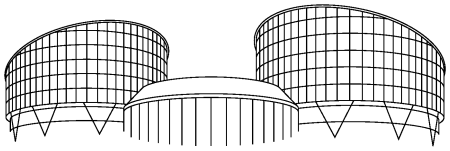

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ÖZCAN v. TURKEY

(Application no. 4728/07)

JUDGMENT

STRASBOURG

10 July 2018

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Özcan 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 regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated in private on 19 June 2018,

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

PROCEDURE

1. The case originated in an application (no. 4728/07) 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 Hasan Özcan ("the applicant"), on 12 January 2007.

2. The applicant was represented by Mr F.N. Ertekin, Mr K. Öztürk, and Ms. F. Kılıçgün, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 6 November 2009 the application was communicated to the Government.

4. The Government objected to the examination of the application by a committee. After having considered the objection, the Court rejects it.

THE CIRCUMSTANCES OF THE CASE

5. The applicant, who was born in 1968, was detained at the Tekirdağ Prison at the time when the application was lodged.

6. On 16 November 2005 the applicant was taken into custody.

7. On 19 November 2005 the investigating judge ordered the applicant's detention on remand.

8. On 22 November 2005 the applicant's lawyer lodged an objection against the detention order and requested his release. On 24 November 2005 the Istanbul Assize Court dismissed the objection, on the basis of the case file, without holding a hearing.

9. Between 19 December 2005 and 6 October 2006, the applicant's pre-trial detention was extended at regular intervals in view of the nature of the offence and the state of the evidence, through examinations held by the Istanbul Assize Court *ex proprio motu* on the basis of the case file.

10. On 15 November 2006 the applicant's lawyer filed an objection against the applicant's continued pre-trial detention. On 20 November 2006 the objection was dismissed by the Istanbul Assize Court without holding a hearing. On 7 December 2006 the applicant's lawyer filed a further objection and requested the court to hold a public hearing before deciding on the applicant's continued detention. On 8 December 2006 the Istanbul Assize Court dismissed the objection without holding a hearing.

11. On 18 January 2007 the public prosecutor filed an indictment with the Istanbul Assize Court charging the applicant with attempting to undermine the constitutional order, an offence proscribed by Article 146 § 1 of the former Criminal Code.

12. On 21 March 2007 the Istanbul Assize Court held its first hearing, at the end of which it ordered the applicant's continued detention. During the subsequent hearings, the court rejected the applicant's requests for release.

13. On 4 May 2011 the Istanbul Assize Court convicted the applicant and sentenced him to eighteen years and nine months' imprisonment.

14. On 25 September 2012 the Court of Cassation upheld the judgment of 4 May 2011.

THE LAW

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

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

16. The Government contested the claim and submitted that the applicant had failed to exhaust domestic remedies. In this connection they referred to the possibility of claiming compensation for unlawful detention under Article 141 § 1 (d) of the Code on Criminal Procedure ("CCP").

17. The Court observes that the domestic remedy in application of Article 141 § 1 (d) of the CCP with regard to 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).

18. In the 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.

19. In the instant case, the Court notes that the applicant's detention ended on 25 September 2012, when his conviction was upheld by the Court of Cassation. The Court therefore observes that the applicant was entitled to

seek compensation under Article 141 § 1 (d) of the CCP and that he must do so.

20. 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.

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

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

22. The applicant complained that he did not have an effective remedy by which to challenge the lawfulness of his continued detention, as provided in Article 5 § 4 of the Convention.

23. The Government contested the claim.

24. The Government maintained that the applicant had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention.

25. The Court observes that it has already examined and rejected a similar objection in the case of *Karaosmanoğlu and Özden v. Turkey* (no. 4807/08, §§ 39-45, 17 June 2014). It sees no reason to depart from that finding.

26. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

27. In the present case, the applicant was placed in detention on remand on 19 November 2005 and his next appearance before a judge was on 21 March 2007 during the first hearing of the Istanbul Assize Court.

28. The Court reiterates that it has already examined a similar grievance in the case of *Erişen and Others v. Turkey* (no. 7067/06, § 53, 3 April 2012) and found a violation of Article 5 § 4. It has examined the present case and finds no particular circumstances which would require it to depart from its findings in the above-mentioned judgments.

29. There has therefore been a violation of Article 5 § 4 of the Convention under this head.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

30. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage and EUR 51,000 in respect of pecuniary damage.

31. The Government contested those claims.

32. 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.

B. Costs and expenses

33. The applicant also claimed EUR 4,760 for costs and expenses incurred before the Court.

34. The Government submitted that the claims for costs and fees were excessive and unsubstantiated.

35. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant lawyer submitted a receipt concerning the lawyer fee, a legal fee agreement, the Turkish Bar Association's list of recommended minimum fees and vouchers of postage in support of that claim. Having regard to these documents, the Court considers it reasonable to award the applicant EUR 1,000 under this head.

C. Default interest

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 under Article 5 § 4 of the Convention admissible and remainder of the application inadmissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 750 (seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the abovementioned three months until settlement simple interest shall be payable on the above amounts 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 10 July 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Paul Lemmens
Deputy Registrar	President