

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

SECOND SECTION

CASE OF GÜNAY v. TURKEY

(Application no. 31596/07)

JUDGMENT

STRASBOURG

17 February 2015

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



In the case of Günay v. Turkey,

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

András Sajó, *President,*
Helen Keller,
Robert Spano, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having regard to the above application lodged on 2 July 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

PROCEDURE

1. The case originated in an application (no. 31596/07) 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 Abdullah Günay ("the applicant"), on 3 July 2007.

2. The applicant was represented by Mr M. Erbil, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 12 January 2010 the complaints concerning the length of the applicant's pre-trial detention and the criminal proceedings brought against him and his right to compensation for unlawful detention 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 was born in 1979. At the time of the introduction of the application, he was detained in the Kırıkkale F-type prison.

5. On 24 April 1999 the applicant was arrested by the police officers from the anti-terror branch of the Istanbul police.

6. On 30 April 1999 the applicant was taken before a judge who ordered the applicant's pre-trial detention.

7. On 6 May 1999 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicant and two other persons

charging them under Article 125 of the former Criminal Code with having carried out activities on behalf of the PKK (the Kurdistan Workers' Party, an illegal organisation) for the purpose of bringing about the secession of part of the national territory.

8. In 2004, pursuant to Law no. 5190 abolishing State Security Courts, the case against the applicant was transferred to the Istanbul Assize Court.

9. On 7 May 2007 the Istanbul Assize Court convicted the applicant as charged and sentenced him to aggravated life imprisonment. It further established, in the light of a number of expert reports, witness testimonies and the statements of the accused, that the applicant and two other persons had planned and executed the bombing of a shopping centre in protest at the arrest of the leader of the PKK. The bombing had caused the death of thirteen innocent people and the injury of numerous persons.

10. On 7 May 2009 the Court of Cassation upheld the judgment.

II. DOMESTIC LAW

11. The relevant domestic law and practice in force at the material time can be found in the case of *Şefik Demir v. Turkey* (dec.), no. 51770/07, §§ 11-15, 16 October 2012.

THE LAW

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

12. Relying on Article 5 § 3 of the Convention, the applicant complained that the length of his pre-trial detention had been excessive.

13. Article 5 § 3 of the Convention reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

14. As regards the admissibility of the complaint, the Government submitted that the applicant failed to exhaust domestic remedies. They maintained in this regard that the applicant could have sought compensation under Article 141 of the new Code of Criminal Procedure (CCP) following its entry into force on 1 June 2005.

15. The Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Remli v. France*, 23 April 1996, § 33, *Reports of Judgments and Decisions* 1996-II).

Nevertheless, the only remedies that must be exhausted are those that relate to the breaches alleged and are also available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, in particular, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdıvar v. Turkey*, judgment of 16 September 1996, Reports 1996-IV, p. 1212, § 71).

16. The Court recalls that in its decision in the case of *Şefik Demir v. Turkey* (cited above), it declared the applicant's complaint under Article 5 § 3 of the Convention inadmissible for non‑exhaustion of domestic remedies as he had failed to use the remedy provided in Article 141 § 1 (d) of the Code of Criminal Procedure, despite the fact that the first-instance court's judgment against him had become final.

17. The Court notes that the applicant's detention within the meaning of Article 5 § 3 of the Convention ended with his conviction on 7 May 2007 and his conviction became final on 7 May 2009 when it was upheld by the Court of Cassation. From the latter date, the applicant could have claimed compensation according to Article 141 of the CCP but he did not.

18. In the light of the foregoing, the Court concludes that the applicant should have exhausted the domestic remedy under Article 141 § 1 (d) of the CCP. It follows that this complaint must be dismissed for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

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

19. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (*N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X). In the light of the foregoing (see paragraphs 16-18 above), the Court considers that this complaint is manifestly ill-founded and must be rejected under Article 35 §§ 3 (a) and 4 of the Convention.

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

20. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, which reads as follows:

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

21. The Government contested that argument.

22. The Court notes that the criminal proceedings commenced on 24 April 1999 with the applicant's arrest and ended on 7 May 2009 with the final decision delivered by the Court of Cassation. They thus lasted for ten years and one month before two levels of jurisdiction.

23. 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* (no. 4860/09, 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 introduced. 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.

24. The Court further recalls that in its decision in the case of *Ümmühan Kaplan* (cited above, § 77) it stressed that it could pursue the examination of the applications of this type which were already communicated to the Government. It further notes that in the present case the Government did not raise an objection in respect of the new domestic remedy.

25. In light of the above, the Court decides to pursue the examination of the present application. However, it notes that this conclusion is without prejudice to an exception that may ultimately be raised by the Government in the context of other communicated applications.

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

27. As regards the merits of the complaint, the Government argued that the length of the proceedings in the present case had been reasonable, considering the complexity of the prosecution of crimes committed on behalf of an illegal organisation, the difficulty in collecting evidence and the number of accused, intervening and complainant parties involved in the proceedings. In this connection, the Government contended that there had been no delay in the proceedings which could be attributable to the national authorities.

28. 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, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

29. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above).

30. 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 case. 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.

31. In view of this, the Court holds that there has accordingly been a breach of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

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

33. The Government contested the claims.

34. The Court considers that the applicants must have sustained non-pecuniary damage in connection with the violations of the Convention found in the present cases. Ruling on an equitable basis the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

35. The applicant also claimed EUR 1,554 for the lawyer's fee and EUR 725 for the costs and expenses incurred before the domestic courts and the Court. The applicant submitted an invoice signed by his representative.

36. The Government contested the claims.

37. According to the Court's case-law, the 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. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 500 covering costs and expenses under all heads.

C. Default interest

38. The Court considers it appropriate that the default interest rate 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 complaint under Article 6 § 1 admissible and the remainder of the complaints inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay to the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) 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 abovementioned 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;

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

Done in English, and notified in writing on 17 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	András Sajó
Deputy Registrar	President