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

SECOND SECTION

DECISION

Application no. 38358/22
Yusuf ORHAN
against Türkiye

The European Court of Human Rights (Second Section), sitting on 6 December 2022 as a Chamber composed of:

Arnfinn Bårdsen*, President*,
Jovan Ilievski,
Pauliine Koskelo,
Saadet Yüksel,
Lorraine Schembri Orland,
Frédéric Krenc,
Diana Sârcu*, judges*,

and Hasan Bakırcı, *Section Registrar,*

Having regard to the above application lodged on 18 July 2022,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Yusuf Orhan, is a Turkish national, who was born in 1985 and lives in Gaziantep.

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. On 13 April 2018 the applicant was found guilty of belonging to a terrorist organisation and sentenced to seven and a half years' imprisonment by the İzmir Assize Court.

4. This conviction was upheld by the İzmir Court of Appeal on 18 October of the same year.

5. On 15 May 2019 the Court of Cassation dismissed the applicant's appeal on points of law.

6. On 3 November 2020 the applicant, who was being held in a cell with individuals convicted for belonging to the same terrorist organisation as himself, requested that the prison service transfer him to a cell for individuals convicted of ordinary criminal offences. He specified that he requested this

transfer "if being in a cell for ordinary prisoners [was] a condition for being [in due course] released on licence".

7. On an unspecified date, the service granted his request.

8. In March 2021 the applicant submitted a request to be transferred to an open prison and to be released on licence.

9. By a decision of 15 March 2021 the prison's Management and Supervisory Board ("the Board"), which included a psychologist and a social worker, refused the applicant's request.

10. The Board noted that, under the regulations in force, individuals convicted of terrorism or organised crime were required to meet certain conditions in order to be granted an adjustment of sentence. One such condition was a finding by the Management and Supervisory Board that the prisoner had left the criminal organisation to which he or she belonged and had done so genuinely.

11. In the present case, however, the Board found that no change had been observed in the applicant's behaviour following his cell transfer, that the applicant had never expressed regret or remorse, that his sole aim in requesting the transfer to a cell for prisoners convicted under ordinary criminal law was to be released on licence, and that the request did not reflect genuine repentance or prove that he had actually left the organisation to which he had belonged.

12. The applicant's appeal against this decision was dismissed by the post-sentencing judge on 25 March 2021.

13. On 7 May 2021 the Assize Court dismissed his application to have the latter decision set aside.

14. Both courts examined the appeals without holding a hearing. The public prosecutor's office sent submissions to each one arguing that the decision being appealed against was "in accordance with the law and procedure".

15. On 19 January 2022 the Constitutional Court declared the applicant's individual application inadmissible.

16. This decision was notified to the applicant on 25 February 2022.

17. On 13 March 2022 the applicant was released on licence, following a favourable opinion from the Board.

RELEVANT LEGAL FRAMEWORK

18. Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties ("the Vienna Convention") provide:

"Article 31

GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

COMPLAINTS

19. The applicant complained under Article 5 of the Convention that he had been unjustly deprived of his liberty on account of the decision – which he alleged was unlawful and arbitrary – not to grant him an adjustment of sentence.

20. He claimed that the procedure for challenging the prison authorities' refusal was not compliant with Article 6 of the Convention, which was applicable under its criminal head. In this connection, he complained in particular that no hearing had been held and that the submissions of the public prosecutor's office had not been disclosed. He also argued that the proceedings had not been adversarial in nature, that an equality of arms had not been ensured, that he had not been given sufficient time to prepare his defence and that he had not had access to his case file.

21. Furthermore, the applicant complained that neither the post-sentencing judge nor the Assize Court that heard his appeal to be released on licence had examined his case effectively, thus breaching Article 13 of the Convention.

22. Lastly, the applicant claimed that he had been the victim of discrimination within the meaning of Article 14 of the Convention, in two respects. First, the prison service provided certain resources to prisoners convicted under the ordinary criminal law to enable them to be released on licence, but did not show the same goodwill towards individuals convicted of organised crime or terrorism. Second, the applicant complained that fulfilment of the criteria for release on licence was assessed more leniently for prisoners elsewhere than in the prison in which he was being held at the material time.

THE LAW

A. Time-limit for lodging the application

23. The Court reiterates that the time-limit for lodging applications provided for in Article 35 § 1 of the Convention is a public policy rule and that it should examine the matter of its own motion (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 33, 29 June 2012).

24. The Court notes that this time-limit was reduced from six months to four months by Article 4 of Protocol No. 15 ("the Protocol").

25. The current version of Article 35 § 1 reads as follows:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken."

26. The Protocol entered into force on 1 August 2021. In accordance with Article 8 § 3, however, the new time-limit only entered into force on 1 February 2022, following a transition period of six months after the date of entry into force of the Protocol.

27. Given that the decision as a result of which the applicant had exhausted all remedies was delivered prior to this date but notified subsequent to it, the Court considers it necessary to specify how the applicable time-limit should be determined, be it the former six-month time-limit or the new four-month time-limit.

28. The Court notes that Article 8 § 3 *in fine* of Protocol No. 15 specifies that the new time-limit "shall not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of Article 4 of this Protocol".

29. The Court would refer to Article 31 § 1 of the Vienna Convention, which states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

30. The Court notes that the ordinary meaning of the terms "was taken", as used in Article 8 § 3 of Protocol No. 15, leaves little room for doubt. The authors seem to have intended to mean that the time-limit to be applied for applications would be the period in force on the date when the national courts delivered the decision exhausting all domestic remedies.

31. It is true that in terms of calculating the time-limit for lodging applications, the Court has consistently held that the period runs not from the date when the decision exhausting all domestic remedies was adopted but rather from the date on which it was notified (where the domestic law provides for such notification) or finalised (*Papachelas v. Greece* [GC], no. 31423/96, § 30, ECHR 1999-II); this remains true notwithstanding that the English version of Article 35 § 1 indicates that the starting point of the period is the date that the decision "was taken" – a detail lacking in the French version of the Article.

32. The question thus arising is whether it would not be more appropriate to apply the application time-limit in force on the date when the final decision was notified rather than when it was adopted.

33. The Court nevertheless observes that identifying the applicable time-limit – four months or six months – is clearly a separate issue from determining the first day from which the period runs. Moreover, while Article 35 § 1 contains general procedural and jurisdictional rules, the purpose of Article 8 § 3 of Protocol No. 15 is to provide for a transition period.

34. In addition, the Court considers that the reference to Article 35 § 1 of the Convention does not mean that, for the purpose of applying Article 8 § 3 of Protocol No. 15, the date on which the "final decision" was taken should be identified in the same way as the first day of the period provided for in Article 35 § 1 of the Convention. In the Court's opinion, this reference more simply means that "the final decision" is the decision that exhausts all domestic remedies within the meaning of Article 35 § 1. In other words, the expression "the final decision within the meaning of Article 35, paragraph 1" should be understood as the final decision exhausting all domestic remedies.

35. The Court further observes that the approach used to identify the starting point of the time-limit has been based on a set of specific considerations that strongly suggest that account should be taken of the date of notification, or the date when the applicant was able to acquaint him- or herself with the final decision (finalisation date). The Court has specified that the application time-limit not only pursues the aim of ensuring legal certainty, it also affords the prospective applicant time to consider whether to lodge an application with the Court and, if so, to decide on the specific complaints and arguments to be raised. The Court has inferred from this that the object and purpose of Article 35 are best served by counting the six-month period as running from the date of notification of the written judgment (see *Worm v. Austria*, 29 August 1997, §§ 32-33, *Reports of Judgments and Decisions* 1997-V).

36. Another argument justifying the approach taken in the *Worm* case, cited above, is that the time for appealing only starts to run from the date when the appellant is able to act effectively. Otherwise, the authorities could substantially reduce the time for lodging an application with the Court or even render any valid application to the Court impossible by delaying notification of final decisions or the possibility of acquainting oneself therewith, thus rendering the right to a remedy under the Convention theoretical and illusory, whereas the Convention is intended to guarantee rights that are practical and effective. Moreover, this approach corresponds to the Court's case-law regarding access to a court within the meaning of Article 6 of the Convention (see *Miragall Escolano and Others v. Spain*, nos. 38366/97 and 9 others, §§ 37 and 38, ECHR 2000-I).

37. In other words, when determining the starting point of the time-limit for an application, the Court has departed from what, prima facie, seems to be the ordinary and usual meaning of the expression used in Article 35 § 1 of the Convention (especially in the English version), but its goal in doing so was to take into account the object and purpose of the Convention and to protect the effectiveness of the right of individual application.

38. With regard to Article 8 § 3 of Protocol No. 15, however, the Court sees no such consideration that would allow it to depart from the ordinary meaning of the words and apply the four-month time-limit in force at the time

the decision was notified rather than the six-month time-limit in force on the date the final decision "was taken".

39. Furthermore, the Court notes that applying the time-limit in force at the time of notification rather than on the date the final decision was taken would have adverse consequences for the applicant, contrary to the intention of the *Worm* case-law, and that, given the ordinary meaning of the terms used in Article 8 § 3, the applicant could legitimately have believed, even with appropriate advice, that he had a six-month time-limit running from the notification of the Constitutional Court's decision.

40. Moreover, reiterating the observation that identifying the time-limit applicable under Article 8 § 3 of Protocol No. 15 is clearly a separate issue from determining the first day from which the period runs under Article 35 § 1 of the Convention, the Court sees no contradiction, on the one hand, in applying the time-limit in force on the date of the final decision, as explicitly provided for in Protocol No. 15, and, on the other hand, in starting the applicable time-limit – old or new – on the date the decision was notified or finalised, taking into account the object and purpose of the Convention in accordance with its well-established case-law.

41. Lastly, regarding the purpose of Article 8 § 3, the Court finds it necessary to consider the Explanatory Report in respect of Protocol No. 15, which states in paragraph 22 *in fine*:

> "Furthermore, the new time limit will not have retroactive effect, since it is specified in the final sentence of paragraph 4 [*sic*] that it does not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of the new rule."

42. This paragraph makes it clear that the purpose of Article 8 § 3 is to avoid giving Article 4 of Protocol No. 15 retroactive effect and to prevent the new four-month time-limit that it introduces from being applied to cases where the final decision was adopted before the new time-limit came into force.

43. Accordingly, applying the time-limit in force on the date the final decision was adopted is compatible with the purpose of Article 8 § 3.

44. It follows from the foregoing that the six-month time-limit applies to applications in which the final decision within the meaning of Article 35 § 1 of the Convention was delivered before 1 February 2022, regardless of the date on which that decision was notified to the applicant, that is, even when the latter date is after 31 January 2022. The four-month time-limit applies to applications in which the final decision was taken after 31 January 2022.

45. In the present case, the last final domestic decision is the decision adopted by the Constitutional Court on 19 January 2022. The applicable time-limit is therefore six months.

46. This period started on 26 February 2022 (*dies a quo*), the day after the decision was notified, and ended on 25 August 2022 (*dies ad quem*).

47. As the application was lodged on 18 July 2022 it complied with the time-limit under Article 35 § 1 of the Convention.

B. Complaints under Articles 5 and 6 of the Convention

48. Regarding the complaint under Article 5, the Court reiterates that this provision of the Convention does not guarantee, as such, any right for a convicted person to benefit from an amnesty law or to obtain early release on a final or conditional basis (see *Mouesca v. France* (dec.), no. 52189/99, 18 October 2001; *İrfan Kalan v. Turkey* (dec.), no. 73561/01, 2 October 2001; and *Çelikkaya v. Turkey* (dec.), no. 34026/03, § 60, 1 June 2010).

49. The situation may, however, differ when the domestic courts, having no discretionary power, are obliged to apply such a measure to any individual who meets the conditions of entitlement laid down by law (see *Hıdır Durmaz v. Turkey (no. 2)*, no. 26291/05, § 26, 12 July 2011, and *Del Rio Prada v. Spain* [GC], no. 42750/09, § 126, ECHR 2013).

50. The Court notes that, under Turkish law, release on licence for an individual convicted of terrorism or organised crime is conditional on fulfilment of several conditions. The individual must have served some of his or her sentence, the individual must have demonstrated "good behaviour" and the prison's Management and Supervisory Board must have observed that the individual is no longer affiliated with the criminal organisation to which he or she belonged.

51. Regarding the third condition, the authorities clearly enjoy some margin of appreciation when determining whether a prisoner has effectively left the organisation and whether his or her request to be transferred out of the cell for individuals belonging to this organisation and into an ordinary cell genuinely reflects a departure from the organisation or whether the request is aimed solely at obtaining such benefits as release on licence by falsely claiming to have left it.

52. It follows from the foregoing that release on licence was not automatic in nature, that the authorities were not obliged to grant such a measure to the applicant and that they had discretionary power in the matter.

53. In addition, there is no indication that, in using this power, the authorities assessed the fulfilment of the third condition in an arbitrary or manifestly unreasonable manner (see, by contrast, *Antonio Messina v. Italy*, no. 39824/07, §§ 46-48, 24 March 2015, where the domestic authorities' reasoning was based on a factual error).

54. The complaint under Article 5 is therefore inadmissible *ratione materiae* with the provisions of the Convention.

55. The Court considers that the same applies to the complaints under Article 6, given that its case-law establishes that a judge examining a request for release on licence is not concerned with determining a civil right or a criminal charge, within the meaning of Article 6 § 1 of the Convention (see

Mouesca, cited above; *Grava v. Italy* (dec.), 43522/98, 5 December 2002; *Pilla v. Italy* (dec.), no. 64088/00, 23 September 2004; *Sannino v. Italy* (dec.), no. 30961/03, 24 February 2005; *Szabo v. Sweden* (dec.), no. 28578/03, 27 June 2006; *Csoszanszki v. Sweden* (dec.), no. 22318/02, 27 June 2006; *Naskovic v. Serbia* (dec.), no. 15914/11, § 63, 14 June 2011; and *Boulois v. Luxembourg* [GC], no. 37575/04, §§ 85-89 and 104, ECHR 2012).

C. Other complaints

56. As there is no arguable complaint under Article 5 of the Convention, the complaint under Article 13 of the Convention is unsustainable and must be declared inadmissible as being manifestly ill-founded.

57. The Court considers the two complaints under Article 14 of the Convention to be unsubstantiated and declares them inadmissible on the same grounds.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in French and notified in writing on 19 January 2023.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President