



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

SECOND SECTION

CASE OF DEMİR AND İPEK v. TURKEY

(Applications nos. 42138/07 and 42143/07)

JUDGMENT

STRASBOURG

26 January 2010

FINAL

26/04/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

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

Having deliberated in private on 5 January 2010,

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

PROCEDURE

1. The case originated in two applications (nos. 42138/07 and 42143/07) 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 Mahmut Demir and Mr Mustafa İpek (“the applicants”), on 11 September 2007.

2. The Turkish Government (“the Government”) were represented by their Agent.

3. On 21 November 2008 the President of the Second Section decided to give notice of the applications to the Government. It was 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 CASES

4. The applicants were born in 1974 and 1970 respectively and are currently detained in Diyarbakır.

5. On 19 January 2000 the applicants were taken into police custody on suspicion of membership of the *Hizbullah*, an illegal organisation.

6. On 31 January 2000 a single judge at the Second Chamber of the Ankara State Security Court ordered the applicants' pre-trial detention.

7. On 24 May 2000 the public prosecutor at the Diyarbakır State Security Court filed a bill of indictment against the applicants, charging

them under Article 146 §1 of the former Criminal Code with attempting to undermine the constitutional order.

8. On 10 July 2000 the first hearing was held before the Third Chamber of the Diyarbakır State Security Court.

9. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, State Security Courts were abolished. The case against the applicants was transferred to the Sixth Chamber of the Diyarbakır Assize Court.

10. At the end of each hearing, the Diyarbakır State Security Court, and subsequently the Diyarbakır Assize Court, considered the applicants' detention either of their own motion or at the applicants' request. Each time, they ordered the applicants' continued detention pending trial, having regard to the nature of the offence with which they were charged, the existence of a strong suspicion that they had committed the offence and the state of evidence.

11. According to the information in the case file, the proceedings are still pending before the Sixth Chamber of the Diyarbakır Assize Court and the applicants are still remanded in custody.

II. RELEVANT DOMESTIC LAW

12. A description of the relevant domestic law and practice prior to the entry into force of the new Code of Criminal Procedure (CCP) (Law no. 5271) on 1 June 2005 may be found in *Çobanoğlu and Budak v. Turkey* (no. 45977/99, §§ 29-31, 30 January 2007). The current practice under Law no. 5271 is outlined in *Şayık and Others v. Turkey* (nos. 1966/07, 9965/07, 35245/07, 35250/07, 36561/07, 36591/07 and 40928/07, §§ 13-15, 8 December 2009¹).

THE LAW

13. Given the similarity of the applications, both as regards fact and law, the Court deems it appropriate to join them.

I. ALLEGED VIOLATION OF ARTICLES 5 § 3, 6 §§ 1 AND 2 OF THE CONVENTION

14. The applicants complained under Articles 5 § 3 of the Convention that the length of their pre-trial detention had been excessive. They further submitted under Article 6 § 2 of the Convention that their lengthy remand in

1. This judgment is not yet final.

custody had violated their right to be presumed innocent. Lastly, they alleged under Article 6 § 1 of the Convention that the criminal proceedings against them had not been concluded within a reasonable time.

15. The Court considers that the applicants' complaints under Articles 5 § 3 and 6 § 2 of the Convention should be examined from the standpoint of Article 5 § 3 alone (see *Güler v. Turkey* (dec.), no. 14152/02, 28 September 2006; *Tamamboğa and Gül v. Turkey*, no. 1636/02, § 26, 29 November 2007).

A. Admissibility

16. The Government asked the Court to dismiss the complaint under Article 5 § 3 of the Convention for failure to exhaust domestic remedies under Article 35 § 1 of the Convention. The Government maintained that the applicants had objected to their continued remand in detention neither under Articles 298 and 299 of the former Code of Criminal Procedure (CCP) (Law no. 1412), nor under Article 104 (2) of the new CCP (Law no. 5271), which entered into force on 1 June 2005.

17. The Court reiterates that it has already examined and rejected the Government's preliminary objection in respect of the remedy provided under the former CCP for being ineffective (see, in particular, *Koştı and Others v. Turkey*, no. 74321/01, §§ 19-24, 3 May 2007). The Court further notes that the remedy indicated by the Government under the new CCP has similarly been examined in the case of *Şayık and Others* and found to be wanting for the time being (cited above, §§ 30-32). Bearing in mind that the Government have not submitted any examples of domestic cases where the adversarial procedure envisaged by Article 271 (1) of the new CCP has been employed, the Court finds no reason to depart from its conclusion in *Şayık and Others* in the present case. Consequently, the Court rejects the Government's preliminary objection. It further notes that these applications are not inadmissible on any other grounds and must, therefore, be declared admissible.

B. Merits

18. The Government maintained that the length of the applicants' remand in custody and the length of the criminal proceedings against them were both reasonable, particularly in view of the complexity of the case, the seriousness of the crimes, the number of accused and the inherent difficulties in collecting evidence in cases involving organised crime.

19. The Court notes that the proceedings in question commenced on 19 January 2000, and are still pending before the first-instance court. They have thus already lasted almost ten years for one level of jurisdiction. The

Court further notes that the applicants were, and continue to be, remanded in custody pending trial throughout this entire period.

20. The Court has frequently found violations of Articles 5 § 3 and 6 § 1 of the Convention in cases disclosing comparable lengthy periods of pre-trial detention and criminal proceedings (see, for example, *Dereci v. Turkey*, no. 77845/01, § 41, 24 May 2005; *Taciroğlu v. Turkey*, no. 25324/02, § 24, 2 February 2006; *Çarkçı v. Turkey*, no. 7940/05, § 21, 26 June 2007; *Hasan Döner v. Turkey*, no. 53546/99, § 54, 20 November 2007; *Uysal and Osal v. Turkey*, no. 1206/03, § 33, 13 December 2007; *Can and Gümüş v. Turkey*, nos. 16777/06 and 2090/07, § 21, 31 March 2009). 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 cases. Having regard to its case-law on the subject, the Court concludes that the length of the applicants' pre-trial detention, as well as the length of the criminal proceedings against them, was excessive, in breach of Articles 5 § 3 and 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damages and costs and expenses

21. The applicants each claimed 40,000 euros (EUR) in respect of pecuniary damage and EUR 40,000 for non-pecuniary damage.

22. The Government contested these claims.

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

24. The Court considers, however, that the applicants must have suffered some non-pecuniary damage which the findings of a violation of the Convention in the present judgment do not suffice to remedy. Ruling on an equitable basis, in accordance with Article 41, it awards the applicants EUR 15,600 each under this head.

25. 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).

26. Finally, the Court notes that, 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 violations which it has found 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 *Yakışan v. Turkey*, no. 11339/03, § 49, 6 March 2007).

B. Default interest

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.

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 Articles 5 § 3 and 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,600 (fifteen thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President