



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

1959 · 50 · 2009

SECOND SECTION

CASE OF ERKUŞ v. TURKEY

(Application no. 30326/03)

JUDGMENT

STRASBOURG

29 September 2009

FINAL

29/12/2009

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Erkuş 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 8 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 30326/03) 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 Ergin Erkuş (“the applicant”), on 12 August 2003.

2. The applicant was represented by Mr S. Çetinkaya, a lawyer practising in Izmir. The Turkish Government (“the Government”) were represented by their Agent.

3. On 20 May 2008 the Court declared the application partly inadmissible and decided to communicate to the Government the complaint concerning the lawfulness and length of the applicant’s detention and the absence of an investigation into his detention. 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 1982 and lives in Izmir.

5. While the applicant was in compulsory military service in Kırklareli, on 19 November 2002 he got ten days’ leave and went to Izmir to see his family. He did not return to his barracks afterwards.

6. On 22 February 2003 at 3 p.m., the applicant was arrested by police officers at the Narlıdere police station during a routine identity check on suspicion of being an army deserter (*asker kaçağı*). At 4 p.m. he was taken to the Üçkuyular Military Station Command where the officials determined that he had not returned to his army command when his leave had ended. He was questioned, *inter alia*, about which army command he belonged to, why he had deserted and whether he had committed a crime during this time.

7. On the same day at 8 p.m., the applicant was taken to Şirinyer Military Station Command where he remained in custody. The next day at 11 a.m., he was transferred to the Military Recruitment Office.

8. On 7 March 2003 at 1.30 p.m., the applicant was transferred to his army command in Kırklareli. The verbatim record of this transfer noted that the applicant, having committed the offence of army desertion, was requested to be transferred to his army command. It further indicated that the applicant had entered the “security room” on 23 February 2003 and “exited” on 6 March 2003.

9. On the same day at 2 p.m., the applicant was questioned by two army officials who informed him that he had committed the offence of exceeding his leave.

10. Between 7 March and 11 March 2003, the applicant was held in custody at his army command.

11. On 11 March 2003 he was brought before the Çorlu Military Court, which remanded him in custody.

12. On 12 March 2003 the Çorlu Military Prosecutor filed an indictment charging the applicant with exceeding his leave (“*izin tecavüzü*”) under Article 66 § 1 of the Military Criminal Code.

13. On 14 April 2003 the Çorlu Military Court convicted the applicant as charged and sentenced him to ten months’ imprisonment. In its decision the court noted that the applicant had failed to return to his army command at the end of his leave, that he had been apprehended on 22 February 2003 and that he had been held in custody between 7 and 11 March. It deducted the period spent on the road and in custody between 22 February and 11 March 2003 from his prison sentence.

14. On 22 April 2003 the judgment of the Çorlu Military Court became final as neither the military prosecutor nor the applicant appealed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. Article 72 of the Constitution and Article 1 of the Law on Military Service stipulate that every male citizen of the Republic of Turkey shall fulfil his military service.

16. Pursuant to section 80 § 1 of the Law on Military Service, those who have deserted their headquarters or who have exceeded their period of leave or medical leave shall be searched for, arrested and placed in the custody of

the local military authorities in order to be handed over to their army commands.

17. Section 66 of the Military Criminal Code is entitled “desertion”. Paragraph 1 (b) of this provision makes it a criminal offence to exceed one’s period of leave by six days without authorisation.

18. Under section 80 § 3 of the Law on the Constitution of Military Courts and Criminal Procedure applicable at the time of the events, the period a person can spend in custody shall not exceed forty-eight hours, excluding the time necessary to transfer the detainee to the nearest military court. Under section 80 § 5, if the arrestee cannot be brought before a military court within the time-limit specified in section 80 § 3, he or she shall be taken to the nearest magistrates’ court. No one shall be deprived of his or her liberty beyond this time-limit.

19. On 29 June 2006 section 80 § 3 of the Law on the Constitution of Military Courts and Criminal Procedure was amended by Law no. 5530, which provided that time in custody shall not exceed twenty-four hours, excluding the time necessary to transfer the detainee to the nearest military court, and that the time necessary for transfer could not be more than twelve hours.

THE LAW

I. ADMISSIBILITY

20. 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 VIOLATION OF ARTICLES 5 §§ 1, 3 AND 13 OF THE CONVENTION

21. The applicant complained that his detention had been unlawful and excessively long and that the authorities had failed to initiate an investigation into the matter. He relied on Articles 5 §§ 1 and 3 and 13 of the Convention.

22. The Court considers that these complaints should be examined solely from the standpoint of Article 5 §§ 1 (b), (c) and 3, which provide as relevant:

“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: ...

(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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.”

A. The parties' submissions

23. The Government maintained that the applicant had not been deprived of his liberty within the meaning of Article 5 of the Convention. In this connection, they submitted that he had been kept under surveillance in the Izmir Military Recruitment Office for the sole purpose of ensuring his transfer back to his army command and that he was not subjected to any proceedings or investigation until he was taken to his military unit. They further claimed that this administrative measure had been taken to prevent his escape, since he was a deserter, and that he had immediately been sent to his unit upon the completion of necessary procedures such as the provision of a vehicle, personnel, travel expenses and monetary matters concerning his transfer. Moreover, the Government claimed that the applicant had actually been in military service during that time. The Government admitted that the applicant had been held in custody between 7 and 11 March 2003 for the proper administration of military discipline. They submitted that he had been brought before a judge on the very day the Military Prosecutor filed an indictment.

24. The applicant maintained that he had been held in custody from 22 February 2003 until 11 March 2003, first in Izmir and afterwards in Kırklareli. He further disputed the qualification given by the Government to his detention, noting that it had deprived him of his liberty and restricted his rights to see his lawyer and family. He claimed that the conditions of his detention had been inhuman as he had been threatened, beaten and given food only once a day. Finally, the applicant repeated that, despite the unlawfulness of his detention, the authorities had failed to investigate the matter.

B. The Court's assessment

1. *Whether there was deprivation of applicant's liberty*

25. The Court observes that there is no dispute between the parties as regards the applicant's detention between 7 March and 11 March 2003 in Kırklareli. However, the Government argued that the applicant was not deprived of his liberty between 22 February 2003 and 7 March 2003 in Izmir.

26. The Court reiterates that military service, as encountered in the Contracting States, does not of itself constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4 § 3 (b). In addition, rather wide limitations upon the freedom of movement of members of the armed forces ensue by reason of the specific demands of military service, so that the normal restrictions accompanying it do not come within the ambit of Article 5 either (see *Engel and Others v. the Netherlands*, 8 June 1976, § 59, Series A no. 22). However, the forms of restriction which clearly deviate from the normal conditions of life in the armed forces of the Contracting States fall within the scope of Article 5. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question (*ibid*).

27. In the instant case, the Court observes that on 22 February 2003 the applicant was detained in custody at the Şirinyer Military Station Command. Between 23 February 2003 and 6 March 2003 the applicant was kept in a "security room" at the Izmir Military Recruitment Office. The Court further observes that these periods were subsequently deducted from the applicant's prison sentence (see paragraph 13 above). Moreover, the Government have not provided any explanation or details as regards what security or other measures were applicable to the applicant and, apart from the statement that he was in military service, no evidence has been adduced to demonstrate that he remained, more or less, within the ordinary framework of his army life during that time. In view of the above, the Court considers that the applicant was also deprived of his liberty within the meaning of Article 5 § 1 of the Convention when he was held in Izmir between 22 February 2003 and 6 March 2003.

2. *Whether the deprivation in issue was "lawful"*

28. The Court reiterates that Article 5 § 1 of the Convention contains a list of permissible grounds of deprivation of liberty which is exhaustive. The applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one sub-paragraph (see, for example, *Erkalo v. the Netherlands*, 2 September 1998, § 50, *Reports of Judgments and Decisions*

1998-VI). However, only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see, *inter alia*, *Giulia Manzoni v. Italy*, 1 July 1997, § 25, *Reports* 1997-IV).

29. The Court reiterates that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be “lawful” and comply with “a procedure prescribed by law”. By the use of these terms the Convention essentially refers back to national law and an obligation to conform to the substantive and procedural rules thereof. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, for example, *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 667, 13 November 2003). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of “arbitrariness” in Article 5 § 1 extends beyond a lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see, for example, *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 68-71, ECHR 2008-... and the cases referred to therein). In particular, to avoid being branded as arbitrary, detention under Article 5 § 1 (b) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (see, *mutatis mutandis*, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, 19 February 2009, and, *mutatis mutandis*, *Saadi*, cited above, § 74).

30. In the instant case, the Government have not expressly relied on any ground under the sub-paragraphs of Article 5 § 1 to justify the applicant’s detention. The applicant did not express any opinion either.

31. Having regard to the documentary evidence submitted by the parties, the Court considers that the applicant’s detention, when he was held in Izmir, served two different purposes. On the one hand, it had the purpose of ensuring his return to his army command in order to secure the fulfilment of his obligation, prescribed by law, to perform compulsory military service pursuant to section 80 § 1 of Law on Military Service. On the other hand, it also had the purpose of bringing him before a competent authority on reasonable suspicion of having committed the offence of exceeding his leave. On this latter point, the Court observes that section 66 § 1 (b) of the Military Criminal Code makes it a criminal offence to exceed one’s period of leave by six days without authorisation. It further observes that the applicant was arrested on suspicion of being an army deserter and was questioned within a few hours of his arrest about the reasons for his desertion (see paragraph 6 above). Moreover, he was subsequently

transferred to his army command in Kırklareli, where he was once again questioned about his desertion. The applicant's detention thereafter thus served the purpose of bringing him before a competent authority on reasonable suspicion of having committed an offence. In this connection, the Court notes that he was subsequently brought before a judge, who remanded him in custody. In sum, the Court considers that the applicant's detention between 22 February 2003 and 6 March 2003 in Izmir falls to be examined under both sub-paragraph (b) and (c) of Article 5 § 1, whereas his detention in Kırklareli falls to be examined under sub-paragraph (c) of Article 5 § 1.

32. However, although the applicant was detained on the basis of section 80 § 1 of the Military Service Law and section 80 § 3 of the Law on the Constitution of Military Courts and Criminal Procedure, the Court has serious doubts whether the authorities acted in compliance with "a procedure prescribed by law". Nevertheless, it does not deem it necessary to determine this question because, in any event, the key issue to be examined is whether the applicant's detention was free from arbitrariness. In this connection, the Court notes that the applicant was deprived of his liberty between 22 February and 11 March 2003 for seventeen days. The Court finds no reason to doubt that the national authorities acted in good faith in detaining the applicant in conformity with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1. In this connection, it takes particular note of the Government's arguments regarding the necessity of securing the necessary material provisions for the applicant's transfer. However, in the absence of any concrete information or documentation, the Court does not find it convincing that, in order to achieve the aim sought by the applicant's detention, the authorities needed twelve days to send the applicant to his army unit or that it was necessary to detain him for a total of seventeen days before he could be brought before a judge. Moreover, the Court attaches importance to the fact that no information has been forthcoming from the Government to clarify the place and conditions of the applicant's detention and the security or other measures which were applicable to him throughout his lengthy detention.

33. It follows that there has been a violation of Article 5 § 1.

34. The Court does not consider it necessary to examine separately the applicant's complaint under Article 5 § 3 of the Convention in view of its foregoing finding that his detention was not "lawful" under Article 5 § 1 (see, *mutatis mutandis*, *Emrullah Karagöz v. Turkey*, no. 78027/01, § 63, ECHR 2005-X).

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.”

A. Damage

36. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

37. The Government contested the amount.

38. The Court, ruling on an equitable basis, awards the applicant EUR 6,500 in respect of non-pecuniary damage.

B. Costs and expenses

39. The applicant also claimed reimbursement of his costs and expenses incurred both before the domestic courts and before the Court. These concerned 4,000 Turkish liras (approximately EUR 2,015) for legal fees, 5.50 (approximately EUR 2.50) Turkish liras for postage and EUR 30 for photocopies and other expenses. The applicant submitted documentation as regards his costs and expenses before the Court.

40. The Government contested the amounts.

41. 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 rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,503 for the proceedings before the Court.

C. Default interest

42. 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 § 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*
 - (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 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,503 (one thousand five hundred and three euros), plus any tax that may be chargeable to the applicant, in respect of 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President