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

SECOND SECTION

CASE OF NART v. TURKEY

(Application no. 20817/04)

JUDGMENT

STRASBOURG

6 May 2008

FINAL

06/08/2008

This judgment may be subject to editorial revision.

In the case of Nart v. Turkey,

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

Françoise Tulkens, *President*,
Antonella Mularoni,
Rıza Türmen,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
András Sajó, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 27 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 20817/04) 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 Tolga Nart ("the applicant"), on 29 May 2004.

2. The applicant was represented by Mrs B. Duran, a lawyer practising in Izmir. The Turkish Government ("the Government") were represented by their Agent.

3. On 10 July 2007 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the length of detention on remand and the right to an effective remedy in this respect to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1986 and is currently in detention on remand in the Uşak Prison in connection with an offence unrelated to the present case.

5. On 28 November 2003 at about 11.30 p.m. the applicant, who was 17 years old at the time, was arrested by police officers on suspicion of

being involved in the armed robbery of a small grocery shop. The police found the applicant while he was asleep in an empty swimming pool near the shop, which had been robbed that night.

6. On 29 November 2003 he was examined by a doctor at Urla State Hospital. His medical report recorded no signs of physical violence on his body, but noted that the applicant was drugged and sleepy. It concluded that there was nothing to prevent the applicant from being taken into custody.

7. On the same day the applicant was once again examined by a doctor. The medical report described the applicant as sleepy, unresponsive and physically weak. The same day, the police requested the presence of a duty lawyer from the Izmir Bar Association for the applicant, who was to be brought before a public prosecutor.

8. The applicant and his lawyer were both present before the public prosecutor. However, the prosecutor could not take a statement from the applicant as he was asleep. The applicant was then brought before the investigating judge, but he could only stand up with the help of his co-accused. His lawyer maintained that, in the circumstances, it would not be appropriate or lawful to take a statement from the applicant. However, the judge rejected this objection and continued with the interrogation. The judge noted that there were no previous statements made by the applicant to the police or the prosecutor. The applicant occasionally woke up and answered the questions; he denied that he had committed the robbery. The lawyer repeated that the applicant was not in a fit state to understand the charges against him and that the taking of his statement would violate the law. However, the applicant's co-accused accepted the charges. He admitted that he and the applicant had drunk beer and taken tablets before the incident and stolen some chocolates, cigarettes, coca-cola, sausages and biscuits from the shop. The investigating judge remanded the applicant and his co-accused in custody. The applicant was accordingly sent to the Buca Prison, where he was kept together with adults.

9. On 2 December 2003 the applicant's lawyer challenged the detention before the Izmir Criminal Court. In her petition, referring to Articles 5 and 6 of the Convention, she submitted that the applicant was incapable of understanding the charges against him and that he had not been given adequate time and facilities to prepare his defence as she was unable to communicate with him. She further stated that the applicant was a minor and, according to Article 37 (b) of the United Nations Convention on the Rights of the Child, the detention of a minor should be a preventive measure of last resort. She also maintained that Article 10 § 5 of the Law on the Establishment, Duties and Procedures of Juvenile Courts (Law no. 2253), required that the applicant be placed in a hospital or in residential social care, instead of being detained in prison.

10. On 3 December 2003, the Izmir Assize Court rejected these objections, having regard to the content of the case file, the nature of the offence attributed to the applicant and the state of the evidence.

11. On 12 December 2003, the public prosecutor filed an indictment with the Izmir Juvenile Court, accusing the applicant and his co-accused of armed robbery under Article 497 of the Criminal Code, for which the minimum sentence was fifteen years' imprisonment.

12. On 16 January 2004 the Izmir Juvenile Court commenced the trial. The applicant was reminded of the statement made to the investigating judge. He accepted its contents, but added that he did not recall anything about the time when it was taken. An eyewitness heard by the court identified the applicant's co-accused as the perpetrator. The witness stated that he was living in one of the flats above the shop and that the shopkeeper was his tenant. At 10.30 p.m. on the night of the incident, he heard noises downstairs and went to check. He saw that the window of the shop's door had been broken, and that the applicant's collaborator was putting things in bags. He also saw the applicant in the shop. Then, the applicant's collaborator pulled a gun on him but the witness grabbed it immediately, whereupon the applicant and his accomplice ran away. The applicant was released pending trial the same day.

13. On 12 April 2004 the Juvenile Court convicted the applicant of robbery under Article 493 § 1 of the Criminal Code, instead of armed robbery, noting that the gun used during the incident had been a fake. Accordingly, it sentenced the applicant to one year and eight months' imprisonment.

14. On 13 April 2004 the applicant's lawyer appealed against this judgment.

15. On 4 October 2006 the Court of Cassation quashed the judgment of the first-instance court, holding that the applicant's conviction and sentence should be reviewed following the entry into force of the new Criminal Code on 1 June 2005.

16. The case was remitted to the Izmir Juvenile Court where, according to the information in the case file, the proceedings are apparently still pending.

II. RELEVANT INTERNATIONAL LAW

A. Recommendations of the Committee of Ministers

European Prison Rules

17. The recommendation of the Committee of Ministers to Member States of the Council of Europe on the European Prison Rules (Rec (2006)2), adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, insofar as relevant, reads as follows:

> "11.1 Children under the age of 18 years should not be detained in a prison for adults, but in an establishment specially designed for the purpose.
>
> 11.2 If children are nevertheless exceptionally held in such a prison there shall be special regulations that take account of their status and needs. ...
>
> 35.1 Where exceptionally children under the age of 18 years are detained in a prison for adults the authorities shall ensure that, in addition to the services available to all prisoners, prisoners who are children have access to the social, psychological and educational services, religious care and recreational programmes or equivalents to them that are available to children in the community.
>
> 35.4 Where children are detained in a prison they shall be kept in a part of the prison that is separate from that used by adults unless it is considered that this is against the best interests of the child."

18. The recommendation of the Committee of Ministers to Member States of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Rec (2003)20), adopted on 24 September 2003 at the 853rd meeting of the Ministers' Deputies, insofar as relevant, reads as follows:

> "16. When, as a last resort, juvenile suspects are remanded in custody, this should not be for longer than six months before the commencement of the trial. This period can only be extended where a judge not involved in the investigation of the case is satisfied that any delays in proceedings are fully justified by exceptional circumstances.
>
> 17. Where possible, alternatives to remand in custody should be used for juvenile suspects, such as placements with relatives, foster families or other forms of supported accommodation. Custodial remand should never be used as a punishment or form of intimidation or as a substitute for child protection or mental health measures."

19. The recommendation of the Committee of Ministers to Member States of the Council of Europe on social reactions to juvenile delinquency (no. R (87)20), adopted on 17 September 1987 at the 410th meeting of the Ministers' Deputies, insofar as relevant, reads as follows:

"Recommends the governments of member states to review, if necessary, their legislation and practice with a view: ...

7. to exclude the remand in custody of minors, apart from exceptional cases of very serious offences committed by older minors; in these cases, restricting the length of remand in custody and keeping minors apart from adults; arranging for decisions of this type to be, in principle, ordered after consultation with a welfare department on alternative proposals ..."

B. The European Social Charter

20. Article 17 of the European Social Charter 1961 regulates the right of mothers and children to social and economic protection. In that context, the European Committee of Social Rights noted in its Conclusions XVII-2 (Turkey) that young offenders were detained, if arrested, in parts of adult prisons and in the two closed detention homes reserved for juveniles and guarded by the gendarmerie. The Committee further noted that the length of pre-trial detention was long and the conditions of imprisonment poor.

C. The United Nations Convention on the Rights of the Child, dated 20 November 1989

21. Article 37 of the United Nations Convention on the Rights of the Child, insofar as relevant, reads as follows:

"States Parties shall ensure that ...

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."

D. The Concluding Observations of the United Nations Committee on the Rights of the Child: Turkey. (09/07/2001(CRC/C/15/Add.152.))

22. The relevant part of this text concerning "juvenile justice" provides as follows:

"65. ... The fact that detention is not used as a measure of last resort and that cases have been reported of children being held incommunicado for long periods is noted with deep concern. The Committee is also concerned that there are only a small number of juvenile courts and none of them are based in the eastern part of the country. Concern is also expressed at the long periods of pre-trial detention and the poor conditions of imprisonment and at the fact that insufficient education, rehabilitation and reintegration programmes are provided during the detention period.

66. The Committee recommends that the State party continue reviewing the law and practices regarding the juvenile justice system in order to bring it into full compliance with the Convention, in particular articles 37, 40 and 39, as well as with other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), with a view to raising the minimum legal age for criminal responsibility, extending the protection guaranteed by the Juvenile Law Court to all children up to the age of 18 and enforcing this law effectively by establishing juvenile courts in every province. In particular, it reminds the State party that juvenile offenders should be dealt with without delay, in order to avoid periods of *incommunicado* detention, and that pre-trial detention should be used only as a measure of last resort, should be as short as possible and should be no longer than the period prescribed by law. Alternative measures to pre-trial detention should be used whenever possible."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

23. The Government asked the Court to dismiss the application for failure to exhaust domestic remedies, under Article 35 § 1 of the Convention. In this regard, they submitted that the applicant had not at any stage in the domestic proceedings relied on the provisions of the Convention. They also maintained that the applicant could have sought compensation pursuant to Law no. 466 on the Payment of Compensation to Persons Unlawfully Arrested or Detained.

24. As regards the first objection, the Court notes that the applicant's representative relied on Articles 5 and 6 of the Convention in her petition dated 2 December 2003, and stated that the decision to place the applicant in detention on remand constituted a breach of the said provisions, as well as a breach of Article 37 (b) of the United Nations Convention on the Rights of the Child. Therefore, this objection cannot be upheld.

25. In respect of the second objection, the Court recalls that it has already examined and rejected such an argument by the Government in similar cases (see *Bayam v. Turkey*, no. 26896/02, § 16, 31 July 2007; *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 44).

It finds no particular circumstances in the instant case which would require it to depart from this jurisprudence. In conclusion, this objection cannot be upheld either.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

26. The applicant complained that his detention on remand exceeded the reasonable time requirement. He also contended that he had no effective remedy to challenge the lawfulness of his detention on remand. In respect of his complaints, the applicant invoked Article 5 §§ 3 and 4, which read as follows:

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

27. The Government contested these arguments.

A. Article 5 § 3 of the Convention

28. The Government submitted that there had been valid reasons for holding the applicant in detention on remand. They maintained in the first place that the applicant had previous convictions for similar offences and provided the relevant court decisions. Secondly, they stated that, as the applicant had been charged with armed robbery, he faced up to fifteen years' imprisonment. At this point, they referred to Article 19 of the Law on the Establishment, Jurisdiction and Judicial Procedures of Juvenile Courts which stipulated that minors could not be held in detention if the charges they faced did not carry a sentence of a minimum of three years' imprisonment.

29. The Court recalls that Article 5 § 3 of the Convention does not imply a maximum length of pre-trial detention. The issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. It falls in the first place to the national judicial authorities to examine all the circumstances arguing for or against the existence of such a requirement and to set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the undisputed facts stated by the

applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see *Klamecki v. Poland*, no. 25415/94, § 74, 28 March 2002; *W. v. Switzerland*, judgment of 26 January 1993, Series A no. 254-A, pp. 15-19, §§ 30-42; *Contrada v. Italy*, judgment of 24 August 1998, *Reports of Judgments and Decisions* 1998-V, § 54).

30. In the present case, the Court notes that the period to be taken into consideration began on 28 November 2003 with the applicant's arrest and ended on 16 January 2004 with his release during the first hearing before the Izmir Juvenile Court. It thus lasted forty eight days.

31. In examining this case, the Court has taken into account the wealth of important international texts referred to above (paragraphs 17-22 above) and recalls that the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults.

32. The Court observes that, when the applicant objected to his detention on remand, the Izmir Assize Court rejected his motion on the basis of the contents of the case file, the nature of the offence and the state of evidence (paragraph 10 above). Although, in general, the expression "the state of evidence" may be a relevant factor for the existence and persistence of serious indications of guilt, in the present case it cannot alone justify the length of the detention of which the applicant complains (see *Selçuk v. Turkey*, no. 21768/02, § 34, 10 January 2006).

33. It is also noted that, although the applicant's lawyer brought to the attention of the authorities the fact that the applicant was a minor, it appears that the authorities never took the applicant's age into consideration when ordering his detention. Furthermore, the case file reveals that, during his detention, the applicant was kept in a prison together with adults (paragraph 8 above).

34. In the light of the foregoing, and especially having regard to the fact that the applicant was a minor at the time, the Court finds that the length of the applicant's pre-trial detention contravened Article 5 § 3 of the Convention.

35. There has accordingly been a violation of this provision.

B. Article 5 § 4 of the Convention

1. Admissibility

36. The Court notes 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.

2. Merits

37. The Government contended that the domestic law provided an effective remedy to challenge the lawfulness of the applicant's detention on remand.

38. The applicant maintained that his objection to his detention on remand received no serious consideration by the domestic courts, which used stereotyped wording in dismissing his request.

39. The Court notes that, in several cases raising similar issues to the present application, it has rejected the Government's foregoing contention. It concluded that Article 298 of the Code of Criminal Procedure could not be considered as an effective remedy and found a violation of Article 5 § 4 of the Convention (see, *mutatis mutandis*, *Koşti and Others v. Turkey*, no. 74321/01, §§ 21-25, 3 May 2007; *Öcalan v. Turkey* [GC], no. 46221/99, §§ 71-72, ECHR 2005-IV). The Court finds no particular circumstances in the instant case, which would require it to depart from these previous findings.

40. In conclusion, the Court holds that there has been a violation of Article 5 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed 4,000 euros (EUR) in respect of non-pecuniary damage.

43. The Government contested this claim.

44. Ruling on an equitable basis, the Court awards the applicant EUR 750 under this head.

B. Costs and expenses

45. The applicant also claimed EUR 2,000 for the costs and expenses incurred before the Court.

46. The Government contested the claim.

47. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable

as to quantum. In the present case, the applicant has not substantiated that he has actually incurred the costs so claimed. Accordingly, it makes no award under this head.

C. Default interest

48. 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

1. *Declares,* unanimously, the remainder of the application admissible;

2. *Holds,* by 5 votes to 2, that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds,* unanimously, that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds,* by 5 votes to 2,
   (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, EUR 750 (seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, which total sum is to be converted into New Turkish liras at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses,* unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Türmen and Mularoni is annexed to this judgment.

F.T.
S.D.

JOINT PARTLY DISSENTING OPINION OF JUDGES TÜRMEN AND MULARONI

We do not agree with the majority who consider that there has been a violation of Article 5 § 3 in this case.

We are fully aware that a number of international texts recommend that prison detention for minors should be a measure of last resort for dealing with juvenile delinquency. We completely share the spirit behind all the declarations, conventions and recommendations adopted in this respect.

However, we observe that all these texts admit the possibility for minors to be detained in prison, although as a measure of last resort and, as far as detention on remand is concerned, for limited periods (see paragraphs 17-21 of the judgment). The Recommendation (2003)20 of the Committee of Ministers of the Council of Europe, for instance, provides for a maximum detention period in custody of six months before the commencement of the trial (see paragraph 18 of the judgment). Along the same line, Article 37 of the UN Convention on the Rights of the Child provides that the arrest, detention or imprisonment of a child may be used, for the shortest appropriate period of time, as a measure of last resort (see paragraph 21 of the judgment). The recommendation of the Committee of Ministers to Member States of the Council of Europe (no. (87)20), for its part, makes specific reference, in order to justify the remand in custody of minors, to "exceptional cases of very serious offences committed by older minors" (see paragraph 19 of the judgment).

This means, to our mind, that special attention must be paid to the specific circumstances of every individual case and to the personality of every single applicant.

We observe that Mr Nart, who was 17 years and 7 months old when he was arrested in connection with the present case, had already been found guilty of burglary in 1999. He had been sentenced to one month and fifteen days' imprisonment but, having regard to his age, his sentence had been first converted into a fine and then suspended.

In 2003, he had been found guilty of attempted burglary. He had been sentenced to 2 months and 20 days' imprisonment but, having regard to his age, his sentence had been again converted into a fine.

As to the present application, we observe that the applicant had been charged with armed robbery, a serious crime. At the end of the first hearing, which took place 48 days after his arrest, the applicant was released pending trial.

Having regard to the total duration of his detention, the applicant's previous convictions for similar offences and the specific circumstances of the case, we consider that the applicant's detention was in conformity with the "reasonable time" requirement of Article 5 § 3 of the Convention.

Contrary to the majority, we do not consider that the fact that the applicant was kept in a prison together with adults is a sufficiently strong element to conclude to the contrary. We completely agree that minors should not be detained in prisons with adults. However, it seems to us that, if a problem arises in this respect, it should be examined under Article 3 of the Convention rather than under Article 5 § 3.