CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 36971/97
by Erkan KURAY
against Turkey

The European Court of Human Rights (Fourth Section), sitting on 29 January 2002 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mrs E. PALM,
Mr J. MAKARCZYK,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr J. CASADEVALL, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 20 June 1997 and registered on 21 July 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the Section's partial decision of 16 November 1999,

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

The applicant, Mr Erkan Kuray, is a Turkish national, who was born in 1976 and lives in Turkey. He is represented before the Court by Mr Adnan Terece, a lawyer practising in İzmir.

A. The circumstances of the case

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

On 17 December 1996 the applicant was arrested by police officers from the anti-terrorist branch of the İzmir Security Department on suspicion of membership of an illegal terrorist organisation.

On 28 December 1996 the applicant was brought before a judge at the İzmir State Security Court and was arrested. The Chief Public Prosecutor at the İzmir State Security Court preferred the indictment on 25 March 1997 and charged the applicant with membership of an illegal terrorist organisation, namely the DHKP/C.

On 29 December 1997 the İzmir State Security Court convicted the applicant, as charged, under Article 168 of the Turkish Criminal Code and sentenced him to 12 years and 6 months' imprisonment.

B. Relevant domestic law and practice

1. Section 168 of the Turkish Criminal Code provides:

> "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."

Under section 3 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), the offence defined in section 168 of the Criminal Code is classified as a "terrorist" act.

2. Article 19 of the Constitution provides:

> "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 the formalities and conditions prescribed by law:
>
> The arrested or detained person must be brought before a judge within forty-eight hours at the latest or, in the case of offences committed by more than one person, within fifteen days ... These time-limits may be extended during a state of emergency...
>
> A person deprived of his liberty for whatever reason shall have the right to take proceedings before a judicial authority which shall give a speedy ruling on his case and order his immediate release if it finds that the deprivation of liberty was unlawful.
>
> Compensation must be paid by the State for damage sustained by persons who have been victims of treatment contrary to the above provisions, as the law shall provide."

Under section 9 of Law no. 3842 on Procedure in the State Security Courts, only these courts can try cases involving the offences defined in Article 168 of the Criminal Code.

At the material time, section 30 of Law no. 3842 of 18 November 1992, amending the legislation on criminal procedure, provided that, with regard to offences within the jurisdiction of the State Security Courts, any arrested person had to be brought before a judge within 48 hours at the latest, or, in the case of offences committed by more than one person, within 15 days.

COMPLAINT

The applicant complains under Article 5 § 3 of the Convention that he was held in police custody for 11 days without being brought before a judge or other officer authorised by law to exercise judicial power.

THE LAW

The applicant complains of the excessive length of his detention in police custody. He invokes Article 5 § 3 of the Convention which provides, in so far as relevant:

> "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 and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Government's preliminary objection

The Government submit that the applicant failed to exhaust domestic remedies. They refer to the Ahmet Sadık v. Greece Judgment of 15 November 1996 where the Court decided that the applicant failed to comply with the rule of exhaustion of domestic remedies by not relying on the relevant article of the Convention before the national court.

The Government also argue that Article 5 § 3 of the Convention is directly applicable in Turkish Law, pursuant to Article 90 § 5 of the Constitution.

Furthermore the Government maintain that the period in which the applicant was kept in police custody was in accordance with the national law, since at the time of the events, the period applicable for custody was up to 15 days for those crimes within the jurisdiction of the State Security Courts.

The applicant contends in reply that this is, in fact, the reason why he was unable to challenge his police custody which lasted 11 days, a period which is in conformity with the Turkish law.

The Court does not consider itself to be required to determine the question of the applicability of the Convention in Turkish Law. However the lack of precedents indicates the uncertainty of this remedy in practice (see Sakık and Others v. Turkey Judgment of 26 November 1997, Reports 1997-VII p. 2625, §53). In previous cases based on similar facts, the Convention organs had already found that this remedy was ineffective on the ground, inter alia, that the Turkish judicial authorities to whom the

applicant complained had already concluded that the detention in question was lawful (ibidem., p.2626, § 60).

The Court notes that in the present case, the length of the applicant's detention in police custody not having exceeded the time limit prescribed by law, the applicant could not successfully challenge it and therefore did not have any remedy within the meaning of Article 35 of the Convention available to him. Moreover the Court observes that the file contains no example of any person detained in police custody having successfully invoked Article 5 of the Convention before a national authority for a ruling on the lawfulness of his detention.

Therefore, the Court considers that the Government's submission that the applicant failed to exhaust domestic remedies cannot be upheld.

B. Merits

As regards the substance of the applicant's complaint, the Court considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and no other grounds for declaring it inadmissible have been established

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President