

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

SECOND SECTION

CASE OF KOÇHAN v. TURKEY

(Application no. 3512/11)

JUDGMENT

STRASBOURG

30 January 2018

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



In the case of Koçhan v. Turkey,

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

Paul Lemmens, *President,*
Valeriu Griţco,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 9 January 2018,

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

PROCEDURE

1. The case originated in an application (no. 3512/11) 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 Kemal Koçhan ("the applicant"), on 23 November 2010.

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

3. On 11 September 2012 the complaints concerning the length of applicant's detention and the effectiveness of the procedure by which the applicant could challenge the lawfulness of his 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 1964 and lives in Istanbul.

5. On 20 January 2009 the applicant was arrested and taken into custody.

6. On 22 January 2009 the Edirne Magistrates' Court placed the applicant in detention on remand on suspicion of forming an organised criminal organisation to commit offences and illegal possession of firearms contrary to Article 13 § 1 of Law no. 6136.

7. On 3 July 2009 the Edirne public prosecutor filed a bill of indictment with the Edirne Assize Court charging the applicant with membership of an organised criminal organisation as well as fraud and robbery.

8. On 8 July 2009 the Edirne Assize Court held that it had no jurisdiction and referred the case file to the Istanbul Assize Court. The court also ordered the continuation of the applicant's detention.

9. On 12 August 2009 the 9th Chamber of the Istanbul Assize Court held a preparatory hearing and ordered the continuation of the applicant's detention.

10. On 29 December 2009 the first hearing was held before the 9th Chamber of the Istanbul Assize Court.

11. On 4 May 2010 the Istanbul Assize Court held another hearing and decided to prolong the applicant's detention on remand. The applicant was present at this hearing.

12. The applicant filed an objection against this decision. On 25 May 2010 his objection was dismissed by the 10th Chamber of the Istanbul Assize Court without holding an oral hearing.

13. By decisions dated 30 June 2010 and 8 July 2010 the 9th Chamber of the Istanbul Assize Court rejected the applicant's requests for release without holding an oral hearing.

14. On 30 September 2010 the 9th Chamber of the Istanbul Assize Court held the third hearing in the proceedings and again prolonged the applicant's detention. The applicant was present at this hearing.

15. On 11 October 2011 the 9th Chamber of the Istanbul Assize held the seventh hearing in the proceedings and released the applicant from detention on remand.

16. At the time when he present application was lodged with the Court, the proceedings against the applicant were still pending before the first-instance court. The parties did not submit any further information concerning the outcome of the proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. A description of the relevant domestic law and practice can be found in *Altınok v. Turkey* (no. 31610/08, §§ 28-32, 29 November 2011), *Demir v. Turkey* ((dec.), no. 51770/07, §§ 29-33, 16 October 2012) and *A.Ş. v. Turkey* (no. 58271/10, § 34-35, 13 September 2016).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

18. The Government submitted that the applicant had failed to submit his complaints in a short and compendious manner in the application form.

They therefore asked the Court to reject the application for failure to meet the requirements of Rule 47 of the Rules of Court.

19. The Court notes that Rule 47 of the Rules of Court, in its version in force at the relevant time, provided that an application under Article 34 of the Convention should be made on the application form provided by the Registry, unless the Court decided otherwise (see *Knick v. Turkey*, no. 53138/09, § 36, 7 June 2016, and *Tomašević v. Montenegro*, no. 7096/08, § 12, 13 June 2017). The application form should contain all the information requested in the relevant parts of the form to enable the Court to determine the nature and scope of the application without recourse to any other document. The Court observes that in his application form, the applicant clearly described the facts and the alleged violations of the Convention. Accordingly, the Government's preliminary objection should be dismissed as the application cannot be rejected for failure to comply with the procedural rules of the Court (see, *Knick* and *Tomašević*, cited above).

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

20. Relying on Article 5 § 3 of the Convention, the applicant complained that the length of his detention on remand had been excessive.

21. The Government rejected that allegation, submitting that the applicant had failed to exhaust domestic remedies. In this connection, they indicated to the possibility of claiming compensation for unlawful detention under Article 141 § 1 (d) of the Code on Criminal Procedure ("CCP").

22. The applicant did not comment on the Government's objection within the time-limit set by the Court.

23. The Court observes that the domestic remedy provided by Article 141 § 1 (d) of the CCP with regard to excessive length of detention on remand was examined in the cases of *Demir v. Turkey*, ((dec.), no. 51770/07, §§ 17-35, 16 October 2012), and *A.Ş. v. Turkey* (no. 58271/10, § 85-95, 13 September 2016).

24. In the aforementioned case of *Demir* (cited above) the Court held that that remedy had to be exhausted by the applicants whose convictions became final. It further ruled in its judgment of *A.Ş.* (cited above, § 92) that as of June 2015 the domestic remedy provided for in Article 141 § 1 (d) of the CCP had to be exhausted by the applicants even before the proceedings became final.

25. In the instant case, the Court notes that the applicant's detention on remand ended on 11 October 2011. Although the parties did not provide any information as to whether the criminal proceedings against the applicant are still pending, the Court considers that the applicant was entitled, in both situations, to seek compensation under Article 141 § 1 (d) of the CCP. However, he failed to do so.

26. 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.

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

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

28. Relying on Article 5 § 4 the Convention the applicant complained about not being able to appear for an excessive period of time before the trial court which examined the lawfulness of his pre-trial detention.

29. The Government contested that argument.

30. The Court notes that it has already examined a similar grievance in the cases of *Erişen and Others v. Turkey* (no. 7067/06, 3 April 2012) and *Karaosmanoğlu and Özden v. Turkey* (no. 4807/08, 17 June 2014) and found a violation of Article 5 § 4 for lack of appearance before a court during the review of detention. The Court held in these judgements that the lack of appearance before the courts examining the lawfulness of detention for more than two months, namely seventy four days, (see, *Erişen and Others v. Turkey*, cited above, § 53), and for more than five months (see, *Karaosmanoğlu and Özden v. Turkey*, cited above, § 76) was incompatible with the requirement to hold a hearing at regular intervals, as required by Article 5 § 4.

31. Turning to the particular circumstances of the present case, the Court observes that the applicant was present at the hearing held on 4 May 2010, and afterwards he did not appear before a court for almost five months until the following hearing which was held on 30 September 2010. The Court observes that although he filed objections against his detention on remand on several occasions during this period, his objections were examined by the courts without holding a hearing (see paragraph 13 above). Thus, the Court finds no particular circumstances which would require it to depart from its findings in the above-mentioned judgments and considers that the applicant's inability to appear before courts dealing with his requests of release for approximately five months is not compatible with the

requirement to hold a hearing at regular intervals, as required by Article 5 § 4.

32. There has therefore been a violation of Article 5 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. The applicant requested 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 11,000 in respect of pecuniary damage covering also his cost and expenses incurred before the domestic courts and the Court.

34. The Government contested those claims.

35. The Court does not discern any causal link between the violation found and the pecuniary damage alleged and it therefore rejects that claim. However, it considers that the applicant must have sustained non-pecuniary damage in connection with the violation of the Convention found in his case. Ruling on an equitable basis, it awards EUR 750 to the applicant in respect of non-pecuniary damage.

36. 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 concerning the non-appearance before a court in the proceedings to challenge the lawfulness of continued detention under Article 5 § 4 admissible and the remainder of the application inadmissible;

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

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months EUR 750 (seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State 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;

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

Done in English, and notified in writing on 30 January 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Deputy Registrar	Paul Lemmens President