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La Corte EDU sulle garanzie procedurali nell'ambito del procedimento di riesame
(CEDU, sez. II, sent. 25 gennaio 2022, ric. n. 227/13)

Con la decisione che si segnala la Corte EDU ha ribadito in via generale che il diritto a un ricorso effettivo per contestare la legittimità della detenzione ai sensi dell'articolo 5 par. 4 della Convenzione richiede, quale garanzia principale, il rispetto del principio del contraddittorio. La possibilità che un detenuto possa essere ascoltato di persona o attraverso una qualche forma di rappresentanza innanzi ad un giudice figura tra le garanzie procedurali fondamentali applicate in materia di privazione della libertà. Ne consegue che l'impossibilità dei ricorrenti di comparire davanti al tribunale per contestare la legittimità della loro detenzione viola l'art. 5 par. 4 CEDU. Altrettanto contraria alla prescrizione convenzionale è – nell'ambito del procedimento di riesame – la mancata notifica ai ricorrenti del parere del PM in base al quale è stato respinto il ricorso contro la loro custodia cautelare. In fine è stato ritenuto violato anche l'art. 5 par. 5 CEDU per l'eccessiva durata della custodia cautelare.

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

SECOND SECTION

CASE OF XXX v. TURKEY
(Application no. 227/13)

JUDGMENT
STRASBOURG
25 January 2022

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 XXX and XXX v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:
Jon Fridrik Kjølbro, *President,*
Carlo Ranzoni,
Egidijus Kūris,

Branko Lubarda,
Marko Bošnjak,
Saadet Yüksel,
Diana Sârcu,
and Stanley Naismith, *Section Registrar*,
Having regard to:
the application (no. 227/13) 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 two Turkish nationals, Mr XXX and Mr XXX ("the applicants"), on 20 September 2012;
the decision to give notice to the Turkish Government ("the Government") of the complaints under Article 5 § 4 (the applicants' inability to appear before a judge to challenge the lawfulness of their detention and the non-communication of the public prosecutor's written opinion) and Article 5 § 5 (absence of a compensatory remedy in domestic law for the alleged violations of Article 5), and to declare inadmissible the remainder of the application;
the parties' observations;
Having deliberated in private on 14 December 2021,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the alleged failure of the national courts to comply with certain procedural requirements under Article 5 § 4 of the Convention, particularly in relation to the right to an oral hearing and to adversarial proceedings in the context of the review of the applicants' objection to their pre-trial detention, and the alleged absence of an enforceable right to compensation under Article 5 § 5 of the Convention.

THE FACTS

2. The applicants were born in XXX and XXX, respectively. At the time of lodging their application, they were detained at the Metris Prison in Istanbul. They were represented by Mr Y.K. Altan, a lawyer practising in Istanbul.
3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Turkey.
4. The facts of the case, as submitted by the parties, may be summarised as follows.
5. On 3 July 2012 the applicants were taken into police custody on suspicion of armed extortion.
6. On 4 July 2012 they were brought before the Istanbul Magistrate's Court, which, after hearing the applicants, ordered their pre-trial detention.
7. On 5 July 2012 the applicants filed an objection against the detention order. On 6 July 2012 the Istanbul Criminal Court of First Instance dismissed the applicants' objection, without holding an oral hearing.

8. On 10 July 2012 the Istanbul public prosecutor filed an indictment with the Istanbul Assize Court, charging the applicants with armed extortion.
9. On 19 July 2012 the Istanbul 20th Assize Court accepted the indictment and decided to prolong the applicants' detention on the basis of the case-file. Furthermore, it decided that the first hearing be held on 13 September 2012 with the participation of the applicants.
10. On 6 August 2012 the applicants filed an objection against the prolongation of their detention. On 8 August 2012 the Istanbul 21st Assize Court, acting as an appeal court, dismissed the applicants' objection, without holding an oral hearing. In delivering its decision, the court took into consideration the written opinion submitted by the public prosecutor, which had not been communicated to the applicants or their representative.
11. Between 13 September 2012 and 12 April 2013, the Istanbul 20th Assize Court held five hearings with the participation of the applicants and ordered the continuation of their detention at each hearing. Moreover, between each hearing – that is, on four occasions – the assize court reviewed the applicants' detention on the basis of the case file.
12. On 25 April 2013 the Istanbul 20th Assize Court convicted the applicants as charged.
13. On 5 February 2014 the Court of Cassation upheld this judgment.
RELEVANT LEGAL FRAMEWORK AND PRACTICE
14. A description of the relevant domestic law and practice can be found in *Altınok v. Turkey* (no. 31610/08, §§ 28-32, 29 November 2011).
15. Article 108 of the Code of Criminal Procedure (Law no. 5271 of 4 December 2004, hereinafter referred to as "the CCP"), concerning the review of pre-trial detention, provided as follows at the material time:
"1. Throughout the suspect's detention during the investigation phase, and at intervals not exceeding thirty days, a magistrate shall, on an application by the public prosecutor (...), review whether continued detention is necessary.
2. A review of detention may also be requested by the suspect within the time indicated in the previous paragraph.
3. The judge or court shall, of its own motion, give a decision on whether the accused's continued detention is necessary at each hearing or, if the circumstances so require, between hearings or within the period indicated in the first paragraph."
On 11 April 2013 the first paragraph of Article 108 was amended to require the magistrate to determine the necessity of continued detention at the investigation phase after hearing the suspect or the suspect's lawyer.
16. Article 271 of the CCP reads:
"Save for the circumstances provided for by law, objections shall be decided [by courts] without holding a hearing. However, if deemed necessary, [the court] may hear the Public Prosecutor, [followed by] the defence counsel or the representative."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

17. The Government maintained that the applicants had not exhausted the individual application remedy before the Constitutional Court. They argued that the applicants should have availed themselves of that remedy as they were still in detention on remand when it entered into force on 23 September 2012. The Government also argued that the applicants had failed to exhaust the compensation remedy under Article 141 of the CCP in respect of their complaints under Article 5 of the Convention, which the Court had declared to be effective in its judgment of *A.Ş. v. Turkey* (no. 58271/10, §§ 92-95, 13 September 2016).

18. As regards the constitutional remedy, the Court notes that the review of the applicants' objection to their pre-trial detention, which is the subject matter of the present application, took place prior to the entry into force of the remedy in question (see paragraph 10 above for the relevant decision). Accordingly, and in the absence of any further explanation by the Government, the remedy in question fell outside the Constitutional Court's temporal jurisdiction (see, for instance, *Uzun v. Turkey* (dec.), no. 10755/13, §§ 25 and 34, 30 April 2013). The Government's objection in this regard may therefore not be taken into consideration.

19. As regards the compensation remedy under Article 141 of the CCP, the Court considers that the issue of exhaustion of domestic remedies in this context is closely linked to the merits of the applicants' complaint under Article 5 § 5 that they did not have an effective remedy at their disposal for the alleged violations of Article 5 of the Convention. The Court therefore finds it necessary to join this objection to the merits of the complaint under Article 5 § 5.

20. The Court further finds that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor are they inadmissible on any other grounds. The Court therefore declares them admissible.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

21. The applicants complained that the proceedings reviewing their pre-trial detention had not complied with the requirements of Article 5 § 4 of the Convention, as no oral hearing had been held by the appeal court at the time of the review of their objection to their detention and the public prosecutor's written opinion submitted to that court in the context of the review proceedings had not been notified to them or to their lawyer. Article 5 § 4 of the Convention reads as follows:

"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."

A. The applicants' inability to appear before the court that reviewed their objection to their continued detention

22. The applicants complained about not being able to appear before the Istanbul 21st Assize Court when their objection to the prolongation of their pre-trial detention was reviewed on 8 August 2012 on the basis of the case file. They claimed that they were thus denied the chance to properly contest the lawfulness of their continued detention.

23. The Government argued that the applicants' detention had been reviewed at regular intervals by the competent domestic courts in their presence and that, in addition, the applicants had had the right to object to their detention as required under Article 5 § 4 of the Convention.

24. The Court refers to the general principles established in its case-law regarding the right to an effective remedy to challenge the lawfulness of detention under Article 5 § 4 of the Convention (see, for instance, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 202-205, ECHR 2009). It reiterates, in particular, that the proceedings must be adversarial and must always ensure equality of arms between the parties, the prosecutor and the detained person (see, for instance, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II). Equality is not ensured if the public prosecutor is allowed to make oral submissions during the review proceedings while the detained person or his lawyer is denied this opportunity (see, for instance, *Samoilă and Cionca v. Romania*, no. 33065/03, §§ 74 and 76, 4 March 2008). Moreover, where a person's detention falls within the ambit of Article 5 § 1 (c), such as in the present case, a hearing is required (see *Idalov v. Russia* [GC], no. 5826/03, § 161, 22 May 2012, and *Knebl v. the Czech Republic*, no. 20157/05, § 81, 28 October 2010). The opportunity for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (*Idalov*, cited above, § 161).

25. The Court notes that in the Turkish system, the question of prolonging detention is examined *ex proprio motu* at regular intervals, both at the investigation and trial stages (see Article 108 of the CCP noted in paragraph 15 above). Furthermore, the detainee may lodge a request for release at any time and may repeat that request without having to wait for any particular period. In addition, against every decision concerning detention on remand, whether taken at the detainee's request or *ex proprio motu*, an objection can be lodged (see *Altınok v. Turkey*, no. 31610/08, § 53, 29 November 2011).

26. The Court accepts that in such a system, the requirement to hold a hearing each time an objection is lodged could lead to a certain paralysis of the criminal proceedings (ibid., § 54). With this in mind, and taking into account the specific nature of the proceedings under Article 5 § 4, in particular the requirement of speed, the Court considers that it is not necessary for a hearing to be held in respect of each objection, unless there are exceptional circumstances (ibid.). It reiterates, nevertheless, that it should be possible to exercise, at reasonable intervals, the right to be heard by the court determining an appeal against detention (see, for instance, *Knebl*, cited above, § 85, and *Baş v. Turkey*, no. 66448/17, § 212, 3 March 2020). It therefore follows that the absence of appearance before a court to challenge the lawfulness of detention would result in a violation of Article 5 § 4 of the Convention after a certain lapse of time, irrespective of the question of equality of arms (see *Adem Serkan Gündoğdu v. Turkey*, no. 67696/11, § 43, 16 January 2018, and the cases referred to therein).

27. The Court notes in this connection that the aforementioned Article 108 of the CCP, as it was in force at the material time, did not envisage the periodic reviews of detention at the investigation stage to be conducted by way of a hearing, whereas at the trial stage, a detained person enjoyed the opportunity to appear at more or less regular intervals before the judges called upon to rule on the merits of the case, who also reviewed the lawfulness of the detention at the end of each hearing. Moreover, objections on decisions concerning pre-trial detention were in principle entertained on the basis of the case file, as per Article 271 of the CCP (see paragraph 16 above; see also *Altınok*, cited above, § 52).

28. Having thus set out the relevant domestic legal context, it now falls on the Court to determine whether the applicants were able to make use of their right to be heard at reasonable intervals and, accordingly, to challenge their detention in an effective manner.

29. The Court observes that the applicants' complaint under this head concerns the Istanbul 21st Assize Court's rejection (on 8 August 2012) of their objection to the prolongation of their detention without the holding of a hearing. It should be pointed out at the outset that the absence of a hearing here did not as such undermine the principles of equality of arms and adversarial proceedings, insofar as none of the parties was invited to make oral submissions (see, for instance, *Çatal v. Turkey*, no. 26808/08, § 37, 17 April 2012). It should also be noted, however, that by the date in question, the applicants had not appeared before a judge for the review of their detention for one month and five days, their previous – and only – appearance being the date of their initial placement in pre-trial detention on 4 July 2012. The Court has found similar or longer periods to be acceptable in the context of challenges brought against detention at the trial stage, on the ground that at that stage of the proceedings, the detainees in question had the opportunity to appear regularly before the trial court and to contest the lawfulness of their detention in person at each hearing (see, for instance, *Öner Aktaş v. Turkey*, no. 59860/10, § 47, 29 October 2013, and *Ali Rıza Kaplan v. Turkey*, no. 24597/08, §§ 30 and 31, 13 November 2014, where the periods concerned were one month and six days and one month and eighteen days, respectively; see also, by contrast, *Mahmut Öz v. Turkey*, no. 6840/08, § 45, 3 July 2012, where non-appearance before a judge at the trial stage for more than three months led to a violation of Article 5 § 4).

30. However, in contrast to those cases, the period at issue here – that is, one month and five days, which spanned the entire investigation stage and continued into the initial phase of the trial stage preceding the first hearing – concerned a stage of the proceedings where the applicants did not enjoy the opportunity to appear before the trial court in person during the hearings on the merits of the case. The Court stresses at this juncture that compliance with the relevant requirement of Article 5 § 4 should be subject to particularly strict scrutiny in circumstances where a person was not able to appear before a judge throughout the entire investigation stage, as in the present case. In a case similarly straddling the investigation and trial stages, a sixteen-day period of non-appearance before a judge to challenge the lawfulness of detention was not considered to fall foul of the requirements Article 5 § 4 (see the Committee judgment in the case of *Çelik v. Turkey*, no. 6670/10, § 18, 17 March 2015). The Court notes, however, that the period in question in the present case is considerably longer. Moreover, after the dismissal of their objection on 8 August 2012 on the basis of the case file, the applicants did not have the opportunity to be heard by a judge regarding the lawfulness for their detention until the first hearing held by the Istanbul 20th Assize Court on 13 September 2012, that is some two months and ten days after the initial order of their pre-trial detention. It appears that it was only from that first hearing onwards – that is, at the trial stage – that the applicants were able to appear before a court on a more or less regular basis for the review of their detention, as claimed by the Government (see paragraphs 11 and 23 above). Accordingly, the Court considers that the period of two months and ten days during which the applicants did not appear before a judge was excessive.

31. The Court concludes, in the light of the foregoing considerations, that there has been a breach of Article 5 § 4 of the Convention on account of the applicants' inability to appear before the court that reviewed their objection to their continued detention.

B. The non-communication of the public prosecutor's written opinion

32. The applicants complained that their objection against the prolongation of their detention had been dismissed by the Istanbul 21st Assize Court on 8 August 2012 on the basis of the public prosecutor's written opinion, which had not been notified to them or to their representative.

33. The Government did not submit any specific arguments in respect of this complaint.

34. The Court notes that similar complaints have already led to findings of violation under Article 5 § 4 in many cases against Turkey for failure to respect the principle of equality of arms (see, for example, *Altınok*, cited above, §§ 57-61; *Çatal v. Turkey*, no. 26808/08, § 44, 17 April 2012; *Adem Serkan Gündoğdu*, cited above, § 49; and *Ruşen Bayar v. Turkey*, no. 25253/08, §§ 73-74, 19 February 2019). In its view, there is no reason to depart from the findings in those previous cases.

35. The Court considers accordingly that there has been a violation of Article 5 § 4 of the Convention in the present case on account of the non-communication of the public prosecutor's written opinion to the applicants or their representative in the context of the examination of their objection to their pre-trial detention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

36. The applicants also complained of the absence of a compensatory remedy in domestic law for the alleged violations of Article 5 of the Convention. They relied on Article 5 § 5 of the Convention which reads as follows:

"5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

37. The Government contested that argument (see paragraph 17 above for their arguments in this regard).

38. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see, for the general principles regarding the right to compensation set forth under Article 5 § 5, *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A; *Houtman and Meeus v. Belgium*, no. 22945/07, § 43, 17 March 2009; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, *Reports of Judgments and Decisions* 2012-I).

39. The Court notes that in the present case, it has found a violation of Article 5 § 4 of the Convention on two accounts. Regarding the possibility of claiming compensation for those violations, the Court has already found that Article 141 of the CCP did not provide for the possibility of seeking compensation for damage suffered as a result of procedural deficiencies in the proceedings brought to challenge pre-trial detention (see *Altınok*, cited above, §§ 66-69; *Hebat Aslan and Firas Aslan v. Turkey*, no. 15048/09, § 93, 28 October 2014; and *Ruşen Bayar v. Turkey*, no. 25253/08, § 82, 19 February 2019). Having regard to the Government's failure to submit any sample court decisions to suggest otherwise, the Court sees no reason to depart from its previous findings. The Court stresses in this connection that the case of *A.Ş.* (cited above) referred to by the Government (see paragraph 17 above) should be distinguished from the present case, since the Court's findings there relate to the compensation claims that may be lodged under Article 141 of

the CCP on account of the excessive length of pre-trial detention, and not compensation for damage suffered due to the lack of an effective remedy to challenge pre-trial detention.

40. Accordingly, the Court dismisses the preliminary objection raised by the Government as to the non-exhaustion of domestic remedies and, ruling on the merits, finds that there has been a violation of Article 5 § 5 taken in conjunction with Article 5 § 4 of the Convention in the present case.

IV. 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 and costs and expenses

42. The applicants claimed 3,000 euros (EUR), jointly, in respect of non-pecuniary damage. They also claimed 600 Turkish liras (TRY) (approximately EUR 155 at the material time) for translation, stationery and postal expenses, and TRY 6,785 (approximately EUR 1,740 at the material time) for their legal costs, which corresponded to the minimum amount for representation before international organs as indicated in the Union of Turkish Bar Associations' scale of fees for 2017. They did not submit any invoices or other documents in support of their claims.

43. The Government contested the applicants' claims as being excessive and unsubstantiated.

44. Having regard to the nature of the violations found, the Court, ruling on an equitable basis, awards EUR 1,250 to each applicant in respect of non-pecuniary damage.

45. As for the costs and expenses, the Court notes that according to its case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that the applicants did no more than refer to the Union of Turkish Bar Associations' scale of fees in respect of their claim for legal fees and failed to submit supporting documents to substantiate any of their claims. In these circumstances, the Court makes no award in respect of the costs and expenses claimed by the applicants (see, for instance, *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 108, 3 December 2019).

B. Default interest

46. 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. *Joins* the Government's preliminary objection concerning the non-exhaustion of compensatory remedies to the merits of the complaint under Article 5 § 5 of the Convention and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the applicants' inability to appear before the appeal court that reviewed their objection to their continued detention;

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the non-communication of the public prosecutor's written opinion to the applicants in the context of review proceedings;
5. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
6. *Holds*
(a) that the respondent State is to pay each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,250 (one thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State 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;
7. *Dismisses* the remainder of the applicants' claim for just satisfaction.
Done in English, and notified in writing on 25 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar
Jon Fridrik Kjølbro President