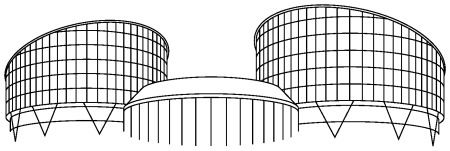

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF GURBAN v. TURKEY

(Application no. 4947/04)

JUDGMENT

STRASBOURG

15 December 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gurban v. Turkey,

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

Julia Laffranque, *President,*
Işıl Karakaş,
Nebojša Vučinić,
Paul Lemmens,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 24 November 2015,

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

PROCEDURE

1. The case originated in an application (no. 4947/04) 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 Emin Gurban ("the applicant"), on 24 December 2003.

2. The applicant was represented by Mr M. Erbil, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 13 November 2008 the complaints under Articles 3, 6 § 1 and 13 concerning life imprisonment without any prospects of conditional release, the excessive length of the criminal proceedings and the lack of an effective remedy to complain about the length of those proceedings were communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1966 and is currently serving a prison sentence in the Kocaeli F-Type Prison.

5. On 11 October 1996 he was arrested and taken into custody on suspicion of being a member of and aiding and abetting the PKK (Kurdistan Workers' Party, an illegal organisation).

6. On 18 October 1996 he was brought before a single judge at the 2nd Chamber of the Istanbul State Security Court, who ordered him to be placed in pre-trial detention.

7. On 25 October 1996 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicant and nine other persons, accusing the applicant of membership of an illegal organisation and of taking part in the murder of two persons for the organisation, along with his co-accused. The public prosecutor requested that the applicant be convicted and sentenced under Article 125 of the former Turkish Criminal Code for having engaged in acts aimed at the separation of a part of the territory of the State.

8. The Istanbul State Security Court held a total of twenty-five hearings following the commencement of the trial on 13 January 1997. The main witnesses against the defendants, who were all police officers, were not heard until 27 March 1998, because they failed to attend the hearings.

9. Between 4 September 1998 and 26 May 1999 the proceedings were adjourned four times because the defendants in detention, including the applicant, were not taken to the hearings by the prison authorities.

10. On 13 June 2001 the Istanbul State Security Court found the applicant guilty as charged and sentenced him to the death penalty under Article 125 of the former Criminal Code.

11. On 28 January 2002 the Court of Cassation found that the information regarding the defendants' identities had not been duly noted in the operative part of the reasoned judgment of the Istanbul State Security Court. It therefore quashed the judgment on those purely procedural grounds and remitted the case to the first-instance court.

12. On 27 September 2002 the Istanbul State Security Court once again convicted the applicant under Article 125 of the former Criminal Code but, having regard to the recent amendments introduced by Law no. 4771 to that Article, sentenced him to life imprisonment instead of the death penalty. In its judgment, the Istanbul State Security Court noted that the Law on the Execution of Sentences (Law no. 647) and the relevant provisions of the Prevention of Terrorism Act (Law no. 3713) on conditional release in force at the material time would not be applicable to the applicant and that he would, therefore, serve his sentence until the end of his life.

13. On 30 June 2003 the Court of Cassation upheld the judgment of the Istanbul State Security Court. It appears that this judgment was deposited with the registry of the first-instance court on 12 September 2003.

14. It further appears that following the entry into force of the new Criminal Code (Law no. 5237) on 1 June 2005, the applicant's case-file was automatically subjected to a re-examination by the Istanbul Assize Court, which found, on 1 November 2006, that the new Criminal Code did not require that any changes to the previous judgment against the applicant be

made. The Court has not been provided with a copy of the relevant decision of the Istanbul Assize Court.

15. The committal order (*müddetname*) issued by the Kocaeli public prosecutor's office on 24 February 2009 concerning the execution of the applicant's sentence indicated that the applicant would not be entitled to conditional release by virtue of section 1/B (2) of Law no. 4771 and section 107 § 16 of Law no. 5275 on the Execution of Sentences and Security Measures.

II. RELEVANT DOMESTIC LAW

16. Paragraph 2 of section 1(B) of Law no. 4771, published on 9 August 2002 to amend various laws, provided as follows:

> "The provisions on conditional release set out in the Law on the Execution of Sentences and the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991) shall not be applicable to persons found guilty of terrorist offences [and] whose death sentences have been commuted to aggravated life sentences in accordance with the provisions of this Law. These persons shall serve the aggravated life sentence for the rest of their lives."

17. A description of the other relevant domestic law and practice concerning, *inter alia*, the execution of life sentences can be found in the case of *Öcalan v. Turkey (no. 2)* (nos. 24069/03, 197/04, 6201/06 and 10464/07, §§ 62-71, 18 March 2014).

THE LAW

I. THE GOVERNMENT'S OBJECTIONS

A. The parties' submissions

18. The Government submitted that the application should be rejected for failure to exhaust domestic remedies, as required by Article 35 § 1 of the Convention. They maintained in this connection that the applicant had failed to introduce an administrative action seeking pecuniary and non-pecuniary damages resulting from the conduct of the public authorities. They stated that he had similarly failed to bring an action before the civil courts against those who had "committed an abuse" of his rights.

19. In the alternative, the Government argued that the applicant had failed to comply with the six-month time-limit rule set out in Article 35 § 1 of the Convention, because he had lodged his application with the Court on 8 May 2004, whereas the Court of Cassation had delivered its final judgment on the merits of the case on 30 June 2003.

20. The applicant did not comment on the Government's claims regarding the non-exhaustion of domestic remedies. As for the allegation that he had failed to comply with the six-month rule, the applicant stated that he had sent to the Court his first letter regarding his complaints on 24 December 2003, that is, within six months from the final judgment of the Court of Cassation.

B. The Court's assessment

1. Non-exhaustion of domestic remedies

21. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. An applicant is normally required to have recourse only to those remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vučković and Others v. Serbia* (preliminary objection) [GC], no. 17153/11 and 29 other cases, § 71, 25 March 2014). As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's specific complaints and offered reasonable prospects of success (see *Vučković and Others*, cited above, § 77, and *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 116, ECHR 2015).

(a) Article 6 § 1 of the Convention

22. The Court notes that while the respondent Government claimed that the applicant had failed to exhaust the domestic remedies available to him, they did not in any way indicate what these remedies were and how they could provide relief to the applicant in relation to his specific complaint under Article 6 § 1. In these circumstances, the Court cannot but dismiss the Government's preliminary objection under this head.

23. The Court stresses in this connection that although a new domestic remedy has come into force in Turkey as of 19 January 2013 for complaints concerning the length of proceedings (see *Turgut and Others v. Turkey* no. 4860/09, 26 March 2013), it may nevertheless pursue the examination of such complaints under the normal procedure in cases which have already been communicated to the Government prior to the entry into force of the new remedy (see *Ümmühan Kaplan v. Turkey*, no. 24240/07, § 77, 20 March 2012). The Court further stresses that there have been no requests

from the Government asking the Court to take this new remedy into consideration in the instant case. Following its ordinary practice of confining the scope of its review to the remedies explicitly invoked by the Government, the Court is therefore not called upon to examine whether this new remedy could offer the applicant a reasonable prospect of redress for his complaints under Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Čuprakovs v. Latvia*, no. 8543/04, § 29, 18 December 2012).

(b) Article 3 of the Convention

24. As for the question of the exhaustion of domestic remedies in relation to the applicant's complaints under Article 3 of the Convention, the Court notes the Government's claim that the applicant could have resorted to the administrative courts to seek pecuniary and non-pecuniary damages "for the conduct of the authorities", or that he could have brought a civil case against those "who had allegedly abused his rights". However, in the absence of any further explanation or information by the Government, it remains unclear how the remedies suggested would have provided relief for the applicant's particular complaint under Article 3, which arises from the legislation concerning the execution of life sentences as opposed to a particular wrongful conduct of any State authorities. In these circumstances, the Court is not satisfied that the remedies mentioned by the Government were relevant or appropriate and, therefore, rejects their objection regarding the non-exhaustion of domestic remedies in relation to the applicant's Article 3 complaints.

2. Compliance with the six-month rule

25. As for the argument that the applicant failed to introduce his application to the Court within six months of the final judgment of the Court of Cassation on the merits of his case in compliance with Article 35 § 1 of the Convention, the Court notes that the final judgment in question was delivered by the Court of Cassation on 30 June 2003 and that judgment was deposited with the registry of the first instance court on 12 September 2003. The applicant subsequently sent his first letter to the Court outlining his complaints on 24 December 2003. Following a letter sent by the Registry of the Court on 9 February 2004 inviting him to submit his duly completed application form "as soon as possible", on 8 June 2004 the applicant sent his application form. The Court notes that the application form was accompanied by a letter from the applicant's representative, explaining why they could not submit the application form earlier. According to this letter, after the finalisation of the criminal proceedings against the applicant and the change of his status from a "detainee" to that of a "convict", the representative could no longer visit the applicant in the prison with his existing power of attorney, and needed a new power of attorney issued by the applicant's legal guardian (*vasi*) in order to be able to have access to

him. Since the procedure for the appointment of a legal guardian had taken some time, and the applicant had been transferred to a new prison in the meantime, they were not able to complete the application form and the necessary documents earlier.

26. The Court recalls that at the material time, the running of the six-month time-limit imposed by Article 35 § 1 of the Convention was, as a general rule, interrupted by the first letter from the applicant indicating an intention to lodge an application and giving some indication of the nature of the complaints made (see *Allan v. the United Kingdom* (dec.), no. 48539/99, 8 August 2001, and *Andreou v. Turkey*, no. 45653/99, 3 June 2008). However, where a substantial interval followed before an applicant submitted further information as to his proposed application, the Court examined the particular circumstances of the case in order to decide what date shall be regarded as the date of introduction and from which to calculate the running of the six month period set out in Article 35 of the Convention (see *Hansen and others v. Denmark*, no. 22507/93, Commission decision of 5 April 1995, Decisions and Reports (DR) 81, p. 67, and *Gaillard v. France* (dec.), no. 47337/99, 11 July 2000). Delays in pursuing the case were only acceptable in so far as they were based on reasons connected with the case (see *Hansen and Others* (dec.), cited above; *Quaresma Afonso Palma v. Portugal* (dec.), no. 72496/01, 13 February 2003; and *Güler, Şahin, Yılmaz, Koyuncu, Çakmak, Yılmaz, Yaman and Others*, *Döner and Dursun, Tuncer v. Turkey*, no. 7782/03, 7784/03, 7786/03, 7788/03, 7789/03, 7790/03, 7791/03, 7792/03, 7793/03, 3 July 2003).

27. The Court notes that in the present case, the applicant had sent his first letter stating the substance of his complaints on 24 December 2003, which is within six months from the final judgment of the Court of Cassation, and had thus interrupted the running of the six-month time-limit in accordance with the practice at the relevant time. Although it took him some six more months to submit his duly completed application form, the Court notes that neither the letter sent from the Registry to the applicant on 8 February 2004, nor the Rules of Court in force at the material time, indicated a specific time-limit in which the completed application form had to be submitted following a first letter for the purposes of the calculation of the six-month time-limit. Moreover, the applicant's representative provided a reasonable explanation as to why the application form could not be submitted at an earlier date, which the Court deems to be plausible in the circumstances.

28. Having regard to the foregoing, and in the absence of any argument by the Government suggesting that the applicant's representative failed to show the necessary due diligence in the submission of the completed application form, the Court considers 24 December 2003 to be the date of

introduction of the application and dismisses the Government's objection under this head.

3. Conclusion

29. The Court notes that 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.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicant complained that the imposition of an irreducible life sentence in accordance with section 1/B, paragraph 2 of the Law no. 4771 without any prospects of review and release amounted to torture or inhuman or degrading treatment or punishment under Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

31. The Government contested that argument. They claimed that the strict life imprisonment being served by the applicant was based on a court decision and was prescribed by law. It was, moreover, not proved beyond reasonable doubt that the applicant's imprisonment amounted to torture or inhuman or degrading treatment. The execution of his sentence was thus compatible with the requirements of Article 3 of the Convention.

32. The Court notes that the question of the compatibility of the aggravated life imprisonment regime currently in force in Turkey with Article 3 of the Convention has been considered in the case of *Öcalan v. Turkey (no. 2)* nos. 24069/03, 197/04, 6201/06 and 10464/07, §§ 190-207, 18 March 2014, and subsequently in the case of *Kaytan v. Turkey* (no. 27422/05, §§ 58-68, 15 September 2015). In both cases the Court found that the legislation governing the execution of aggravated life sentences, which was characterised by the absence of any mechanism that would allow the review of a life sentence after a certain minimum term, as well as the absence of the possibility of the release of the life prisoner, was in breach of the requirements of Article 3 of the Convention.

33. The Court notes that the applicant in the present case, just like the applicants in the aforementioned applications, was sentenced to aggravated life imprisonment for his crimes against the security of the State and, according to the clear terms of the relevant legislation, he was similarly denied any prospects of release and any possibility of having his life sentence reviewed. In these circumstances, the Court sees no reasons which would require it to depart from its findings in those judgments.

34. There has, therefore, been a violation of Article 3 of the Convention on the facts of the instant case.

35. The Court, however, stresses that this finding cannot be understood as giving the applicant the prospect of imminent release, but merely requires the national authorities to put in place a review mechanism in the light of the standards set out by the Grand Chamber in the case of *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09, 130/10 and 3896/10, §§ 107-122, ECHR 2013 (extracts)), which would allow the judicial or other authorities to consider whether any changes in the life prisoner were so significant, and such progress towards rehabilitation was made in the course of the sentence, as to mean that continued detention could no longer be justified on legitimate penological grounds (see *Vinter and Others*, cited above, § 119 and 120, and *Öcalan (no. 2)*, cited above, § 207).

III. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

36. The applicant complained under Article 6 § 1 of the Convention that he had not been tried within a reasonable time. He further maintained under Article 13 that there had been no effective domestic remedies available to him to complain about the excessive length of the criminal proceedings. The relevant provisions of the Convention read as follows:

Article 6 § 1

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Article 6 § 1 of the Convention

37. The Government submitted that the length of the proceedings could not be considered to be unreasonable, particularly 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, and that the judicial authorities had not prolonged the proceedings unnecessarily.

38. The applicant maintained his complaint.

39. According to the Court's established case-law, the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of

the applicant and of the relevant authorities. What is at stake for the applicant has also to be taken into account (see *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI). The Court reiterates that the "reasonable time" guarantee of Article 6 § 1 serves, amongst other purposes, to protect all parties to court proceedings against excessive procedural delays; in criminal matters, especially, it is designed to avoid leaving a person charged with a criminal offence in a state of uncertainty about his or her fate for too long (see *Rutkowski and Others v. Poland*, nos. 72287/10, 13927/11 and 46187/11, § 126, 7 July 2015).

40. The Court notes that the proceedings in question commenced on 11 October 1996, when the applicant was taken into police custody, and ended on 30 June 2003, when the Court of Cassation upheld the applicant's conviction. They thus lasted six years, eight months and nineteen days before two levels of jurisdiction.

41. The Court observes that the case was before the Istanbul State Security Court for four years and eight months of this period, pending an initial judgment. While the Court acknowledges that the case presented some complexities on account of the number of the accused and the nature of the charges involved, it cannot but note that the case was considerably delayed as a result of the relevant State authorities' failure to arrange the attendance of the detained defendants, including the applicant, at a number of hearings for no apparent reason. Further delays were encountered because the trial court could not compel the attendance of the police officers, who were the main witnesses to the case, at the hearings until more than a year after the commencement of the proceedings. The Court considers that these delays were unjustified and caused the prolongation of the proceedings unnecessarily.

42. More strikingly, however, the Court notes that the judgment of the Istanbul State Security Court was quashed by the Court of Cassation on purely procedural grounds due to the trial court's failure to note the defendants' identity information in the operative part of the judgment. The Court notes that this simple procedural error prolonged the proceedings for another two years. Bearing particularly in mind that the applicant was on trial for a capital offence and was in detention throughout the trial, the first-instance court could have been expected to show greater diligence.

43. In view of the foregoing, the Court concludes that the proceedings at issue did not proceed with the necessary expedition and failed to satisfy the reasonable time requirement. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

B. Article 13 of the Convention

44. The Government did not submit any observations regarding this complaint, save for their general submissions on non-exhaustion noted in paragraph 18 above.

45. The applicant maintained his complaint.

46. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see *Kudła v. Poland*, cited above, § 157).

47. The Court has ruled that the applicant's right to a hearing within a reasonable time guaranteed by Article 6 § 1 of the Convention has not been respected (see paragraph 43 above). There is, therefore, no doubt that his complaint is "arguable" for the purposes of Article 13 and that he was entitled to a remedy whereby he could obtain appropriate relief for the Convention breach before the domestic authorities.

48. The Court has already found that the Government failed to establish the availability of an effective domestic remedy for the applicant's grievances under Article 6 § 1 (see paragraphs 22 and 23 above). There has, therefore, been a violation of Article 13 of the Convention on the facts of the instant case.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

51. The Government contested this claim, submitting that the amount requested was unsubstantiated.

52. The Court considers that its finding of a violation of Article 3 constitutes sufficient just satisfaction and accordingly makes no award under this head in connection with the violation of that provision (see *Vinter and Others*, cited above, § 136, and *Kaytan*, cited above, § 72). The Court, however, considers that the applicant must have suffered non-pecuniary

damage as a result of the remaining violations found in his case. Having regard to the particular circumstances of the case and ruling on an equitable basis, the Court awards the applicant EUR 3,000 for non-pecuniary damage.

B. Costs and expenses

53. The applicant also claimed EUR 6,650 in respect of lawyer's fees and EUR 651 for other costs and expenses incurred before the Court, such as postage expenses and translation costs. In that connection, he submitted a time-sheet showing that his legal representative had carried out sixty-five hours' legal work and a legal services agreement concluded with his representative. He did not, however, provide proof for the remaining costs and expenses.

54. The Government submitted that the applicant had not shown that the costs sought had been actually incurred.

55. 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 5,000 covering the lawyer's fees.

C. Default interest

56. 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 application admissible;

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

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

4. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 6 § 1;

5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant in relation to his complaints under Article 3;

6. *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 the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 5,000 (five 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 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;

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

Done in English, and notified in writing on 15 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Julia Laffranque
President