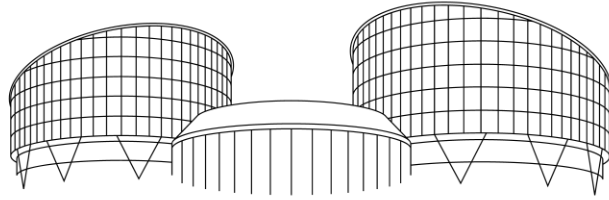

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ŞAHAP DOĞAN v. TURKEY

(Application no. 29361/07)

JUDGMENT

STRASBOURG

27 May 2010

FINAL

27/08/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Şahap Doğan v. Turkey**,**

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos, *judges,*
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 4 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 29361/07) 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 Şahap Doğan ("the applicant"), on 3 July 2007. The applicant was represented by Mr M. Filorinalı and Ms Y. Başara, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

2. On 21 October 2008 the applicant's representative requested that an interim measure be applied under Rule 39 of the Rules of Court to discontinue the applicant's pre-trial detention, that the respondent Government be notified of the introduction of the application in accordance with Rule 40 and that the case be given priority under Rule 41. On 23 October 2008 the President of the Second Section decided that the application should be given priority.

3. On 9 December 2008 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the applicant's right to be released pending trial under Article 5 § 3 of the Convention, his right to compensation under Article 5 § 5 of the Convention and his right to a fair hearing within a reasonable time under Article 6 § 1 of the Convention. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1974 and is currently detained in the Tekirdağ F-Type Prison pending the criminal proceedings against him.

5. On 19 June 1996 the applicant was taken into police custody on suspicion of membership of the PKK (the *Kurdistan Workers' Party*), an illegal organisation.

6. On 15 July 1996 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicant and seven other persons, accusing him of membership of the PKK (case no. 1996/276). On 2 December 1996 the public prosecutor filed a second bill of indictment, charging the applicant, along with sixteen other persons, under Article 125 of the former Criminal Code with carrying out activities with the aim of bringing about the secession of part of the national territory (case no. 1996/302).

7. On 10 April 1997 the Istanbul State Security Court decided to join the two cases against the applicant under case no. 1996/302.

8. On 13 June 2001 the Istanbul State Security Court convicted the applicant under Article 125 of the former Criminal Code and sentenced him to the death penalty.

9. On 12 February 2002 the Court of Cassation quashed the judgment of the Istanbul State Security Court.

10. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, State Security Courts were abolished. The case against the applicant was transferred to the Fourteenth Chamber of the Istanbul Assize Court.

11. On 12 April 2007 the applicant objected to his detention during the judicial proceedings and requested his release.

12. On 28 May 2007 the Ninth Chamber of the Istanbul Assize Court dismissed the applicant's objection, having regard to the nature of the offence in question, the existence of a strong suspicion that the applicant had committed the offence and that a heavy sentence would be imposed if he were to be found guilty. No hearing was held.

13. At a hearing held on 4 June 2008, the Fourteenth Chamber of the Istanbul Assize Court ordered the applicant's continued detention in view of the nature of the offence, the existence of a strong suspicion that he had committed the offence and the possibility that he would abscond if released.

14. In the meantime, between 5 May 2006 and 24 October 2008, the applicant's lawyers requested several extensions from the trial court to submit his defence.

15. According to the information submitted by the parties, the proceedings are still pending before the first-instance court and the applicant remains in pre-trial detention.

II. RELEVANT DOMESTIC LAW

A. Judicial review of pre-trial detention

16. A description of the relevant domestic law and practice prior to the entry into force of the new Code of Criminal Procedure (the "CCP"; Law no. 5271) on 1 June 2005 may be found in *Çobanoğlu and Budak v. Turkey* (no. 45977/99, §§ 29-31, 30 January 2007). The current practice under the new CCP is outlined in *Şayık and Others v. Turkey* (nos. 1966/07, 9965/07, 35245/07, 35250/07, 36561/07, 36591/07 and 40928/07, §§ 13-15, 8 December 2009).

B. Compensation for unlawful detention

17. The relevant domestic law and practice under Section 1 of Law no. 466 on the payment of compensation to persons unlawfully arrested or detained, which is now defunct, may be found in *Adırbelli and Others v. Turkey* (no. 20775/03, § 18, 2 December 2008).

18. The current practice may be found in Section 1 (d) of Article 141 of the new CCP, which provides:

> "Persons who; ...
>
> d) have been lawfully detained but not brought before a legal authority within a reasonable time and who have not been tried within such time,...
>
> during criminal investigation or prosecution may demand all pecuniary and non-pecuniary damages they sustained from the State."

19. Section 1 of Article 142 of the new CCP further provides:

> "Compensation may be demanded [from the State] within three months from the date of service of the final ... judgment and, in any case, within one year following the date on which the ... judgment becomes final."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

20. The applicant complained under Article 5 § 3 of the Convention that the length of his pre-trial detention had been excessive. He further maintained under Article 5 § 5 of the Convention that he had no right to compensation in domestic law for the alleged violation of Article 5 § 3 of the Convention.

A. Admissibility

21. The Government asked the Court to dismiss the complaint under Article 5 § 3 of the Convention for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. The Government maintained that the applicant had not objected to his continued remand either under Article 298 of the former CCP (Law no. 1412), or under Article 104 (2) of the new CCP. The Government further maintained that the applicant could not claim to be a victim of a violation of Article 5 § 3 of the Convention because the time spent by him on remand would eventually be deducted from his total sentence.

22. As regards the applicant's victim status, the Court notes that it has already examined similar submissions made by the respondent Government in other cases (see, for example, *Arı and Şen v. Turkey*, no. 33746/02, § 19, 2 October 2007). The Government have not submitted any arguments which could lead the Court to reach a different conclusion in the instant case. Accordingly, the Government's objection to the applicant's victim status must be rejected.

23. As regards the Government's preliminary objection concerning non-exhaustion of domestic remedies, the Court reiterates that it has already examined and rejected this objection in the context of the former CCP for being ineffective (see, in particular, *Koşti and Others v. Turkey*, no. 74321/01, §§ 19-24, 3 May 2007). The remedy indicated by the Government under the new CCP has similarly been examined in the case of *Şayık and Others* and found to be wanting for the time being (cited above, §§ 30-32). The Court notes that, despite these apparent shortcomings in the domestic law and the allegations of the Government to the contrary, the applicant in the present case has objected to his continued detention on at least one occasion. His objection, however, was rejected by the Istanbul Assize Court in circumstances which lacked the guarantees appropriate to the kind of deprivation of liberty in question, such as a hearing (see paragraph 12 above). Consequently, the Court rejects the Government's preliminary objection under this head.

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

B. Merits

1. *Article 5 § 3 of the Convention*

25. The Government maintained that the applicant's detention was based on the existence of reasonable grounds of suspicion of him having committed an offence, and that his detention had been reviewed periodically by the competent authority, with special diligence, in accordance with the requirements laid down by the applicable law at the relevant time. They pointed out that the offence with which the applicant was charged was of a serious nature, and that his continued remand in custody was necessary to prevent crime and to preserve public order.

26. The Court notes that, after deducting the period when the applicant was detained after conviction under Article 5 § 1 (a) of the Convention (namely the period between 13 June 2001 and 12 February 2002) from the total time that he has been held in pre-trial detention, the period to be taken into consideration in the instant case is already over twelve years and ten months, and still continuing (see *Solmaz v. Turkey*, no. 27561/02, §§ 36-37, ECHR 2007-II (extracts)).

27. The Court has frequently found violations of Article 5 § 3 of the Convention in cases disclosing comparable lengthy periods of pre-trial detention (see, for example, *Tutar v. Turkey*, no. 11798/03, § 20, 10 October 2006; *Cahit Demirel v. Turkey*, no. 18623/03, § 28, 7 July 2009). Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court finds that in the instant case the length of the applicant's pre-trial detention was excessive.

28. There has accordingly been a violation of Article 5 § 3 of the Convention.

2. *Article 5 § 5 of the Convention*

29. The Government argued that Turkish law afforded the applicant an enforceable right to compensation, contrary to his allegations. They maintained in this regard that the applicant could have sought compensation under the now defunct Law no. 466 pertaining to the payment of compensation to persons unlawfully arrested or detained, or under Article 141 of the new CCP following its entry into force on 1 June 2005.

30. The Court reiterates that paragraph 5 of Article 5 requires a remedy in compensation for a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (*Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A). This right to compensation presupposes that a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court.

31. In this connection, the Court notes that it has found that the applicant's right to be released pending trial was infringed (see paragraph 28 above) in the present case. It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether Turkish law afforded the applicant an enforceable right to compensation for the breach of Article 5 in this case.

32. The Court notes in this regard that it has previously held that Law no. 466 does not provide an enforceable right to compensation for persons in the applicant's position (see, for instance, *Çiçekler v. Turkey*, no. 14899/03, § 64, 22 December 2005; *Sağnak v. Turkey*, no. 45465/04, § 43, 13 October 2009). The Court finds no particular circumstances in the instant case which would require it to depart from such precedents.

33. As for the remedy envisaged under Article 141 § 1(d) of the new CCP, the Court notes that this provision introduces a mechanism whereby a person who has been lawfully detained but whose pre-trial detention exceeds a reasonable time may demand compensation from the State. The Court also notes, however, that according to Article 142 § 1 of the same Code, such demand may only be made after the relevant criminal proceedings have come to an end. This remedy is therefore not available in circumstances where the domestic proceedings are still pending, as in the instant case (see *Kürüm v. Turkey*, no. 56493/07, §§ 18-21, 26 January 2010). It follows that the new CCP also fails to provide an enforceable right to compensation for the applicant's deprivation of liberty in breach of Article 5 § 3 of the Convention, as required by Article 5 § 5.

34. The Court therefore declares this complaint admissible and concludes that there has been a violation of Article 5 § 5 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

35. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings against him had not been concluded within a reasonable time.

36. The Court finds this complaint admissible, no ground for declaring it inadmissible having been established.

37. As regards the merits, the Government submitted that the length of the proceedings could not be considered to be unreasonable in view of the complexity of the case, the number of the accused and the nature of the offence with which the applicant was charged. The Government also argued

that the conduct of the applicant's lawyer, who had failed to submit the applicant's defence in a timely manner, had contributed to the prolongation of the proceedings.

38. The Court notes that the proceedings in question commenced on 19 June 1996 when the applicant was taken into police custody, and according to the information in the case file, they are still pending before the first-instance court. They have thus already lasted over thirteen years and ten months before two levels of jurisdiction.

39. The Court has frequently found violations of Article 6 § 1 of the Convention in applications raising issues similar to the one in the present case (see *Bahçeli v. Turkey*, no. 35257/04, § 26, 6 October 2009; *Er v. Turkey*, no. 21377/04, § 23, 27 October 2009). Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. The Court particularly notes that, whilst the delay in the submission of the applicant's defence statement might have somewhat prolonged the proceedings, neither the applicant's conduct nor the complexity of the case could justify their entire length. Having regard to its case-law on the subject, the Court therefore considers that the length of the proceedings was excessive and failed to meet the “reasonable time” requirement. There has accordingly been a breach of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damages and costs and expenses

40. The applicant claimed 42,500 euros (EUR) in respect of pecuniary damage and EUR 37,500 for non-pecuniary damage.

41. The Government contested these claims.

42. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it considers that the applicant must have sustained some non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 13,800 under that head.

43. The applicant also claimed EUR 5,500 in respect of cost and expenses incurred before the Court. In this connection, he submitted documentation indicating the time spent by his legal representative on the application, as well as a table of costs and expenditure. He did not, however, submit any invoices regarding the expenses.

44. The Government contested this claim.

45. 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 were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 1,000 for his costs and expenses.

46. Furthermore, according to the information submitted by the parties, the criminal proceedings against the applicant are still pending and the applicant is still detained. In these circumstances, the Court considers that an appropriate means for putting an end to the violation which it has found would be to conclude the criminal proceedings in issue as speedily as possible, while taking into account the requirements of the proper administration of justice, and to release the applicant pending the outcome of these proceedings (see, *mutatis mutandis*, *Yakışan v. Turkey*, no. 11339/03, § 49, 6 March 2007; *Batmaz v. Turkey* (dec.), no. 34997/06, 1 April 2008).

B. Default interest

47. The Court considers it appropriate that the default interest 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 remainder of the application admissible;

2. *Holds* that there has been a violation of Articles 5 §§ 3 and 5 and 6 § 1 of the Convention;

3. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into Turkish liras at the rate applicable at the date of settlement:
(i) EUR 13,800 (thirteen thousand eight hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
(ii) EUR 1,000 (one thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
(b) that from the expiry of the above-mentioned 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 27 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President