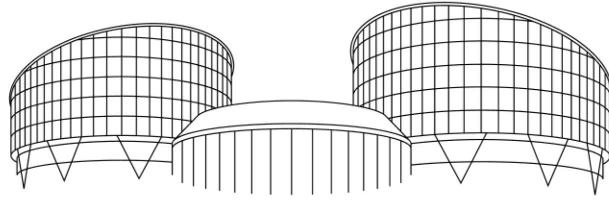

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ARAZ v. TURKEY

(Application no. 44319/04)

JUDGMENT

STRASBOURG

20 May 2010

FINAL

20/08/2010

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

In the case of Araz v. Turkey**,**

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

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

Having deliberated in private on 29 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 44319/04) 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 İbrahim Araz ("the applicant"), on 8 November 2004.

2. 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.

3. On 31 March 2009 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 1981 and lives in Istanbul.

5. On 3 July 1999 the applicant, who was seventeen years old at the material time, was taken into police custody by police officers from the anti-terrorist branch of the Istanbul police headquarters.

6. On 12 July 1999 the public prosecutor at the Istanbul State Security Court filed a bill of indictment, charging the applicant under Article 168 § 2 of the former Criminal Code with membership of an illegal armed organisation.

7. On 5 November 2001 the Istanbul State Security Court found the applicant guilty as charged, along with ten other persons.

8. On 25 June 2002 the Court of Cassation quashed the judgment of the first-instance court. The case was thus remitted to the Istanbul State Security Court and registered under case no. 2002/220.

9. On 25 September 2003 the Istanbul State Security Court decided to separate the case against the applicant from case no. 2002/220, since he was under the age of eighteen at the time of committing the alleged offences. The Istanbul State Security Court accordingly declared its lack of jurisdiction and referred the case to the Istanbul Juvenile Court.

10. On 21 October 2003 the Istanbul Juvenile Court decided that it would be to the applicant's benefit to be tried alongside the other defendants before the Istanbul State Security Court. The Istanbul Juvenile Court accordingly declared non-jurisdiction and referred the case back to the Istanbul State Security Court.

11. On 10 December 2003 the Istanbul State Security Court accepted the Istanbul Juvenile Court's decision and re-joined the applicant's case to no. 2002/220.

12. On 11 May 2004 the Istanbul State Security Court ordered the applicant's release pending trial.

13. 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 Istanbul Assize Court which, on 27 February 2007, convicted him.

14. According to the information in the case file, the case is currently pending before the Court of Cassation.

II. RELEVANT DOMESTIC LAW

15. Section 1 (d) of Article 141 of the new Code of Criminal Procedure (CCP) (Law no. 5271), which was adopted on 4 December 2004 and entered into force on 1 June 2005, 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.”

16. Section 1 of Article 142 of the same Law 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

17. 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

18. The Government asked the Court to dismiss the complaint under Article 5 § 5 of the Convention for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They submitted that the applicant could have sought compensation pursuant to Article 141 § 1 (d) of the new CCP.

19. The Court notes that the Government's preliminary objection is inextricably linked to the merits of the applicant's complaint under Article 5 § 5 of the Convention. It follows that this issue should be joined to the merits.

20. The Court considers 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

21. The Government maintained that the length of the applicant's pre-trial detention had been reasonable. In particular, they submitted that the

seriousness of the crime, coupled with the risk of escape or the committal of a further crime had justified his continued detention pending trial.

22. 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 5 November 2001 and 25 June 2002, from the total time that he was remanded in detention pending trial, the period to be taken into consideration in the instant case is over four years and two months (see *Solmaz v. Turkey*, no. 27561/02, §§ 36-37, ECHR 2007-II (extracts)).

23. 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, *Gökçe and Demirel v. Turkey*, no. 51839/99, § 45, 22 June 2006; *Bayam v. Turkey*, no. 26896/02, § 20, 31 July 2007).

24. 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.

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

2. Article 5 § 5 of the Convention

26. 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.

27. In this connection, the Court notes that it has found that the applicant's right to be released pending trial was infringed (see paragraph 25 above) in the present case. It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether or not Turkish law afforded the applicant an enforceable right to compensation for the breach of Article 5 in this case.

28. The Court notes, as indicated by the Government, that Article 141 § 1(d) of the new CCP 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[1]).

29. It follows that the new CCP does not provide for 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.

30. The Court therefore rejects the Government's preliminary objection 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

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

32. The Government considered that the domestic courts' handling of the applicant's case had complied with the "reasonable time" requirement.

33. The Court considers that this complaint 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.

34. As regards the merits, the Court notes that the proceedings in question began on 3 July 1999 and, according to the information in the case file, are still pending before the Court of Cassation. They have thus already lasted over ten years and eight months before two levels of jurisdiction.

35. 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 (*Hasan Döner v. Turkey*, no. 53546/99, § 54, 20 November 2007; *Uysal and Osal v. Turkey*, no. 1206/03, § 33, 13 December 2007; *Can and Gümüş v. Turkey*, nos. 16777/06 and 2090/07, § 19, 31 March 2009). It finds no reason to reach a different conclusion in the present circumstances. Consequently, there has been a breach of Article 6 § 1 of the Convention on account of the excessive length of the criminal proceedings against the applicant.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damages and costs and expenses

36. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,900 for his costs and expenses before the Court, including various translation expenses. In this latter connection he

1. This judgment is not yet final.

submitted a time sheet indicating eighteen and a half hours of legal work carried out by his legal representative.

37. The Government contested these claims.

38. The Court accepts that the applicant must have suffered non-pecuniary damage which cannot be sufficiently compensated by the finding of a violation alone. Ruling on an equitable basis, the Court awards the applicant EUR 6,900 in respect of non-pecuniary damage.

39. As for costs and expenses, the Court reiterates that 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 limited documentation in its possession and the above criteria, the Court finds it reasonable to award to the applicant the sum of EUR 1,000 for his costs and expenses.

40. 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, *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

41. 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 have been violations of Article 5 §§ 3 and 5 and Article 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 6,900 (six thousand nine hundred 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 chargeable to the applicant, for costs and expenses;

(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 20 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President