



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application Number: 2013/8694

Date of Decision: 23/7/2014

FIRST SECTION

DECISION

President	: Serruh KALELİ
Members	: Nuri NECİPOĞLU Hicabi DURSUN Erdal TERCAN Zühtü ARSLAN
Rapporteur	: Şükrü DURMUŞ
Applicant	: Yaşar KAYA
Counsel	: Att. Cavit ÖZTÜRK Att. Mesut YILDIZ

I. SUBJECT OF APPLICATION

1. The applicant has claimed that articles 19 and 38 of the Constitution have been violated, alleging that the continuation of his detention was decided in a way to exceed the maximum duration which has been envisaged in the code and without the demonstration of material facts.

II. APPLICATION PROCESS

2. The application was lodged at the Constitutional Court on the date of 2/12/2013. As a result of the preliminary administrative examination of the petition and annexes thereof, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

3. It was decided on the date of 15/4/2014 by the Third Commission of the First Section that the admissibility examination be carried out by the Section, that the file be sent to the Section as per clause (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. The President of the Section on the date of 29/5/2014, has decided that the examination of admissibility and merits be carried out together.

5. The incidents and facts, which are the subject matter of the application were notified to the Ministry of Justice on the date of 29/5/2014. The Ministry of Justice, on the date of 16/4/2013, has notified that it deemed it not necessary to present opinions concerning the application with a reference to its previous opinions.

III. FACTS AND CASES

A. Facts

6. The facts in the petition of application are as follows:

7. The applicant has been taken under custody within the scope of solicitation to murder on the date of 16/9/2008 and detained upon the decision of the 2nd Criminal Court of Peace of Kartal dated 20/9/2008 and no. 2008/278.

8. The case that was lodged with the indictment of the Office of the Chief Prosecutor of Kartal dated 26/12/2008 and no. 2008/677 regarding the applicant and other suspects for crimes of deliberate murder and objection to the Code No. 6136 has been carried out within the file No. M.2009/1 of the 1st Assize Court of Kartal.

9. The 1st Assize Court of Kartal, on the date of 7/1/2010, has decided that the file no. M.2009/424 be conjoined with the file no. M.2009/1 of the Court and that the trial be conducted on the file M.2009/1.

10. The 1st Assize Court of Kartal has ruled with the decision dated 25/3/2010 and No. M.2009/1, D.2010/75 that the applicant be sentenced to 38 years and 4 months of imprisonment for crimes of deliberate murder. Upon appeal, the 1st Criminal Chamber of the Supreme Court of Appeals with the writ dated 19/4/2011 has decided for the reversal of the judgment with the justification that *"neither a positive not a negative decision was made on the matter although a request for participation was made"*.

11. Following the reversal, with the decision dated 23/11/2011 and No. M.2009/1, D.2011/396 of the 1st Assize Court of Kartal it was decided that the applicant be sentenced to 38 years and 4 months of imprisonment for crimes of deliberate murder and de jure detention was ruled. With the writ dated 2/4/2013 following the appeal examination the 1st Criminal Chamber of the Supreme Court of Appeals has reversed such judgment with the justification *"that, since the legal statuses of the accused had to be evaluated whereby the evidence had to be assessed conjointly with a consideration for the outcome of the joinder of the two files for there were a legal and actual link between the Merit file 2012/77 of the 3rd Assize Court of Kartal and the file concerned, which was not observed."*

12. In the retrial that took place the 1st Assize Court of Istanbul Anadolu (the 1st Assize Court of Kartal) has decided, with its decisions of joinder dated 21/5/2013 and No. M.2013/180, D.2013/270 and dated 13/5/2013 and No. M.2013/173, D.2013/245, that the case be joined with the file No. M.2012/77 of the 7th Assize Court of Istanbul Anadolu. Upon the decision dated 23/5/2013 and No. M.2012/77, D.2013/95 of the 7th Assize Court of Istanbul Anadolu concerning the conduct of the trial through the file No. M.2013/173 of the 1st Assize Court of Istanbul Anadolu, the file has been sent to the 5th Criminal Chamber of the Supreme Court of Appeals for the determination of the competent court. The 5th Criminal Chamber of the Supreme Court of Appeals has decided, on the date of 8/7/2013 that *"...the decision No. Merits 2013/173 and Decision 2013/245 concerning the joinder of the 1st Assize Court of Istanbul Anadolu be LIFTED, that the case be carried out through the file of the 1st Assize Court of Istanbul Anadolu."*

13. The objection of the applicant against the decision concerning the continuation of his detention of the 1st Assize Court of Istanbul Anadolu was dismissed with the decision dated 24/10/2013 and miscellaneous action No. 2013/1969 of the 2nd Assize Court of Istanbul Anadolu. The decision of dismissal was notified to the applicant on the date of 11/11/2013.

14. The 1st Assize Court of Istanbul has, on the date of 9/4/2014, decided that the file about the applicant be separated as a result of the rejection of the bench of the court, announced its judgment concerning other accused persons.

15. The case about the applicant is ongoing in the file M.2014/188 of the 1st Assize Court of Istanbul Anadolu.

16. The applicant lodged an individual application on 2/12/2013.

B. Relevant Law

17. Articles 81 and 38 of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 are as follows:

18. Article 100 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 is as follows:

"Article 100 - (1) A decision of arrest may be made about the suspect or accused in the event of the presence of facts indicating the existence of strong suspicion of a crime and the presence of a ground for detention. A decision of detention cannot be made in the event that the gravity of the case not be proportionate to the anticipated penalty to be given or the security measure.

(2) Grounds for detention can be considered to exist in the following circumstances:

a) If there are concrete facts indicating that the suspect or accused will escape and arising suspicion towards the suspect or accused escaping or hiding.

b) If the suspect or accused's behaviors give rise to strong suspicion on the matters of:

1. Destruction, concealment or alteration of evidence,

2. Attempting to exert pressure on the witness, aggrieved or others.

If strong suspicion is established on such issues.

(3) Grounds for arrest can be considered to exist in the presence of grounds for strong suspicion that the crimes below have been committed:

a) The following crimes stipulated in Turkish Criminal Code numbered 5237 and dated 26.9.2004;

...

2. Willful murder (Articles 81, 82, 83)

...

(4) (Amended: 2/7/2012- art. 6352/96) A decision of detention cannot be made for crimes requiring only a judicial fine or the upper limit of which is not more than two years.

19. Paragraph (2) of article 101 of the same Code is as follows:

(2) (Amended: 2/7/2012- art. 6352/97) *In the decisions pertaining to detention, continuation of detention or overruling the motion for release on said matter, evidence pointing towards;*

- a) *Strong suspicion of crime,*
- b) *The presence of grounds for detention,*
- c) *The fact that the measure of detention is proportionate,*

shall be explicitly shown by being justified with concrete facts. The content of the decision shall be notified to the suspect or accused orally, also a copy thereof shall be given thereto in writing and said matter shall be stated in the decision.

20. Paragraph (2) of article 102 of the same Code is as follows:

"The duration of detention in cases falling under the jurisdiction of the assize court shall be two years at the most. The said duration may, in cases of vis majors, be extended by showing the justifications thereof; the duration of extension cannot exceed three years in total."

IV. EXAMINATION AND JUSTIFICATION

21. The individual application of the applicant dated 2/12/2013 and numbered 2013/8694 was examined during the session held by the court on 23/7/2014 and the following were ordered and adjudged:

A. Claims of the applicant

22. Indicating that the continuation of his detention was decided in a way to exceed the maximum duration that has been envisaged in the code and without the demonstration of material facts, the applicant has claimed that article 19 of the Constitution was violated and requested that it be decided that his release was required.

B. Evaluation

1. In Terms of Admissibility

a. The Claim that the Legal Duration of Detention has been Exceeded

23. The applicant claimed that his detention was not legal for the duration of his detention has exceeded the duration that has been envisaged in the code.

24. The complaint of the applicant regarding the excess of the legal duration for detention has to be evaluated within the perspective of paragraph three of article 19 of the Constitution.

25. Article 19 of the Constitution is as follows:

"Everyone has the right to personal liberty and security.

The form and conditions of which have been shown in the Code:

...

Individuals against whom there is strong indication of delinquency can only be detained through a decision by a judge in order to prevent their escape, prevent the destruction or manipulation of evidence. Arrest of a person without a decision by a judge may be executed only when a person is caught in flagrante delicto or in cases where delay is likely to thwart the course of justice; the conditions for such acts shall be defined by law.

...

Detained individuals have the right to request for being tried within a reasonable time and being released during investigation or prosecution. Release can be linked to a guarantee in order to ensure that the relevant individual is present at the court during trial or that the sentence is executed.

...”

26. In article 19 of the Constitution the right to liberty and to security have been taken under guarantee and it was specified therein that no individual can be arbitrarily bereaved of his/her freedom. In paragraph one of article 19 is the rule that everybody has the right to personal liberty and security and in paragraphs two and three, that individuals can be deprived of such a right in some exceptional cases the form and conditions of which has been demonstrated in the code.

27. Accordingly, restriction of a person's right of liberty and security can be possible only in the event of presence of one of the circumstances specified within the scope of article 19 of the Constitution. Circumstances where the right of liberty and security of an individual can be restricted have been listed with limitations. Within this framework, persons regarding whom, according to paragraph three of article 19, there is a strong indicator regarding his/her guilt can only be detained with the decision of the judge so as to prevent them from escaping or the destruction or manipulation of evidence. Detention shall be in compliance with the form and conditions prescribed in the code.

28. In paragraph no. (2) of article 102 of the Code No. 5271 it has been indicated that the duration of detention in matters that are within the remit of the assize court is a maximum of two years and that such duration can be extended upon the provision of justifications thereto and yet the duration of extension cannot be in excess of a total of three years, and in the text of the article it is prescribed that the total duration of detention including the durations of extension can be a maximum of 5 years (The decision dated 12/4/2011 and No. M.2011/1-51, D.2011/42 of the Penal General Assembly of the Supreme Court of Appeals).

29. In the calculation of such duration, the durations that have passed during the trial stage before the court of first instance have to be taken into consideration. If, in the case that s/he is being tried, the person has been convicted upon the decision of the court of first instance the status of such person is no longer within the scope of "*detention on the basis of a criminal charge*" and the reason for detention becomes detention in relation to the judgment of the court of first instance. Hence, the ECtHR does not consider the circumstance of detention after the decision of conviction and does not take into consideration such elapsed time in the calculation of the duration of detention at the appeal stage. The same approach has also been embraced by the Criminal General Assembly of the Supreme Court of Appeals and it was ruled that the time elapsed at the appeal shall not be included in the duration of detention. App. No. 2012/338, 2/7/2013, § 41).

30. In the material incident the applicant was taken under custody on the date of 16/9/2008, detained on the date of 20/09/2008 and the decision of conviction about him was

taken by the court of first instance on the date of 25/3/2010. This decision was reversed on the date of 19/4/2011 by the 1st Criminal Chamber of the Supreme Court of Appeals. As a result of the trial which took place following the reversal the court of first instance ruled for conviction again, on the date of 23/11/2011, and this decision was also reversed by the Supreme Court of Appeals on the date of 2/4/2013. The case regarding the applicant is still pending. Accordingly, the duration for which the applicant has remained under detention as he was tried before the court of first instance, excluding the durations elapsed at the appeal stage, is 3 years 5 months.

31. Accordingly, since it is understood that the total duration for detention of the applicant is not in excess of 5 years as prescribed by the Code, it has to be decided that this part of the application is inadmissible for being "*explicitly devoid of basis*"

b. The Claim Concerning the Detention Exceeding the Reasonable Duration

32. The applicant has alleged that the duration of detention was not reasonable and the material facts concerning the evidence demonstrating the existence of the reasons for detention were not clearly demonstrated.

33. As it is seen that the complaints of the applicant are not explicitly devoid of a basis and there is no other reason for admissibility, it needs to be decided that the application is admissible.

2. In Terms of Merits

34. In paragraph seven of article 19 of the Constitution, it is enshrined that the individuals who are detained within the scope of a criminal investigation have the right to request the conclusion of the trial within a reasonable period and being released during investigation or prosecution.

35. It is not possible to evaluate the issue of whether the period of detention is reasonable or not within the framework of a general principle. Whether the period during which an accused is kept under detention is reasonable or not should be evaluated depending on the characteristics of each case. The continuation of detention can be considered to be justified in spite of the presumption of innocence only if there is a public interest which has more precedence over the right to personal liberty and security enshrined in article 19 of the Constitution (App. No: 2012/239, 2/7/2013, § 61).

36. Ensuring that detention does not exceed a certain period of time in a case is primarily the duty of the courts of instance. To this end, all incidents which affect the aforementioned requirement of public interest should be examined by the courts of instance and these facts and cases should be put forth in the decisions as regards the requests for release (App. No: 2012/239, 2/7/2013, § 62).

37. The measure of detention can be resorted to in the presence of a strong indication on the delinquency of individuals and in addition, in order to prevent these individuals from escaping, the destruction or alteration of the evidence. Even if these grounds for detention can be considered sufficient for the continuation of detention up to a certain period, after the expiry of this period, it is necessary to show that the grounds for detention still continue to exist together with their justifications in the decisions as regards extension. In the event that these justifications are considered as "*relevant*" and "*sufficient*", whether the trial process has been diligently executed or not should also be examined. Factors such as the complexity of a case, whether it is related to organized crimes or not or the number of the accused are taken into account for the evaluation

of diligence shown in the functioning of the process. A conclusion whether such duration is reasonable or not can be arrived at upon conjoint assessment of all such aspects. (App. No. 2012/239, 2/7/2013, § 63).

38. Therefore, in the evaluation of whether paragraph seven of article 19 of the Constitution is violated or not, the justifications of the decisions as regards the requests for release should be considered and whether the decisions are sufficiently justified or not within the framework of the documents submitted in the applications of opposition against detention filed by the individuals who are kept under detention should be taken into account. On the other hand, as long as a strong indication that a person who is detained in accordance with the law has committed a crime and one or more of the grounds for detention continue to exist, it is necessary, as a principle, to accept the state of detention up to a certain period as reasonable (App. No: 2012/1137, 2/7/2013, §§ 63-64).

39. Detention and extension of the detention of a person with a judicial decision **that is totally without justification** cannot be accepted. Nevertheless, it is not possible to say that the detention of a suspect or an accused is arbitrary **by way of demonstration of justifications that legitimize detention**. However, making a decision of detention or a decision concerning the continuation of detention with excessively abridged justifications and without showing any legal provisions what so ever **shall not be** considered within such framework (App. No: 2013/9895, 2/1/2014, § 45). Moreover, in cases where the authority of objection or of appeal agrees with the decision of the court, which is the subject of examination of objection or appeal and with the justifications in such decision, non-justification of its decision concerning thereto with the details thereof, as a rule, shall not constitute a violation of the right to a justified decision. (App. No. 2013/9895, 2/1/2014, § 46).

40. The beginning of the duration in the calculation of the reasonable period is the date of being arrested and taken into custody in cases where an applicant was previously arrested and taken into custody or the date of detention in cases where s/he has been directly detained. Then, the end of the duration, as a rule, shall be the date on which the person is released or the judgment has been made by the court of first instance. (App. No. 2012/239, 2/7/2013, § 66).

41. In the calculation of the duration of detention the durations that have passed during the trial stage before the court of first instance have to be taken into consideration. If, in the case that the person is being tried, s/he has been convicted upon the decision of the court of first instance, the status of such person is no longer within the scope of "*detained in relation to an a charged offense*" and the reason for detention becomes "*detention in relation to the judgment of the court of first instance.*" From this angle, the durations that have passed at the appeal stage cannot be taken into consideration in the evaluation of the duration of detention. However, for the status of the person following the decision of reversal will turn in, once again, to detention on grounds of alleged crime, the duration that has passed before the court of first instance shall be taken into consideration in the evaluation (App. No. 2013/338, 2/7/2013, § 41).

42. It must be examined whether or not the issues that have been shown as the justification of the continuation of the detention are "*relevant*" and "*sufficient*" considering the duration during which the applicant has remained under detention.

43. When the case file is perused in the material incident, the applicant, following the decision of arrest that was ruled against him as a result of the crime of deliberate murder which was committed on the date of 3/8/2008 and which resulted in the deaths of two persons, was arrested on the date of 16/9/2008 and detained on the date of 20/9/2008.

44. When the decisions concerning the continuation of the detention regarding the applicant are examined it was decided that the circumstances of detention be sustained with the justification concerning *"the quality and the nature of the charged crime, the actual status of the evidence"* in decisions dated 25/11/2008, 17/12/2008, 6/1/2009, 19/8/2009, 9/12/2009, 4/2/2010 the trials on the dates of 4/3/2009, 2/4/2009, 30/4/2009, 28/5/2009, 25/6/2009, 21/7/2009, 17/9/2009, 15/10/2009, 10/11/2009, 7/1/2010, 24/2/2010, with the justification concerning *"the quality and the nature of the charged crime, the actual status of the evidence and the duration for which he has remained detained"* in decisions dated 17/8/2011, 13/10/2011, with the justification concerning *"the quality and the nature of the charged crime, the actual status of the evidence and the charged crime among the crimes listed in article 100/3 of the CCP"* in sessions on the dates of 5/7/2011, 14/9/2011, 26/10/2011, with the justification concerning *"the quality of the charged crime, the lower limit of the sentenced as prescribed in the code, the crime being of the catalogue crimes that have been listed in the article 100/3 of the CCP and that a reason for detention being considered to exist accordingly, the account of the accused during the stages, the accounts of the participants and the witnesses who are present in the file and the continuation of the suspicion of crime on grounds of the evidence collected, the importance of the matter, the insufficiency of the administrative control and security measures that are to be implemented other than the measure of detention regarding the amount of the expected sentence amount"* with the decisions dated 20/6/2013, 16/7/2013, and 14/8/2013, with the justifications concerning *"the statements that are present in the file, the accounts of the victims, that the accused will escape depending on the duration of the charged crime which is by the code bound by a sanction in the event of implementation of a measure other than the measure of detention and that for these reasons the strong suspicion of crime about the accused is still ongoing"* in the sessions on the dates of 9/9/2013 and 7/10/2013.

45. The applicant, finally, has objected to the decision of the 1st Assize Court of Istanbul Anadolu dated 7/10/2013 concerning the continuation of the circumstance of detention, claiming that the maximum duration for detention which has been prescribed in paragraph no. (2) of article 102 of the Code No. 5271 has been exceeded. Such objection was dismissed with the decision of the 2nd Assize Court of Istanbul Anadolu dated 24/10/2013 and the miscellaneous action 2013/1969 with the justification that *"the contents of the incident within the scope of the file of trial and of the minutes of arrest, the contents of the statements during stages, the reasons that have been propounded in the petition for objection, the justification that has been made regarding the reasons for detention during the decision concerning the arrest/the continuation of the arrest and the evaluation that has been made and that the decision which is the subject of the objection has been found to be in compliance with the code."*

46. In the material incident the applicant has been taken under custody on the date of 16/9/2008, arrested on the date of 20/9/2008 and it was decided that he be sentenced to imprisonment and that his circumstance of detention be maintained with the decision dated 25/3/2010 of the 1st Assize Court of Kartal. Between the date of 16/9/2008 on which he was for the first time bereaved of his freedom and the date of 25/3/2010 the date on which it was decided that he be sentenced to imprisonment, the applicant has been kept *"in relation to a charge of crime."*

47. The applicant has appealed the sentencing decision of the court of instance. In the time elapsed between the dates of 25/3/2010 and 19/4/2011, the date which is the date of decision of the court of first instance and the date on which such decision was reversed by the Supreme Court of Appeals as a result of the appeal examination, relatively, the applicant has been detained *"in relation to the judgment of the court of first instance."* The detention of the applicant following the sentencing decision of the court of first instance cannot be considered as detention. The

time that has passed at the appeal stage shall not be taken into consideration in the determination of the duration of detention.

48. Following the decision of reversal of the Supreme Court of Appeals, the trial of the applicant was resumed at the court of instance. With the decision dated 23/11/2011 of the 1st Assize Court of Kartal it was decided that the applicant be sentenced to imprisonment. The applicant, with the decision of reversal of the Supreme Court of Appeals dated 2/4/2013, was detained once again "*concerning a charge of crime*". The case at the court of instance is pending whereby the applicant is still detained.

49. Accordingly, the applicant has been bereaved of his freedom for a total of 3 years and 5 months, with the exception of the time that has passed at the appeal stage, between the date of 8/8/2009, the date when he was bereaved for the first time of his freedom and the date on which the appeal examination was carried out.

50. The applicant has been tried within the scope of the case file, with other nine accused persons with the claim that he has committed the crimes of solicitation to deliberate murder and unlicensed bearing of arms.

51. When the justifications of the decisions delivered in the instance trial concerning the continuation of detention, it is seen that these justifications did not have the diligence and the content that would justify the lawfulness of the continuation of detention and the legitimacy thereof and has the quality of being a repetition of the same matters. When the quality of the case in the material incident, the number of the accused and the alleged charges are considered, it cannot be said that the justifications regarding the continuation of the circumstance of detention are relevant and sufficient. The duration of 3 years and 5 months when the applicant was deprived of his freedom cannot be evaluated as reasonable based on justifications that are irrelevant and insufficient..

52. For the reasons explained, it should be decided that paragraph seven of article 19 of the Constitution was violated. Members Nuri NECİPOĞLU and Hicabi DURSUN have not agreed with this opinion.

3. The Application of Article 50 of the Code No. 6216

53. In paragraph (1) of article 50 of the Code No. 6216, it is indicated that in the event that a violation decision is delivered at the end of the examination on merits, the necessary actions to remove the violation and the consequences thereof are taken, however it is adjudged that a review for legitimacy cannot be done and that a decision with the quality of administrative act and action cannot be delivered.

54. In the application, it has been concluded that paragraph seven of article 19 of the Constitution was violated. The applicant has made no requests for compensation, requesting that the violation of his constitutional rights have been violated.

55. It has to be decided that the total trial expenses of 1,698.35 TRY in total including the application fee of 198.35 that has been incurred by the applicant and the counsel's fee of 1,500.00 TL be paid to the applicant.

56. It has to be decided that the sample of the decision be sent to the respective court.

V. JUDGMENT

In the light of the reasons explained, it is decided

A. UNANIMOUSLY that the claim of the applicant that

1. *"The maximum duration of detention as prescribed in the code has been exceeded"* is INADMISSIBLE for *"being expressly without basis,"*

2. UNANIMOUSLY that his claim concerning *"the duration of detention being in excess of the reasonable duration"* is ADMISSIBLE,

B. WITH THE MAJORITY OF VOTES and with the dissenting votes of Nuri NECİPOĞLU and Hicabi DURSUN that as a result of *"the detention being in excess of reasonable duration"* paragraph seven of article 19 of the Constitution was violated,

C. UNANIMOUSLY that the sample of the decision be sent to the 1st Assize Court of Istanbul Anadolu,

D. It has to be decided that the total trial expenses of 1,698.35 TRY in total including the application fee of 198.35 that has been incurred by the applicant and the counsel's fee of 1,500.00 TL PAID TO THE APPLICANT,

On the date of 23/7/2013.

President
Serruh KALELİ

Member
Nuri NECİPOĞLU

Member
Hicabi DURSUN

Member
Erdal TERCAN

Member
Zühtü ARSLAN

DISSENTING VOTE

The detention which was sustained in the first instance trial, taking into consideration the quality of the alleged crime, the number of accused persons who have been tried within the scope of the case, the sentences prescribed for the alleged crimes, the relatively complicated nature of the case and the justifications of the decisions concerning the continuation of detention, has not exceeded the reasonable duration.

Member
Nuri NECİPOĞLU

Member
Hicabi DURSUN