Court.

45. The Court further observes that in almost all of its judgments against Turkey where there was a violation of Article 5 § 3, it found that the domestic courts ordered the applicants' continued detention pending trial using identical, stereotyped terms, such as "having regard to the nature of

---

1. For a list of these judgments, see 1051st meeting (DH) (17-19 March 2009) of the Committee of Ministers, Appendix 9 - Demirel group against Turkey - 68 cases of length of detention and of length of criminal proceedings:
https://wcd.coe.int/ViewDoc.jsp?id=1393887&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

the offence, the state of the evidence and the content of the file" (see, among many others, *Dereci v. Turkey*, no. 77845/01, § 38, 24 May 2005; *Solmaz*, cited above, § 41; *Akyol v. Turkey*, no. 23438/02, § 30, 20 September 2007). The Court also found that the courts failed to give consideration to the application of other preventive measures foreseen by Turkish law, such as a prohibition on leaving the country or release on bail, other than the continued detention of the applicants (see *Yavuz,* cited above, § 40; *Duyum v. Turkey*, no. 57963/00, § 38, 27 March 2007; *Getiren v. Turkey*, cited above, § 107). Similarly, the Court has repeatedly held there is no remedy in Turkish law within the meaning of Article 5 § 4 by which applicants could challenge the lawfulness of their pre-trial detention (see paragraph 30 above).

46. Thus, the Court considers that the violations of Article 5 §§ 3 and 4 of the Convention found in the instant case originated in widespread and systemic problems arising out of the malfunctioning of the Turkish criminal justice system and the state of the Turkish legislation, respectively (see *Kauczor v. Poland*, no. 45219/06, §§ 58 and 60, 3 February 2009; *Gülmez v. Turkey*, no. 16330/02, § 60, 20 May 2008).

47. In this connection, it is to be reiterated that, where the Court finds a violation, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Kauczor*, cited above, § 61; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

48. Having regard to the systemic situation which it has identified, the Court is of the opinion that general measures at national level must be taken in the execution of the present judgment in order to ensure the effective protection of the right to liberty and security in accordance with the guarantees laid down in Article 5 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant claimed 36,975 Turkish liras (TRY) (17,900 euros (EUR)) in respect of pecuniary damage and TRY 75,000 (EUR 36,300) in respect of non-pecuniary damage.

51. The Government contested these claims.

52. As regards the alleged pecuniary damage sustained by the applicant, the Court observes that the applicant did not produce any document in support of his claim, which the Court accordingly dismisses.

53. However, it accepts that the applicant must have suffered some non-pecuniary damage which cannot be sufficiently compensated by the finding of a violation alone. Consequently, taking into account the circumstances of the case and having regard to its case-law, the Court awards the applicant EUR 7,000.

B. Costs and expenses

54. The applicant also claimed TRY 16,850 (EUR 8,154) for the costs and expenses incurred before the Court. In this connection, he submitted a time sheet indicating twenty-eight hours' legal work carried out by his legal representative and a table of costs and expenditures.

55. The Government maintained that only costs actually incurred can be reimbursed. In this connection, they submitted that all costs and expenses must be documented by the applicant.

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 are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court finds it reasonable to award the sum of EUR 1,000 under this head.

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 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 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

5. *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, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, 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;

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

Done in English, and notified in writing on 7 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President