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

SECOND SECTION

DECISION

Application no. 46533/13
Ülkem Evrim KEPENEK
against Turkey

The European Court of Human Rights (Second Section), sitting on 3 November 2020 as a Committee composed of:

Aleš Pejchal, *President,*
Egidijus Kūris,
Carlo Ranzoni, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to the above application lodged on 29 March 2012,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Ülkem Evrim Kepenek, is a Turkish national, who was born in 1977 and lives in Istanbul. She was represented before the Court by Mr Ö. Kılıç and Ms A. Taşdemir, lawyers practising in Istanbul.

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

A. The circumstances of the case

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

1. The applicant's arrest and criminal proceedings brought against her

4. Between 2009 and 2011, a number of criminal investigations were initiated against the alleged members of an armed illegal organisation called

the KCK ("*Koma Civakên Kurdistan*" – Union of Communities in Kurdistan).

5. In the course of one of these investigations, on 20 December 2011, the applicant, a journalist working for the Dicle News Agency, and approximately fifty other persons, were arrested. The police officers told the applicant that she was being arrested on suspicion of carrying out activities for the KCK.

6. On the same day, a judge at the Ninth Division of the Istanbul Assize Court, assigned under Article 250 of the Code of the Criminal Procedure at the material time, ordered that the applicant and the other suspects be prevented from having access to their legal representatives and that the latter be prevented from having access to the entire content of the investigation file in accordance with sections 10(b) and 10(d) of the Prevention of Terrorism Act (Law no. 3713), in force at the material time.

7. Between 20 and 23 December 2011 the applicant was kept in police custody.

8. During her detention in police custody, the applicant did not make any statement in relation to the charges against her.

9. On 22 December 2011 one of the applicant's representatives lodged a petition with the Ninth Division of the Istanbul Assize Court on behalf of two other persons and requested, *inter alia*, to be allowed to have access to the investigation file. Some other lawyers also lodged petitions containing similar requests on behalf of the other persons arrested at the same time as the applicant.

10. On 23 December 2011 the Ninth Division of the Istanbul Assize Court dismissed those requests.

11. On 23 December 2011 the applicant was brought before the Istanbul public prosecutor. In her statements to the public prosecutor, the applicant stated that she was a journalist working for the Dicle News Agency and that she had previously worked for three newspapers. The applicant noted that she did not carry out any activities other than activities related to journalism.

12. The applicant was asked about a telephone conversation held on 24 October 2011 between her and a certain E.A., a conversation intercepted by the police, according to which the applicant had called E.A. and asked him if he could cover a press statement to be made by a parliamentarian, S.S.Ö. During the conversation, the applicant noted that the news agency did not have a sufficient number of journalists and since all journalists had tasks that day, the agency could not send any person to report about that press statement. The applicant contended before the public prosecutor that she had tried to obtain information about that event on behalf of the Dicle News Agency, given that a press statement by S.S.Ö. was an event to be covered by a media outlet.

13. The public prosecutor further questioned the applicant about the materials seized in a tent put up by the Dicle News Agency, in a park in the province of Van, where the applicant had been arrested. In her reply, the applicant contended that she had been a guest there and that she did not have any knowledge of the nature of those materials.

14. When shown the images of a demonstration in which the applicant had appeared, she contended that a number of parliamentarians had attended that demonstration and that she had been there as a journalist in order to cover the event and the parliamentarians' participation in it. She noted that their news reports were uploaded on the website of the Dicle News Agency and that those reports had been password protected. She did not know how those images were also found on the websites of RojTV and Fırat News Agency, media that broadcast in support of a terrorist organisation.

15. During her questioning before the Istanbul public prosecutor, the applicant was accompanied by two lawyers who contended that the applicant was a journalist in the Dicle News Agency, a legally established media outlet. According to the lawyers' statements, the applicant did not have any connection with any illegal organisation and her participation in demonstrations and similar events had been due to her work as a journalist. Noting that the applicant's activities had been within the scope of press freedom and in the light of the importance of the right to liberty and the fact that she had a permanent residence and that there was no risk of tampering with evidence, they asked for their client to be released.

16. On 23 December 2011, after her questioning by the public prosecutor, the applicant was released.

17. On 27 April 2012 the Istanbul public prosecutor filed a bill of indictment against forty-four people, including the applicant, and charged them with membership of the KCK. The public prosecutor noted that according to the "KCK Agreement", the document setting out the ideological foundations of the KCK, the aim of the KCK was establishing an independent Kurdish state and a new society. He further noted that the KCK was a part of the PKK (Workers' Party of Kurdistan, an illegal armed organisation). The public prosecutor observed that the "KCK Agreement" envisaged setting up a Media Committee within the KCK. According to the public prosecutor, the committee in question would work towards the goals of establishing the media policies of the KCK and controlling the media outlets which disseminated information and ideas in support of the KCK and the PKK and had rich financial resources. The members of this committee would work in line with the instructions of the leader of the PKK, Abdullah Öcalan, and a number of other leading members of the organisation. The Istanbul public prosecutor stated that the subject matter of the bill of indictment was the media activities of the KCK.

18. As regards the applicant, the Istanbul public prosecutor noted that when she had been arrested on 20 December 2011, the following materials

were found in the tent of the Dicle News Agency in Van: books, periodicals, flash disks, computers, mobile telephones, photographs, documents, notebooks, credit cards and identity cards. The public prosecutor noted that there were court orders for confiscation and prohibition of four of the books found in the tent.

19. According to the indictment, the applicant had had a telephone conversation with E.A. in respect of a press statement to be held by a parliamentarian (see paragraph 12 above). The public prosecutor noted that E.A. had called the Dicle News Agency and asked for a journalist to attend the press statement to be made by S.S.Ö. and that the applicant had told E.A. that the agency did not have a sufficient number of journalists and since all journalists had tasks that day, she could not send any person to report about that press statement.

20. The public prosecutor further noted that in May and June 2011 the applicant had attended two demonstrations in Istanbul, which had become propaganda in support of the KCK/PKK, in her capacity as a member of the KCK/PKK Media Committee. He also noted that during one of these demonstrations, clashes had occurred between some demonstrators and the security forces, during which a number of police officers had been injured and shops and vehicles had been damaged.

21. The Istanbul public prosecutor finally relied on the statement of B.Y., an anonymous witness, dated 2 January 2012. According to that statement, the PKK was in control of the Media Committee, of which the applicant was a member. The Committee's activities were carried out in line with the instructions received from the PKK. The Committee members held secret meetings approximately every two months. The applicant participated in these meetings and carried out journalistic activities under the control of the PKK.

22. In view of the aforementioned evidence, the Istanbul public prosecutor concluded that the applicant carried out activities which formed a part of the activities of the Media Committee; that she worked as a journalist at the Dicle News Agency; that according to the statement of B.Y., she was a member of the Media Committee and worked in line with the instructions of the PKK; and that therefore the applicant was a member of the KCK/PKK.

23. According to the information in the case file, the criminal proceedings against the applicant and her co-accused are currently pending before the Third Division of the Istanbul Assize Court.

2. The applicant's conditions of detention at the Istanbul courthouse

24. According to the National Judiciary Information System records, on 23 December 2011 at 11.14 a.m., the applicant together with forty nine other suspects was brought to the Istanbul courthouse in order to be

questioned by the Istanbul public prosecutor and her questioning was completed at 3.05 p.m., after which she was released.

25. As a result of the high number of detainees to be questioned, the applicant and the other detainees were kept in two detention rooms in the courthouse.

26. The applicant alleges that during her stay in the courthouse, she was kept in a room of 20 sq. m. without natural light, fresh air or heating and that there were approximately twenty other women in the room.

B. Relevant domestic law and practice

27. The relevant domestic law and practice is summarised in the Court's judgment in the case of *Mustafa Avci v. Turkey* (no. 39322/12, §§ 30-43, 23 May 2017).

COMPLAINTS

28. The applicant complains under Articles 3 and 13 of the Convention about the conditions of detention at the place of detention in the Istanbul courthouse.

29. The applicant complains under Article 5 § 1 of the Convention that she was arrested and detained in police custody in the absence of any tangible evidence and reasonable grounds for suspicion that she had been involved in illegal activities. She also alleges under this head that the prosecuting authorities did not follow the procedure set out in Article 98 of the Code of Criminal Procedure, according to which she should have been invited to make statements to the public prosecutor and that her arrest could have been ordered had she failed to appear before the public prosecutor.

30. The applicant complains under Article 5 § 2 of the Convention that she was not informed of the reasons for her arrest and detention in police custody.

31. The applicant complains under Article 5 § 3 of the Convention that the length of her detention in police custody was excessive.

32. Relying on Article 10 of the Convention, the applicant complains that she was charged with membership of the KCK/PKK on the basis of her activities as a journalist and that as a result her right to freedom of expression was breached.

33. The applicant complains under Article 13 of the Convention, in conjunction with Article 5 §§ 1 and 2 and Article 10 of the Convention that the remedies provided in domestic law were not effective. She complains, in particular, about the decision of 20 December 2011 preventing her representatives from having access to the content of the investigation file.

THE LAW

A. As regards the applicant's conditions of detention at the Istanbul courthouse

34. Under Articles 3 and 13 of the Convention, the applicant claims that during her stay in the courthouse, she was kept in a room of 20 sq. m. with approximately twenty other women. The room did not receive natural light and there was no fresh air or heating. There were only two benches in the room and only three or four people could sit on benches at a time. The applicant and the other suspects had to sit on the benches in turns and those who could not sit on the benches had to stand up or sit on the floor.

35. The Government argued that the applicant did not raise her complaint before national authorities and that she did not exhaust domestic remedies. In view of the Government, the applicant could have filed a criminal complaint concerning the conditions of her stay at the Istanbul courthouse.

36. The Court reiterates that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system (see *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 115, ECHR 2015). The rule of exhaustion of domestic remedies requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014). If the complaint presented before the Court has not been put, either explicitly or in substance, to the national courts when it could have been raised in the exercise of a remedy available to the applicant, the national legal order has been denied the opportunity to address the Convention issue which the rule on exhaustion of domestic remedies is intended to give it (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

37. The Court observes that the applicant did not argue that, at the material time, she could not lodge a complaint in respect of her complaints with respect to her conditions of detention. Furthermore, she does not explain why she did not lodge such a complaint about the alleged ill-treatment. It follows that the Government's objection that the applicant did not exhaust domestic remedies must be upheld.

38. Consequently, this part of the application must be rejected for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

B. As regards the applicant's arrest

39. The applicant complains that her arrest was not in conformity with domestic legislation inasmuch as the national authorities did not follow the procedure laid down in Article 98 of the Code of Criminal Procedure ("CCP"). She invokes Article 5 § 1 of the Convention on that account.

40. The Government submitted that a compensation claim had been available to the applicant under Article 141 § 1 of the CCP. They contended that the applicant could and should have brought a compensation claim on the basis of that provision. Moreover, the Government argued that the applicant should have lodged an appeal against her arrest under Article 91 § 5 of the CCP. According to the Government, an appeal was likely to put an end to the deprivation of liberty contested by that applicant.

41. The Court observes that the Turkish legal system provides applicants with two remedies in this respect, namely an objection aimed at securing release from custody (Article 91 § 5 of the CCP) and a compensation claim against the State (Article 141 § 1 of the CCP) (see *Mustafa Avci*, cited above, § 63). The Court notes that the applicant did not use these remedies. Having regard to its well-established case-law and in the absence of any strong reasons to depart from its assessment concerning this issue, the Court considers that its conclusions in the *Mustafa Avci* judgment (cited above, §§ 58-67) are also valid in the context of the present case (see also, *mutatis mutandis*, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 101, 20 March 2018).

42. In light of the foregoing, the Court considers that, as regards her complaint concerning the lawfulness of her arrest, the applicant was required to bring a claim under Article 141 § 1 of the CCP, or lodge an appeal under Article 91 § 5 of the same code, before the domestic courts, but did not do so. It therefore allows the Government's objection and rejects this complaint for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

C. Alleged lack of reasonable suspicion that the applicant committed a criminal offence

43. Under Article 5 § 1 of the Convention, the applicant submitted that there had been no reasonable suspicion warranting her arrest and police custody.

44. The Government disagreed. They stated first that a compensation claim had been available to the applicant under Article 141 § 1 of the CCP. They contended that the applicant could and should have brought a

compensation claim on the basis of this provision. Furthermore, they maintained that the applicant was taken into custody on suspicion of being members of a terrorist organisation and conducting activities on behalf of that organisation.

45. As regards the Government's preliminary objection, the Court observes that the domestic remedy in application of Article 141 § 1 of the CCP with regard to the complaints under Article 5 § 1 was examined in the case of *Lütfiye Zengin and Others v. Turkey* (no. 36443/06, §§ 61-65, 14 April 2015). In that case, the Court has concluded that where an applicant claims that he or she has been detained in breach of domestic law and where the deprivation of liberty has ended, an action for compensation capable of leading to recognition of the alleged violation and awarding a sufficient compensation was in principle an effective remedy which had to be exercised. In this respect, the Court has indicated however that the irregularity or illegality of such deprivation of liberty had to be previously recognised by domestic authorities. Otherwise, the Court held that an action for compensation under Article 141 § 1 of the CCP would have been doomed to failure. The Court observes that in the present application, the domestic authorities have never, explicitly or implicitly, acknowledged that the deprivation of liberty suffered by the applicant was unlawful. In that connection, the Court also notes that the Government has not provided any domestic decision indicating that in circumstances similar to those of the present application, an appeal under Article 141 § 1 of the CCP has been successful. The Court therefore concludes that the objection raised by the Government on this account must be dismissed.

46. The Court reiterates that, in order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c), it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 53, Series A no. 145‑B). Neither is it necessary that the person detained should ultimately have been charged or brought before a court. The object of detention for questioning is to further a criminal investigation by confirming or dispelling suspicions which were the grounds for detention (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A).

47. The Court notes in this context that the applicant was arrested in the course of an investigation into an illegal armed organisation of which she was suspected of being a member, and of conducting activities on its behalf. In these circumstances, the suspicion against her may be considered to have reached the level required by Article 5 § 1 (c), as the purpose of the deprivation of liberty was to confirm or dispel the suspicions about their involvement in this illegal organisation. In this regard, the Court observes that after her questioning by the public prosecutor, the applicant was released. In fact, the interpretation and application of the legal provisions

invoked by the domestic authorities does not seem to be arbitrary or unreasonable to the extent that the applicant's arrest and custody were irregular or unlawful.

48. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

D. As regards the complaint under Article 5 § 2 of the Convention

49. The applicant complains, under Article 5 § 2 of the Convention, that she was not informed of the reasons for her arrest and detention in police custody.

50. The Court observes that it is apparent even from the application form submitted by the applicant to the Court that the police officers informed her at the beginning of her police custody that she was suspected of being a member of an illegal organisation (see paragraph 5 above).

51. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

E. As regards the complaint under Article 5 § 3 of the Convention

52. The applicant contended that the duration of her detention in police custody was excessive. She alleges a violation of Article 5 § 3 of the Convention on that account.

53. The Court reiterates that any period of detention in police custody in excess of four days is *prima facie* too long (*Oral and Atabay v. Turkey*, no. 39686/02, § 43, 23 June 2009, and *McKay v. the United Kingdom* [GC], no. 543/03, § 47, ECHR 2006-X). Shorter periods can also breach the promptness requirement if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner (*İpek and Others v. Turkey*, nos. 17019/02 and 30070/02, §§ 36-37, 3 February 2009).

54. In the present case, the Court observes that on 20 December 2011, the applicant was arrested along with approximately fifty other people on the suspicion of being a member of a terrorist organisation. She was released within three days after her arrest. As such, the length of the applicant's detention in police custody is, *prima facie*, compatible with the requirements of Article 5 § 3. Considering the complexity of the criminal investigation in question, and in particular the number of suspects arrested on the same day, the Court finds that the duration of the applicant's detention in police custody appears to have been sufficiently prompt within the meaning of Article 5 § 3 of the Convention.

55. As a result, this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

F. As regards the complaint under Article 13 of the Convention

56. Relying on Article 13 of the Convention, in conjunction with Article 5 §§ 1 and 2 and Article 10, the applicant complained that there was no effective remedy by which she could have challenged her detention. In particular, she complained about the decision of 20 December 2011 preventing her representatives from having access to the content of the investigation file.

57. The Government contested the applicant's arguments. In this respect, they argued that the applicant never contested her deprivation of liberty before domestic authorities.

58. The Court notes that the applicant could have lodged an appeal against her arrest and subsequent detention in police custody, of which she did not avail herself.

59. In the absence of any appeal lodged by the applicant, the Court concludes this part of the application must be rejected for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

G. As regards the complaint under Article 10 of the Convention

60. Under Article 10 of the Convention, the applicant complains that she was charged with membership of a terrorist organisation on the basis of her journalistic activities.

61. The Government indicated that the criminal proceedings initiated against the applicant are still pending before the domestic courts. In this respect, the Government argued that she could bring an individual application before the Constitutional Court. Therefore, the Government requests the Court to declare this complaint inadmissible for non-exhaustion of domestic remedies.

62. The Court observes that it had examined the main aspects of the remedy before the Turkish Constitutional Court and found that the Turkish Parliament had entrusted that court with powers that enabled it to provide, in principle, direct and speedy redress for violations of the rights and freedoms protected by the Convention, in respect of all decisions that had become final after 23 September 2012, and declared it as a remedy to be used (see *Uzun v. Turkey*, (dec.), no. 10755/13, §§ 68-71, 30 April 2013).

63. The Court further notes that the Constitutional Court's jurisdiction *ratione temporis* had begun on 23 September 2012 and it was clear from the judgments already delivered that it accepted an extension of its jurisdiction *ratione temporis* to situations involving a continuing violation which had commenced before the introduction of the right of individual application and had carried on after that date.

64. In the present case, the criminal proceedings against the applicant are pending before the domestic courts. As a result, taking into account the

Government's preliminary objection, and without prejudice to the possibility that the applicant may bring new proceedings before this Court after exhausting the individual application before the Constitutional Court, the Court finds this part of the application to be premature. Consequently, it must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 26 November 2020.

Hasan Bakırcı	Aleš Pejchal
Deputy Registrar	President