

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

SECOND SECTION

CASE OF AYDIN v. TURKEY

(Application no. 34170/07)

JUDGMENT

STRASBOURG

16 May 2017

This judgment is final but it may be subject to editorial revision.



In the case of Aydın v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Committee composed of:

Valeriu Griţco, *President,*
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges,*

and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 25 April 2017,

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

PROCEDURE

1. The case originated in an application (no. 34170/07) 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 a Turkish national, Mr Gökhan Aydın ("the applicant"), on 31 July 2007.

2. The applicant was represented by Mr M. Filorinalı and Ms Y. Filorinalı, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 16 June 2009 the complaints concerning the excessive length of the applicant's pre-trial detention and the criminal proceedings brought against him and his right to take proceedings to challenge the lawfulness of his detention as well as his to an enforceable right to compensation were communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant, Mr Gökhan Aydın, is a Turkish national who was born in 1983. He was detained in Tekirdağ F-type prison at the time of the introduction of the application with the Court.

5. The facts of the case, as submitted by the parties, may be summarised as follows.

6. On 11 November 2002 the applicant was taken into custody by police officers from the Anti-Terrorist Branch of the Istanbul police headquarters on suspicion of membership of TKP/ML-TIKKO, an illegal organisation.

7. On 14 November 2002 the Istanbul State Security Court ordered the applicant's pre-trial detention.

8. On 26 December 2002 the public prosecutor at the Istanbul State Security Court filed a bill of indictment charging the applicant and ten other persons with attempting to undermine the constitutional order, an offence prescribed by Article 146 § 1 of the former Criminal Code.

9. Following the promulgation of Law no. 5190 of 16 June 2004, the case against the applicant was transferred to 10th Chamber of the Istanbul Assize Court.

10. During the proceedings, the first-instance courts examined the applicant's continued detention at the end of every hearing, either on their own motion or upon the applicant's request.

11. On 25 December 2007, at the end of the hearing and in the presence of the applicant, the 10th Chamber of the Istanbul Assize Court ordered the applicant's continued detention. The applicant objected to this decision. On 27 December 2007 the 11th Chamber of Istanbul Assize Court dismissed his objection without holding an oral hearing and relying on the public prosecutor's opinion which had not been communicated to the applicant or his representative.

12. On 24 March 2009 the applicant was convicted as charged and sentenced to life imprisonment. This decision was upheld by the Court of Cassation and became final on 20 January 2011.

II. RELEVANT DOMESTIC LAW

13. A description of the relevant domestic law can be found *Demir v. Turkey* ((dec.), no. 51770/07, §§ 29-33, 16 October 2012), *Turgut and Others v. Turkey* ((dec.), no. 4860/09, §§ 19-26, 26 March 2013), and *Altınok v. Turkey* (no. 31610/08, §§ 28-32, 29 November 2011).

COMPLAINTS

14. The applicant complained under Article 5 § 3 of the Convention that the length of his pre-trial detention had exceeded the "reasonable time" requirement.

15. The applicant contended under Article 5 § 4 of the Convention that there was no remedy in domestic law by which he could challenge the lawfulness of his pre-trial detention.

16. The applicant complained under Article 5 § 5 of the Convention that he did not have an enforceable right to compensation for his excessively long detention.

17. The applicant maintained under Article 6 § 1 of the Convention that the criminal proceedings brought against him were not concluded within a reasonable time.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

18. The applicant complained that the length of his detention on remand had been excessive.

19. The Government challenged the allegation, submitting that the applicant had failed to exhaust domestic remedies, referring to the possibility of claiming compensation for unlawful detention under Article 141 of the Code on Criminal Procedure ("CCP").

20. The applicant contested that argument.

21. The Court observes that the domestic remedy in application of Article 141 of the CPP with regard to length of detention on remand was examined in the decision *Demir v. Turkey* (no. 51770/07, §§ 17-35, 16 October 2012). The Court concluded in that decision that the domestic remedy provided for in Article 141 of the CPP had to be exhausted by the applicants whose convictions became final.

22. In the instant case, the Court notes that the applicant's conviction became final on 20 January 2011. From that date onwards the applicant was entitled to seek compensation under Article 141 of the CPP (see *Demir*, cited above, § 35), but failed to do so.

23. The Court reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, as the Court has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *İçyer v. Turkey* (dec.), no. 18888/02, § 72, ECHR 2006-I). The Court has previously departed from this rule in cases concerning the above-mentioned remedy in respect of the length of detention, which became applicable after the final decision on the criminal proceedings (see also, among others, *Tutal and Others v. Turkey* (dec.), no. 11929/12, 28 January 2014). The Court takes the view that the exception should be applied in the present case as well.

24. As a result, taking into account the Government's objection, the Court concludes that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

A. Failure to bring the applicant before the appeal court which examined the applicant's objection to his continued detention

25. Relying on Article 5 § 4 of the Convention, the applicant complained about his inability to appear before the trial court which reviewed the decision ordering the continuation of his pre-trial detention.

26. The Government contested that argument.

27. In the present case, the applicant was placed in detention on remand on 14 November 2002. At the end of the hearing on 25 December 2007, the trial court decided to extend the applicant's pre-trial detention. The applicant, who attended the hearing, objected to this decision.

28. The Court notes that the objection was dismissed on 27 December 2007 by the 11th Chamber of Istanbul Assize Court without holding an oral hearing. Nevertheless, the applicant appeared before the trial court two days before his objection was examined. In these circumstances, the Court does not consider that a further oral hearing before the appeal court was required for the purposes of Article 5 § 4. Consequently, in the Court's opinion, the lack of an oral hearing during the appeal proceedings did not jeopardise the principle of equality of arms (see *Ali Rıza Kaplan v. Turkey*, no. 24597/08, §§ 28-32, 13 November 2014; *Altınok v. Turkey*, no. 31610/08, §§ 54-55, 29 November 2011; and *Çatal v. Turkey*, no. 26808/08, § 40, 17 April 2012).

29. It follows that this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Non-communication of the public prosecutor's opinion

30. The applicant complained under Article 5 § 4 the Convention that he did not have an effective remedy to challenge the lawfulness of his detention. He contended that his right to have an effective remedy had been breached since his objection had been dismissed by the 11th Chamber of Istanbul Assize Court on the basis of the public prosecutor's written opinions, which had not been communicated to him or to his representative.

31. The Government contested that argument.

32. The Court notes that the cases raise issues similar to the case of *Altınok* (cited above, §§ 57-61), where the Court found a violation of Article 5 § 4 of the Convention. There is no reason to depart from those findings.

33. Accordingly, the Court considers that in the present case there has been a violation of Article 5 § 4 of the Convention on account of the non-communication of the public prosecutor's opinion to the applicant or

his representative in the context of review proceedings of lawfulness of the applicant's detention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

34. The applicant complained under Article 5 § 5 of the Convention that he did not have an enforceable right to compensation.

35. The Government contested that argument. They maintained in this regard that the applicant could have sought compensation under Article 141 of the CCP.

36. The Court notes that the Government's preliminary objection is inextricably linked to the merits of the applicant's complaint under Article 5 § 5 of the Convention. It follows that this issue should be joined to the merits (see *Altınok* cited above, §§ 65).

37. The Court considers that this part of 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 and must therefore be declared admissible.

38. The Court reiterates that paragraph 5 of Article 5 requires a remedy in compensation for a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (*Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A.). This right to compensation presupposes that a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court.

39. In this connection, the Court notes that it has found that the applicant's right to have an effective remedy to challenge the lawfulness of his detention was infringed in the present case on account of the non-communication of the public prosecutor's opinion (see paragraph 33 above). It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether or not the Turkish law afforded the applicant an enforceable right to compensation for the breach of Article 5 in this case.

40. The Court observes that Article 141 of the former CPC provided for a possibility to apply for compensation in certain circumstances. However, none of the circumstances listed in the aforementioned provision included the possibility of seeking compensation for the lack of an effective remedy to challenge the lawfulness of detention as prescribed under Article 5 § 4 of the Convention. In this connection, the Court notes that the Government failed to submit any court decision where a litigant, who was in a similar situation as the applicant, could successfully seek compensation on the basis of Article 141 of the former CPC (see Karaosmanoğlu and Özden v. Turkey, no. 4807/08, § 84, 17 June 2014).

41. The Court observes that Law no. 5271, which was in force at the material time, did not provide for an enforceable right to compensation for the applicant's right to have an effective remedy under Article 5 § 4 of the Convention, as required by Article 5 § 5 (see *Altınok,* cited above, § 67).

42. The Court therefore rejects the Government's objection and concludes that there has been a violation of Article 5 § 5 of the Convention.

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

43. The applicant maintained under Article 6 § 1 of the Convention that he had not been tried within a reasonable time.

44. The Court observes that a new domestic remedy has been established in Turkey after the application of the pilot judgment procedure in the case of *Ümmühan Kaplan v. Turkey* (no. 24240/07, 20 March 2012). The Court recalls that in its decision in the case of *Turgut and Others v. Turkey* ((dec.), no. 4860/09, §§ 19-26, 26 March 2013), it declared a new application inadmissible on the ground that the applicants had failed to exhaust the domestic remedies as a new domestic remedy had been envisaged. In so doing, the Court in particular considered that this new remedy was, *a priori*, accessible and capable of offering a reasonable prospect of redress for complaints concerning the length of proceedings.

45. The Court further recalls that in its judgment in the case of *Ümmühan Kaplan v. Turkey* (cited above, § 77) it stressed that it could pursue the examination of applications of this type which were already communicated to the Government.

46. The Government requested the Court to declare this application inadmissible for non-exhaustion of domestic remedies, referring to Law no. 6384 of 9 January 2013 which provides for a remedy capable of redressing the Convention grievances of persons who complain about the length of proceedings. The applicant contested the Government's argument.

47. In the light of its ruling in the case of *Turgut and Others*, cited above, the Court considers that there are no exceptional circumstances capable of exempting the present applicant from the obligation to exhaust domestic remedies. Accordingly, the applicant should avail himself of the new remedy offered by Law no. 6384 of 9 January 2013.

48. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

49. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

50. The Government disputed the above claim as unreasonable and excessive.

51. The Court, having regard to all the elements before it, considers that the finding of a violation of Article 5 §§ 4 and 5 constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant (see *Ceviz v. Turkey*, no. 8140/08, § 64, 17 July 2012).

B. Costs and expenses

52. The applicant also claimed EUR 5,350 for the costs and expenses incurred for those incurred before the Court. In that connection, the representative submitted a time-sheet showing that he had carried out six hours of legal work.

53. The Government contested the claims.

54. 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, the applicant submitted a time-sheet, showing the hours of work done by his legal representative, in support of that claim. The Court considers it reasonable to award the applicant EUR 500 for his costs and expenses.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 5 §§ 4 and 5 of the Convention, concerning the non-communication of the public prosecutor's opinion to the applicant or his representative in the context of appeal proceedings, and the lack of compensation in this respect admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 §§ 4 and 5 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

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, EUR 500 (five hundred 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 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 May 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Valeriu Griţco
Deputy Registrar	President