

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

SECOND SECTION

CASE OF GÜNER v. TURKEY

(Application no. 10914/11)

JUDGMENT

STRASBOURG

16 May 2017

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



In the case of Güner 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. 10914/11) 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 Birol Güner ("the applicant"), on 8 November 2010.

2. The applicant was represented by Mr H.H. Erdoğan, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. On 12 March 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1980 and lives in Istanbul.

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

6. On 22 December 2009 the Ankara Magistrates' Court decided to restrict access to the investigation file in accordance with Article 153 § 2 of the Code of Criminal Procedure (the "CCP"), Law no. 5271

7. On 9 February 2010 the applicant was arrested and taken into custody on suspicion of forming a criminal organisation and fraudulent use of credit cards.

8. On 11 February 2010 the applicant's statement was taken by the police in the presence of his lawyer and he was questioned at length about his telephone conversations that had been intercepted. The police read out the transcripts of the intercepted conversations, and the applicant did not

deny that he had had these conversations but claimed that they did not prove that he was guilty.

9. On 12 February 2010 the investigating judge questioned the applicant in the presence of his lawyer. The applicant denied that he was involved in a criminal organisation and submitted that the intercepted calls did not prove that he was guilty. The investigating judge ordered the applicant's detention on remand taking into account the strong suspicion that he had committed the alleged offence, the risk of absconding and tampering with evidence as well as the risk of coercing some of the witnesses and victims.

10. On various dates the applicant requested his release pending trial. These requests were dismissed by the courts, having regard to the nature of the offence with which the applicant was charged, the existence of a strong suspicion that the applicant had committed the offence in question, the state of the evidence, the risk of absconding and tampering with evidence as well as the time spent in detention. The applicant objected to these decisions. By decisions of 22 April 2010 and 20 October 2010 the appeal courts, without holding a hearing, rejected the applicant's objections based on the information contained in the case file.

11. Upon his application, on 19 January 2011, the 26th Chamber of Ankara Criminal Court ordered the applicant's release having regard to the time he spent in detention.

II. RELEVANT DOMESTIC LAW

12. Article 153 of the Code of Criminal Procedure (Law no. 5271) reads:

> "1. The defence counsel may examine the full content of the investigation file and may take copies of the documents free of charge.
>
> 2. Upon the request of the public prosecutor, the judge may order a restriction on access to the investigation file, should he considers that the outcome of the ongoing investigation could be jeopardised."

COMPLAINTS

13. Under Articles 5 § 3 and 6 of the Convention, the applicant complained of not being able to appear before the courts when his pre-trial detention was reviewed and lack of an effective remedy to challenge the lawfulness of his detention on account of the restriction placed on his access to the investigation file.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

14. The Government submitted that the applicant had failed to submit his observations and claims for just satisfaction within the time-limit. They therefore argued that the application should be struck out of the Court's list of cases as per Article 37 § 1 (a) of the Convention.

15. The Court notes that following the communication of the application, the applicant's representative replied to the letters sent by the Registry within the time-limits.

16. In the light of the foregoing, the Court rejects the preliminary objection of the Government.

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

17. Relying on Articles 5 § 3 and 6 of the Convention, the applicant complained of not being able to appear before the courts when his pre-trial detention was reviewed and lack of an effective remedy to challenge the lawfulness of his detention on account of the restriction placed on his access to investigation file.

18. The Court considers that these complaints should be examined under Article 5 § 4 of the Convention, which reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Concerning the applicant's absence before the appeal court which examined the objections to the detention orders

19. The applicant complained about not being able to appear before the courts when his pre-trial detention was reviewed.

20. The Court notes that this part of the application 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.

21. In the present case, the applicant was placed in pre-trial detention on 12 February 2010 and was released on 19 January 2011. During this period, he was not able to appear before a judge.

22. The Court reiterates that it has already examined a similar grievance in *Erişen and Others v. Turkey* (no. 7067/06, § 53, 3 April 2012) and *Karaosmanoğlu and Özden v. Turkey*, no. 4807/08, § 76, 17 June 2014, and found a violation of Article 5 § 4. It has examined the present case and finds

no particular circumstances which would require it to depart from its findings in the above-mentioned judgments.

23. There has therefore been a violation of Article 5 § 4 of the Convention under this head.

B. Concerning the restriction of access to the investigation file

24. The applicant complained that on account of the restriction decision on his having access to the investigation file, he had not been able to challenge the evidence relied on by the trial court for his arrest and continued detention.

25. The Court observes that people who have been arrested or detained are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person (see *Ceviz v. Turkey*, no. 8140/08, § 41, 17 July 2012).

26. In the instant case, the Court notes that on 22 December 2009 the Ankara Magistrates' Court decided to restrict access to the investigation file, under Article 153 § 2 of the CCP, to ensure proper conduct of the investigation. However, on 11 and 12 February 2010, the applicant was questioned, in the presence of his lawyer, by the police and later by the investigating judge about his telephone conversations intercepted by the authorities and which were considered as part of the evidence of the offence of which the applicant was a suspect. The applicant did not deny that the intercepted conversations had taken place, but argued that they were not sufficient to prove his link to the offence with which he had been charged (see paragraphs 8 and 9 above). Furthermore, when his representative was asked about the applicant's statements before the investigating judge, he referred to the incidents in question and the transcripts of the applicant's telephone conversations contained in the investigation file.

27. In the light of the foregoing, the Court considers that both the applicant and his lawyer had sufficient knowledge of the content of the investigation file and that they had the opportunity to challenge the pre-trial detention order (see *Ceviz*, cited above, §§ 41-44; *Karaosmanoğlu and Özden*, cited above, § 74; and *Ayboğa and Others v. Turkey*, no. 35302/08, § 17, 21 June 2016).

28. The Court concludes that this part of the complaint is manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 5 § 4 of the Convention concerning the non-appearance of the applicant before a court in the proceedings to challenge the lawfulness of his continued detention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the non-appearance of the applicant before a court in the proceedings to challenge the lawfulness of his continued detention.

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
Deputy Registrar

Valeriu Griţco
President