CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 47659/99
by Fehmi KÜÇÜKASLAN and Sefagül KESKİN
against Turkey

The European Court of Human Rights (Second Section), sitting on 11 March 2003 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr Gaukur JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 26 March 1999,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Fehmi Küçükaslan and Ms Sefagül Keskin are Turkish nationals who were born in 1968 and 1977 respectively. Mr Fehim Küçükaslan is currently serving his prison sentence in Tekirdağ F Type Prison in Turkey. Ms Keskin lives in Ankara. They are represented before the Court by Ms Engül Çıtak, a lawyer practising in Ankara.

A. The circumstances of the case

The facts of the case, as submitted by the applicants and as set out in the official documents submitted by the applicants, may be summarised as follows.

At 8.45 p.m. on 21 November 1998 a bomb, which had been placed next to the Akbank branch in the city of Ordu, exploded and caused damage to the building in which a cash machine had been installed.

According to the arrest reports drawn up by police officers, the applicants were arrested at a house in Ordu at 9 p.m. on 21 November 1998 on suspicion that they had planted the bomb. A search was conducted in the house and false identity cards were found on the applicants.

According to the official documents the local prosecutor was informed about the arrests at 10 p.m. According to the custody records the applicants were placed in police custody at 11.55 p.m.

On 22 November 1998 the deputy chief of the anti-terrorist department of the Ordu Police asked the Ordu public prosecutor to authorise the applicants' detention in police custody for an appropriate period. On the same day the prosecutor granted authorisation for the applicants to be detained for a period of three days.

On 24 November 1998 the Ordu public prosecutor was again requested by the deputy chief of the anti-terrorist department of Ordu to authorise the applicants' detention in police custody for a second period. The deputy police chief informed the prosecutor that this second extension was necessary because the investigation had to be widened as more suspects had been arrested. The judge at the Second Chamber of the Ordu Criminal Court of Peace, who was informed about the request by the prosecutor, granted authorisation to detain the applicants detention for a further period of four days.

In the early hours of 27 November 1998 the applicants were questioned in relation to the bombing and possible connections with a number of illegal organisations. The applicants exercised their right to silence and refused to answer any of the questions put to them. They also refused to sign the statements.

On 27 November 1998 the applicants were brought before the Ordu public prosecutor who questioned them further. The prosecutor informed the applicants that they were free to consult the services of a lawyer and that the local branch of the Bar Association would appoint a lawyer to represent them if they required one. The applicants were further informed by the prosecutor that their families could be informed of their arrests if they so wished. Both applicants stated that they would appoint lawyers at a later stage and that they would then answer the questions relating to their membership of the outlawed organisations. The first applicant rejected the accusation that he had planted the bomb. Both applicants stated that they

had exercised their right to silence because they had been ill-treated during their detention in police custody.

On the same day the applicants were brought before the Second Chamber of the Criminal Court of Peace in Ordu. They denied the accusations against them and stated they had nothing to add to the statements they had made before the prosecutor earlier that day. The judge ordered their detention on remand, under Article 104 of the Code of Criminal Procedure, on the grounds of the state of the evidence and the nature of the offence of which they stood accused, which could be classified as a serious crime.

On 25 December 1998 the chief public prosecutor of the State Security Court in Erzurum prepared an indictment accusing the applicants of membership of the outlawed organisation TKP-ML-TİKKO *(Turkish Communist Party/Marxist-Leninist)* and of attempting to undermine the constitutional order, offences under Article 146 of the Criminal Code.

On 25 May 1999 and while the trial was in progress, Ms Sefagül Keskin, the second applicant, was released on bail pending the outcome of the trial.

On 8 September 1999 the Erzurum State Security Court found the first applicant guilty of the offence under Article 146 § 3 of the Criminal Code and sentenced him to six years and three months' imprisonment. The court acquitted the second applicant. The first applicant appealed against the judgment.

On 21 February 2000 the Ninth Chamber of the Court of Cassation's Criminal Division quashed the judgment convicting the first applicant. The decision to acquit the second applicant became absolute as no appeal had been filed against the acquittal.

A re-trial took place before the Erzurum State Security Court. On 27 June 2000 the first applicant was found guilty of the offence under Article 168 § 2 of the Criminal Code. He was sentenced to twelve years and six months' imprisonment. However, as the appeal had been lodged by the applicant and not by the prosecution, the court had to abstain from handing down a longer sentence than the applicant had received previously. The applicant was therefore sentenced to six years and three months' imprisonment. He appealed against the judgment.

On 5 February 2001 the Ninth Chamber of the Court of Cassation's Criminal Division rejected the appeal lodged by the first applicant and upheld the judgment of 27 June 2000.

B. Relevant domestic law

The relevant provisions of the Criminal Code read as follows:

Article 146 §§ 1 and 3

" 1. Whosoever shall attempt to alter or amend in whole or in part the Constitution of the Republic of Turkey or to effect a coup d'état against the Grand National

Assembly formed under the Constitution or to prevent it by force from carrying out its functions shall be liable to the death penalty.

...

3. Accomplices to the crime specified in paragraph one, other than those specified in paragraph two, shall be punished by heavy imprisonment for not less that fifteen years and be disqualified to hold public office for life".

Article 168

"Any person who, with the intention of committing the offences defined in Articles ..., forms an armed gang or organisation or takes leadership ... or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years' imprisonment.

The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years' imprisonment".

The relevant provisions of the Code of Criminal Procedure provide as follows:

Article 135 § 4

"Detainees shall be informed of their statutory right not to make any comments in relation to the offence of which they stood accused".

Article 136 § 1 of the Turkish Code of Criminal Procedure (amended by Law 3842 of 18 November 1992)

"The accused or a person arrested shall have access to legal assistance of one or more lawyers at any stage and level of the investigation."

Article 31 of Law 3842 provides that the above provision shall not be applicable to charges that fall under the jurisdiction of the State Security Courts.

COMPLAINTS

The applicants complain under Article 5 of the Convention that they were unlawfully deprived of their right to liberty and security because although they were arrested at 9 p.m. on 21 November 1998 the custody records were not filled in until 11.55 p.m. They further argue that their families were not informed of their arrests and subsequent detention in police custody.

Invoking Article 5 § 3 of the Convention, the applicants complain that they were not brought before a judge until 6 days after their arrest.

Invoking Article 6 § 3 (c) of the Convention, the applicants complain that they were deprived of their right to legal assistance while in police custody.

The applicants finally allege under Article 14, in conjunction with Articles 5 and 6 of the Convention, that there is a difference between proceedings in the State Security Courts and those in ordinary criminal courts with regard to the length of permissible police custody and the sentences, which amounts to unlawful discrimination.

THE LAW

1. The applicants complain that their detention was in breach of their rights under Article 5 of the Convention, the relevant parts of which provide as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power...

a) As regards the applicants' complaint that their names were not registered in the custody ledgers until 11.55 p.m. despite been arrested at 9 p.m., the Court observes that according to the arrest reports the applicants were arrested at 9 p.m. on 21 November 1998. This is not disputed by the applicants. From the moment of their arrests at 9 p.m. the applicants were under police control. The Court finds that the fact that their names were not registered in custody ledgers until 11.55 p.m. does not compromise the lawfulness of their detention.

It follows that this complaint should be declared inadmissible as being manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

b) As regards the applicants' complaint under Article 5 of the Convention that their families were not informed of their arrests and

subsequent detention in police custody, the Court observes that the Convention does not as such guarantee this right.

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

c) As regards the applicants' complaint that they were not brought promptly before a judge or other officer authorised by law to exercise judicial power, as required by Article 5 § 3 of the Convention, the Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 3 of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. The applicants complain that they were not allowed to consult their lawyers during police custody. They invoke Article 6 § 3 (c) of the Convention which provides as follows:

> "3.Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> c. to defend himself in person or through legal assistance of his own choosing..."

a) As to the second applicant's complaint under Article 6 § 3 (c) of the Convention, the Court observes that she was acquitted at the end of the criminal proceedings. Against this background, the Court is of the opinion that any defects which may have existed at the time of the applicant's detention in police custody or the subsequent trial by the Erzurum State Security Court must be considered to have been rectified by the judgment acquitting her, and thus she can no longer claim to be a victim of the alleged violation (see *Ketenoğlu and Ketenoğlu v. Turkey*, nos. 29360/95 and 29361/95, judgment of 25 September 2001, §§ 36-7).

It follows that the second applicant's complaint regarding her right to a fair hearing is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

b) As to the first applicant's complaint under Article 6 § 3 (c) of the Convention, the Court recalls that Article 6 applies even at the stage of the preliminary investigation into an offence by the police. Thus, Article 6 - especially paragraph 3 - may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions (see the *Imbrioscia v. Switzerland* judgment of 24 November 1993, Series A no. 275, p.13, § 36). The manner in which Article 6 § 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case (loc.cit. p.14, § 38).

The Court further recalls that national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation, which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of the police investigation. However, this right, which is not explicitly set out in the Convention, may be subject to restriction for a good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (*John Murray v. the United Kingdom* judgment of 8 February 1996, *Reports of Judgments and Decisions*, 1996-1, pp. 54-55, § 63).

In the instant case, the first applicant's right of access to a lawyer during his police custody was restricted pursuant to the domestic legislation. However, he refused to make statements during his police custody, which could have subsequently been used in evidence against him in the criminal proceedings. Subsequently, when brought before the public prosecutor and the investigating judge, the first applicant denied the accusations against him. The Court further recalls at this point that whether the drawing of adverse inferences from an accused person's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences are drawn, the weight attached to them by the national courts in their assessment of evidence and the degree of compulsion inherent in the situation (*John Murray v. the United Kingdom* judgment, loc.cit., pp.49-50, § 47).

The Court recalls that pursuant to Article 135 of the Turkish Code of Criminal Procedure, accused persons have the right to remain silent and no adverse inferences can be drawn from their silence by the national courts in their assessment of evidence (see *Erdem and Others v. Turkey* (dec.), no. 35980/97, 14.12.2000, unreported). Indeed, no references were made by the trial court to the first applicant's refusal to make a statement during his detention in police custody.

Furthermore, the first applicant was represented both at his trial and on appeal by a lawyer and had the opportunity of challenging the prosecution case. The Court considers that there is no element to suggest that the overall fairness of the first applicant's trial was prejudiced on account of the fact that he was denied access to a lawyer during his custody period.

It follows that the first applicant's complaint regarding his right to a fair hearing is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

3. The applicants submit under Article 14 of the Convention, in conjunction with Articles 5 and 6, that there is a difference between the proceedings in State Security Courts and in the ordinary courts as regards the permissible length of police custody and the length of sentences

imposed. This, they argue, amounts to unlawful discrimination. Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court notes that the distinctions alleged by the applicants are not distinctions which are made between different groups of people, but between different types of offences, according to the legislature's view of their gravity. The Court has previously held that such distinctions are not contrary to Article 14 of the Convention (see, *mutatis mutandis*, *Gerger v. Turkey* [GC] appl. 24919/94, § 69, 8 July 1999, unreported).

Consequently, the applicants' complaints under Article 14 taken together with Articles 5 and 6 of the Convention are manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicants' complaints that they were not brought promptly before a judge;

Declares the remainder of the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President