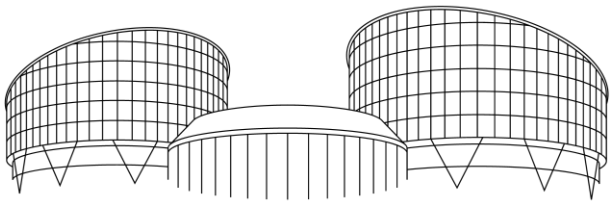

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF SERDAR GÜZEL v. TURKEY

(Application no. 39414/06)

JUDGMENT

STRASBOURG

15 March 2011

FINAL

15/06/2011

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

In the case of Serdar Güzel v. Turkey**,**

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

Françoise Tulkens, *President,*
Danutė Jočienė,
David Thór Björgvinsson,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*
and Françoise Elens-Passos, *Deputy Section Registrar,*

Having deliberated in private on 22 February 2011,

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

PROCEDURE

1. The case originated in an application (no. 39414/06) 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 Serdar Güzel ("the applicant"), on 26 September 2006.

2. The applicant was represented by Mr M. A. Kırdök, Mrs M. Kırdök and Mrs M. Hanbayat, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 11 May 2009 the President of the Second Section decided to give notice of the application to the Government. It was also decided that the admissibility and merits of the application would be examined together (former Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's arrest and detention in police custody and the medical reports issued in respect of him

4. On 20 February 1999 the applicant was arrested by officers from the anti-terrorist branch of the Istanbul Police Headquarters on suspicion of

membership of the MLKP (Marxist-Leninist Communist Party), an illegal organisation; he was arrested in a restaurant along with a woman, G.B. According to the arrest report signed by four police officers, the applicant and G.B. attempted to escape, following which the officers were obliged to use force in order to effect their arrest. Thereupon, the applicant and G.B. were found to possess false identity cards.

5. On the same day the applicant was medically examined by a doctor who noted that he was suffering from pain and restricted movement in his shoulders.

6. The applicant was subsequently placed in the Istanbul Police Headquarters. He was allegedly ill-treated there. In particular, he claimed to have been subjected to hanging, to have had his testicles squeezed and to have been forced to lie in ice covered by a wet blanket.

7. On 25 February 1999, at 3.10 p.m., the applicant was again examined by a doctor, who noted the following:

> "There is a bruise of 2 cm. on the right ..."[1]

8. On 27 February 1999, at 12 p.m., the applicant was examined by a doctor from the Istanbul branch of the Forensic Medicine Institute, who observed the following on the applicant's body:

> "An ecchymosis of yellow-green colour of 4 x 3 cm under the left eye; a haematoma of 3 x 2 cm on the exterior of the right eyebrow; a scabbed wound of 1 cm on the vertex; scabbed grazes on the exterior of the left wrist; an ecchymosis of yellow colour of 10 x 10 cm and a hyperaemia of 4 x 3 cm in the right armpit; sensitivity in the right testicle..."

9. On the same day the applicant was taken before the public prosecutor and a single judge at the Istanbul State Security Court. On both occasions the applicant maintained that he had been subjected to torture while in police custody. He submitted that he had been subjected to hanging, that his testicles had been squeezed and that he had been forced to lie in ice covered by a wet blanket.

10. On the same day the judge at the State Security Court ordered the applicant's pre-trial detention. The applicant was subsequently placed in Ümraniye prison.

B. Criminal proceedings against the police officers

11. On 6 April 1999 the applicant lodged a criminal complaint with the Fatih Public Prosecutor's Office against the police officers who had allegedly inflicted the ill-treatment on him. He stated that he had been beaten, hung by the arms, immersed in cold water and forced to lie in ice. Furthermore, his testicles had been squeezed. Stating that he would

1. The medical report submitted to the Court is partially illegible.

recognise the police officers who had been responsible for his ill-treatment, the applicant requested that an investigation be initiated into his allegations.

12. On 31 December 2002 the Fatih Public Prosecutor issued a decision not to prosecute anyone in relation to the applicant's allegations. He noted in the decision that the applicant had refused to go to the public prosecutor's office from prison to make statements and that the police officers had denied the veracity of the allegations against them.

13. On an unspecified date the decision of 31 December 2002 was quashed.

14. On 1 August 2003 the Fatih Public Prosecutor filed a bill of indictment with the Fatih Criminal Court against four police officers from the anti-terrorist branch of the Istanbul Police Headquarters, charging them with ill-treatment under Article 245 of the former Criminal Code.

15. On 2 April 2004 the Fatih Criminal Court issued a decision based on lack of jurisdiction and transferred the case to the Istanbul Assize Court because the charges of torture should have been brought under Article 243 of the former Criminal Code.

16. On 27 September 2004 the applicant joined the case against the police officers as a civil party.

17. Between 27 September 2004 and 26 July 2006, the First Chamber of the Istanbul Assize Court postponed the hearings as some of the accused police officers could not be summoned.

18. On various dates the accused police officers and the applicant made statements before different courts at the request of the Istanbul Assize Court. These statements were then sent to that court.

19. On 13 December 2006 the Istanbul Assize Court held that the criminal proceedings against the police officers should be discontinued on the ground that the prosecution was time-barred (*zamanaşımı*).

20. On 27 February 2008 the Court of Cassation upheld the judgment of 13 December 2006.

C. Criminal proceedings against the applicant

21. On 27 August 1999 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicant and eleven other persons. The applicant was charged with attempting to undermine the constitutional order, an offence proscribed by Article 146 § 1 of the former Criminal Code.

22. On 11 November 1999 the Istanbul State Security Court held the first hearing on the merits.

23. Pursuant to Law no. 5190 of 16 June 2004 abolishing State Security Courts, published in the Official Gazette on 30 June 2004, the case against the applicant was transferred to the Istanbul Assize Court.

24. According to the information in the case file, the applicant was released from pre-trial detention on 4 January 2011. However, the case against the applicant is still pending before the Thirteenth Chamber of the Istanbul Assize Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. A description of the relevant domestic law at the relevant time may be found in *Batı and Others v. Turkey* (nos. 33097/06 and 57834/00, §§ 95-99, ECHR 2004-IV), and *Barış v. Turkey*, (no. 26170/03, § 14, 31 March 2009)

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 6 OF THE CONVENTION

26. The applicant complained under Articles 3 and 13 of the Convention that he had been subjected to torture while in police custody, and that the authorities had failed to punish those responsible for his ill-treatment. He further contended under Article 6 § 1 of the Convention that the case against the police officers had not been concluded within a reasonable time. Relying on Article 6 § 3 of the Convention, he further maintained that he had not been heard in person by the First Chamber of the Istanbul Assize Court and that he had not been able to question the accused police officers before that court.

27. The Court considers that these complaints should be examined from the standpoint of Article 3 alone.

A. Admissibility

28. The Government argued that the applicant had failed to exhaust available domestic remedies within the meaning of Article 35 § 1 of the Convention. In this connection, they submitted that the applicant had not availed himself of the civil and administrative law remedies which could have provided reparation for the harm which he had allegedly sustained. The Government further submitted that the applicant had failed to comply with the six-month time-limit with regard to his complaints under Articles 3 and 13. They contended that the applicant should have lodged these complaints within six months of his detention in police custody.

29. The applicant disputed the Government's arguments.

30. The Court reiterates that it has already examined and dismissed the Government's preliminary objections in similar cases (see, for example, *Dur v. Turkey*, no. 34027/03, § 26, 18 September 2008; *Eser Ceylan v. Turkey*, no. 14166/02, § 23, 13 December 2007; and *Arif Çelebi and Others v. Turkey*, nos. 3076/05 and 26739/05, § 53, 6 April 2010). It finds no particular circumstances in the instant case requiring it to depart from its findings in the above-mentioned applications. It therefore rejects the Government's preliminary objection.

31. 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. The responsibility of the respondent State in the light of the substantive aspect of Article 3 of the Convention

32. The Government submitted that the injuries noted in the applicant's medical reports were the result of force used by the police during his arrest which was proportionate in the circumstances.

33. The applicant alleged that he had been subjected to ill-treatment while in police custody. In particular, he had been beaten and subjected to hanging and his testicles had been squeezed. He relied on the medical reports dated 25 and 27 February 1999 in support of his allegations.

34. The Court reiterates the basic principles laid down in its judgments concerning the prohibition of ill-treatment under Article 3 of the Convention (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Çelik and İmret v. Turkey*, no. 44093/98, § 39, 26 October 2004; *Hacı Özen v. Turkey*, no. 46286/99, §§ 46 and 47, 12 April 2007; and *Demirbaş and Others v. Turkey*, nos. 50973/06, 8672/07 and 8722/07, §§ 55 and 56, 9 December 2008). It will examine the responsibility of the respondent State under the substantive limb of Article 3 in the light of these principles.

35. In the instant case, the Court observes that the medical report drawn up on 27 February 1999 showed that the applicant had sustained injuries to various parts of his person, notably to his head, eyes, right armpit and right testicle. The Court notes that the parties did not dispute the findings of the medical report of 27 February 1999. However, they put forward different versions of how the applicant had actually sustained them. The applicant alleged that he had been ill-treated while in custody, whereas the Government alleged that the injuries had occurred during his arrest.

36. The Court observes that after his arrest the applicant was examined by a doctor who noted that the applicant had suffered injuries to his

shoulders. The Court considers that if the applicant had sustained the injuries noted in the medical report of 27 February 1999 during the arrest, as alleged by the Government, those injuries should have appeared in the report drawn up on 20 February 1999. The Court further notes that the findings of the medical report are consistent with the types of ill-treatment alleged by the applicant (see paragraph 33 above). The Court is therefore not satisfied with the Government's explanations as to how the applicant sustained the injuries found on his body (see *Getiren v. Turkey*, no. 10301/03, § 74, 22 July 2008).

37. The Court reiterates that States are responsible for the welfare of all persons held in detention. Such persons are in a vulnerable situation and the authorities have a duty to protect them (see *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, § 30, 20 July 2004). Bearing in mind the authorities' obligation to account for injuries caused to persons under their control in custody, and in the absence of a convincing explanation by the Government in the instant case, the Court considers that the injuries recorded in the medical report of 27 February 1999 were the result of treatment for which the Government bear responsibility. The Court further observes that the respondent Government failed to make any submission as regards the nature and degree of the ill-treatment. In the absence of such an explanation, and having regard to the extent of the injuries noted in the medical report of 27 February 1999, as well as to the strong inferences that can be drawn from the evidence that the ill-treatment was inflicted in order to obtain information from the applicant about his suspected connection with the MLKP, the Court is led to conclude that the ill-treatment involved very serious and cruel suffering that can only be characterised as torture (see, among others, *Salman v. Turkey* [GC], no. 21986/93, § 115, ECHR 2000-VII; *Aksoy v. Turkey*, 18 December 1996, § 64, *Reports of Judgments and Decisions* 1996-VI; *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 47, 2 November 2004; and *Koçak v. Turkey*, no. 32581/96, § 48, 3 May 2007).

38. There has accordingly been a violation of Article 3 of the Convention under its substantive limb.

2. The responsibility of the respondent State in the light of the procedural aspect of Article 3 of the Convention

39. The Government contended that the applicant's allegations had been subjected to an effective examination since an investigation had been initiated promptly. They contended that the mere fact that the outcome of the proceedings had not been favourable for the applicant did not mean that the remedy in question had been inadequate.

40. The applicant maintained that the criminal proceedings brought against the police officers had been ineffective because they had been terminated for being time-barred and he had not been heard in person by the first-instance court.

41. The Court reiterates that Article 3 of the Convention also requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion" (see, in particular, *Ay v. Turkey*, no. 30951/96, §§ 59-60, 22 March 2005). When the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirement of the prohibition of ill-treatment. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow grave attacks on physical and moral integrity to go unpunished (see *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts)).

42. In this connection, the Court reaffirms that when an agent of the State is accused of crimes involving torture or ill-treatment, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible. It further reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and trial, and should be dismissed if convicted (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

43. The Court has found above that the respondent State was responsible, under Article 3 of the Convention, for the injuries sustained by the applicant. An effective investigation was therefore required.

44. The Court notes in the instant case that the case against the police officers was dropped on 13 December 2006 as the statutory time-limit had elapsed. That judgment became final on 27 February 2008. Furthermore, there is no indication in the case file that the accused police officers were suspended from duty during this time. The Court observes that the proceedings in question have not produced any result because the substantial delays resulted in the application of the statutory limitations in domestic law (see *Abdülsamet Yaman v. Turkey*, cited above, § 59). It finds that the domestic authorities cannot be considered to have acted with sufficient promptness or diligence, which created virtual impunity for the main perpetrators of the acts of violence, despite the evidence against them (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 147, ECHR 2004-IV).

45. In the light of the foregoing, the Court finds that the criminal proceedings brought against the police officers were inadequate and therefore in breach of the State's procedural obligations under Article 3 of the Convention.

46. It follows that there has been a violation of Article 3 under its procedural limb.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

47. The applicant complained under Article 13 of the Convention that the national authorities had failed to punish those responsible for his ill-treatment, in connection with his allegations under Article 3, and that, as a result, he had not had an effective remedy whereby he could claim compensation.

48. The Government contested that argument. They submitted that the applicant could have sought compensation pursuant to Article 141 of the Code of Criminal Procedure (Law no. 5271).

49. The Court observes that according to Article 141 (a) and (b) persons who are unlawfully arrested or detained and who are not brought before a judge within the statutory period for which they can be held in custody may seek compensation from the State for the pecuniary and non-pecuniary damage they have sustained. The remedy referred to by the Government can therefore not be considered to be an effective remedy for the damage sustained by the applicant as a result of the ill-treatment he suffered at the hands of the police officers.

50. The Court further refers to its findings above (see paragraphs 28-31) and reiterates its conclusion in a number of previous cases that the civil remedies were inoperative in such situations as they did not enable the applicants to obtain compensation for the alleged violations (see, among others, *Batı and Others*, cited above, § 148; *Müdet Kömürcü v. Turkey (no. 2)*, no. 40160/05, § 36, 21 July 2009; and *Karagöz and Others v. Turkey*, nos. 14352/05, 38484/05 and 38513/05, § 59, 13 July 2010). The Court finds no reason in the instant case to depart from its earlier conclusion.

51. There has accordingly been a violation of Article 13 in conjunction with Article 3 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLES 5 § 3 and 6 § 1 OF THE CONVENTION

52. The applicant complained that his detention during the judicial proceedings had exceeded the "reasonable time" requirement of Article 5 § 3 of the Convention. He further alleged under Article 6 § 1 of the Convention that the length of the criminal proceedings brought against him was excessive.

A. Admissibility

53. 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

54. The Government maintained that the length of the applicant's pre-trial detention was reasonable. In particular, they submitted that the seriousness of the crime and the risk of escape, together with the special circumstances and the complexity of the case, had justified the applicant's continued detention pending trial.

55. The applicant maintained his allegations.

56. The Court observes that in the instant case the detention began on 20 February 1999 when the applicant was taken into police custody, and ended on 4 January 2011. His pre-trial detention thus lasted eleven years, ten months and seventeen days.

57. The Court has frequently found violations of Article 5 § 3 of the Convention in cases raising similar issues to those in the present application (see, for example, *İnan and Others v. Turkey*, nos. 19637/05, 43197/06 and 39164/07, §§ 39 and 40, 13 October 2009). Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing 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 the length of the applicant's detention pending the criminal proceedings against him has been excessive and contravenes Article 5 § 3 of the Convention.

There has accordingly been a violation of this provision.

2. Article 6 § 1 of the Convention

58. The Government maintained that, in the circumstances of the present case, the length of the criminal proceedings could not be considered to have been unreasonable. In this connection, they referred to the complexity of the case. The Government further submitted that the applicant and his representative had contributed to the length of the proceedings by not attending a number of hearings. Finally, they maintained that there had been no delays in the proceedings which could be attributed to the authorities.

59. The applicant maintained his allegation.

60. The period to be taken into consideration is approximately twelve years at one level of jurisdiction. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see, for example, *İnan and Others*, cited above, §§ 46 and 47). In the present case, the Court observes that neither the

complexity of the case nor the alleged conduct of the applicant is sufficient to explain the delays in the conduct of the proceedings. The Court therefore finds no reason to depart from the conclusions of the case cited above.

There has therefore been a breach of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage, costs and expenses

62. The applicant claimed 45,000 euros (EUR) in respect of non-pecuniary damage.

63. The Government contested this claim.

64. The Court considers that the applicant must have suffered non-pecuniary damage which cannot be compensated solely by the finding of violations. Having regard to the gravity of the violations and to equitable considerations, it awards the applicant his claim in full.

65. Furthermore, according to the information submitted by the parties, the criminal proceedings against the applicant are still pending. 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 (see *Yakışan v. Turkey*, no. 11339/03, § 49, 6 March 2007).

66. The applicant also claimed EUR 8,000 for the costs and expenses incurred before the domestic courts and the Court. In support of his claims the applicant submitted a fee agreement and a schedule of costs, which indicate eighty hours of legal work carried out by his representative.

67. The Government contested this claim.

68. 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, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,500 under all heads.

B. Default interest

69. 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 application admissible;

2. *Holds* that there has been a violation of Article 3 of the Convention under its substantive limb;

3. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;

4. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 3 of the Convention;

5. *Holds* that there has been a violation of Article 5 § 3 of the Convention on account of the length of the applicant's pre-trial detention;

6. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the proceedings brought against the applicant;

7. *Holds*

(a) that the respondent State is to pay the applicant, within three months of 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 on the date of settlement:

(i) EUR 45,000 (forty-five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(ii) EUR 3,500 (three thousand five hundred 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;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Francoise Elens-Passos Deputy Registrar	Françoise Tulkens President