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La Corte EDU sul principio del contraddittorio e della parità delle armi in un procedimento giudiziario di riesame

(Cedu, sez. II, sentenza del 23 maggio 2023, ric. n. 61808/19)

La Corte EDU, adita da un cittadino turco, ha definito il ricorso avente ad oggetto l'asserita inefficacia del procedimento di controllo giurisdizionale della detenzione del ricorrente disposto al momento della sua condanna dal giudice di merito. Il ricorrente ha sostenuto, ai sensi dell'articolo 5 § 4 della Convenzione, che il procedimento di revisione aveva violato il principio della parità delle armi e il diritto al contraddittorio, in quanto non gli era stata fornita una copia delle osservazioni del P.M. presentate al tribunale di primo grado in relazione alla sua detenzione.

In generale, la Corte ha ribadito che, in virtù dell'articolo 5 § 4 della Convenzione, una persona arrestata o detenuta ha il diritto di proporre un ricorso per il controllo giurisdizionale delle condizioni procedurali e sostanziali che sono essenziali per la "liceità", ai sensi dell'articolo 5 § 1, della sua privazione della libertà. Di conseguenza, un tribunale che esamina un ricorso contro la detenzione deve fornire le garanzie di una procedura giudiziaria in cui sia garantita la "parità di armi" tra le parti, offrendo la possibilità di conoscere e commentare le osservazioni depositate dall'altra parte. Sicché nel caso di specie, la Corte ha ritenuto che il parere espresso in relazione alla detenzione del ricorrente costituiva il primo coinvolgimento del pubblico ministero nel procedimento medesimo e che il ricorrente non poteva quindi conoscere la posizione sostenuta dallo stesso in merito alla sua detenzione. Di conseguenza, per la Corte il ricorrente ha subito uno svantaggio e, tenuto conto del posto preminente che il diritto alla libertà occupa in una società democratica, ha ritenuto violato l'art. 5 § 4 della Convenzione.

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

SECOND SECTION

CASE OF XXX v. TÜRKİYE
(Application no. 61808/19)

JUDGMENT
STRASBOURG
23 May 2023

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 v. Türkiye,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:
Arnfinn Bårdsen, *President*,
Jovan Ilievski,
Egidijus Kūris,
Pauliine Koskelo,
Saadet Yüksel,
Diana Sârcu,
Davor Derenčinović, *judges*,
and Hasan Bakırcı, *Section Registrar*,

Having regard to:
the application (no. 61808/19) against the Republic of Türkiye 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 XXX ("the applicant"), on 15 November 2019;
the decision to give notice to the Turkish Government ("the Government") of the applicant's complaint under Article 5 § 4 that the proceedings for judicial review of his detention violated his right to equality of arms and to declare the remainder of the application inadmissible;
the parties' observations;
Having deliberated in private on 2 May 2023,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns the alleged ineffectiveness of the proceedings for judicial review of the applicant's detention ordered at the time of his conviction by the trial court. The applicant alleged under Article 5 § 4 of the Convention that the review proceedings had violated the principle of equality of arms and the right to adversarial proceedings as he had not been given a copy of the public prosecutor's written observations submitted to the trial court in relation to his detention.

THE FACTS

2. The applicant was born in 1993 and lives in Ankara. He was represented by Ms B. Başer, a lawyer practising in Ankara.

3. The Government were represented by their Agent, Mr Ömer Yılmaz, Deputy Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye.

4. The facts of the case may be summarised as follows.

5. On an unspecified date, the Ankara Chief Public Prosecutor's Office initiated a criminal investigation in respect of the applicant on suspicion of drug trafficking.

6. On 4 February 2016 the applicant was taken into police custody. Following a body search, a total of 1.27 grams of heroin was found on him. He denied accusations of drug trafficking in the statement he gave in the presence of his lawyer. On 5 February 2016 the applicant was released from police custody as per the public prosecutor's instructions.

7. On 23 February 2016 the Ankara Chief Public Prosecutor's Office filed an indictment with the Ankara Assize Court, charging the applicant with production and trade of narcotics and psychotropic substances under Article 188 of the Criminal Code. After the indictment was accepted,

criminal proceedings commenced in the Ankara 8th Assize Court, during the course of which the applicant remained at liberty.

8. On 26 April 2016 the trial court convicted the applicant of drug trafficking and sentenced him to a term of imprisonment of twelve years, six months and five days. The trial court also ordered the applicant's immediate detention.

9. On 27 April 2016 the applicant lodged an objection (*itiraz*) against the detention order. In substance, he argued that the detention order lacked legal grounds and was disproportionate and that there was no factual evidence giving rise to strong suspicion that he had committed an offence, nor was there any risk that he would abscond, conceal or tamper with evidence or influence witnesses. The trial court dismissed the objection and referred it to the Ankara 9th Assize Court. Prior to its examination, the Ankara 9th Assize Court obtained the written opinion of the Ankara Chief Public Prosecutor, who considered that the detention order dated 26 April 2016 had been in compliance with the applicable procedure and law. The public prosecutor's written opinion was not forwarded to the applicant or his lawyer.

10. On 2 May 2016 the Ankara 9th Assize Court dismissed an objection by the applicant, indicating expressly that it had acted in line with the opinion of the public prosecutor.

11. On 20 May 2016 the applicant lodged an individual application with the Turkish Constitutional Court. He alleged, in particular, that the order for his detention was not lawful, as it was not based on a reasonable suspicion and lacked relevant and sufficient grounds, that it was disproportionate and that his right to equality of arms had been breached, because the Ankara 9th Assize Court had taken its decision of 2 May 2016 without having duly provided him with the opinion of the prosecutor and had thus deprived him of the opportunity to examine and comment on the observations therein.

12. On 10 May 2019 the Turkish Constitutional Court declared the complaint concerning the lawfulness of the applicant's detention inadmissible as being manifestly ill-founded. As regards the other complaint alleging a violation of the right to personal liberty and security on account of the failure to provide the applicant with the public prosecutor's opinion, the Constitutional Court declared that complaint inadmissible as lacking constitutional and individual importance, on the ground that the applicant had not suffered a significant disadvantage.

13. On 12 April 2018 the applicant's conviction became final.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE CONSTITUTION

14. The relevant parts of Article 19 of the Constitution read as follows:

"Everyone has the right to personal liberty and security.

...

Everyone who is deprived of his or her liberty for any reason whatsoever shall be entitled to apply to a competent judicial authority for a speedy decision on his or her case and for his or her immediate release if the detention is not lawful.

..."

II. THE CODE OF CRIMINAL PROCEDURE

15. Under the Code of Criminal Procedure ("the CCP"), the prosecution phase begins with the acceptance of the indictment and ends when the final judgment is delivered. A person who is detained may request to be released at any stage of the investigation or prosecution phase, including during appeal stages.

16. The relevant provisions and guarantees for review of detention under the CCP, as in force at the relevant time, read as follows:

Definitions
Article 2

"1. In the application of this Code, the following terms shall mean:

...

(e) Investigation: the phase which runs from the moment when the competent authorities become aware of the suspicion that a criminal offence has been committed until the indictment is accepted,

(f) Prosecution: the phase which runs from the acceptance of the indictment until the delivery of the final judgment ..."

Detention order
Article 101

"1. Detention shall be ordered at the investigation stage by a magistrate at the request of the public prosecutor and at the trial stage by the competent court, whether of its own motion or at the prosecutor's request. Legal and factual reasons must be given for extending detention and for finding that alternative measures would be insufficient.

2. In decisions ordering detention, extending detention or rejecting requests for release, evidence indicating

(a) strong suspicion that the [alleged] offence has been committed,

(b) the existence of the grounds for detention,

(c) the proportionality of the detention order, and

(d) the ineffectiveness of alternative measures

shall be demonstrated with concrete facts and legal reasoning. ...

5. An objection may be lodged against decisions ordered pursuant to this Article and Article 100."

Requests for release of the suspect or accused
Article 104

"1. The suspect or accused may, at any stage of the investigation or prosecution phases, apply to be released.

2. The judge or the court shall decide whether detention should be continued or the suspect or accused should be released. Objections may be lodged against decisions rejecting such applications ..."

17. Furthermore, under Article 267 of the CCP, an objection may be lodged against any decision concerning detention, whether taken at the detainee's request or by the judge or the court *proprio motu*. An objection is initially reviewed by the same judge or the court which has given the decision being challenged. The judge or the court may rectify the decision in the event that the objection is allowed (Article 268 § 2). Otherwise, the judge or the court transmits the case file for review by the competent court, which is designated under Article 268 § 3 of the CCP.

18. Regarding an objection lodged against a decision concerning detention, the CCP provides, in so far as relevant:

Notification of the objection to the public prosecutor and the other party
Article 270

"1. The authority examining the objection may forward it to the public prosecutor and the other party in order to obtain their written observations. The authority may conduct further investigations into the matter ...

2. If the authority examining the objection requests an opinion from the public prosecutor, it shall be required to transmit the prosecutor's observations to the detainee or his or her lawyer for a response ..."

III. DOMESTIC PRACTICE

19. In a plenary decision of 19 July 2018 (*Ç.Ö.*, no. 2014/5927) the Turkish Constitutional Court indicated that the applicability of the safeguards stemming from the right to seek a judicial review of detention were contingent upon the nature of the detention in question, that is, whether it was classified as "detention on remand" (*suç isnadına bağlı tutukluluk*) or "detention after conviction" (*hükmen tutukluluk*). Accordingly, following conviction by a trial court, those safeguards would be applied in a selective manner and only those which were compatible with the nature and specificities of detention after conviction would remain applicable. The relevant paragraphs of the decision are as follows:

"...

33. Article 19 of the Constitution does not include a specific provision regarding the execution of a judgment of conviction. However, the purpose of Article 19 of the Constitution is to provide protection against arbitrary and unjustified deprivations of liberty, and the permitted exceptions to the right to personal liberty and security should be appropriate for attaining the purpose pursued by this Article (*Abdullah Ünal*, B. No: 2012/1094, 7/3/2014, § 38). For a person to be detained in the context of '*the execution of sentences and security measures restricting liberty which have been ordered by courts*', first of all the sentence or the security measure restricting liberty has to be ordered by a court, and secondly, the decision [depriving a person of his or her liberty] has to bear upon the sentence or the security measures in question. It is not permitted to deprive a person of his or her liberty on the basis of a decision which does not include any sentence or security measure. Finally, the deprivation of liberty should not exceed the scope of the sentence or the security measure restricting liberty (*Ercan Bucak (2)*, § 40; *Şaban Dal*, § 32).

...

46. Given that Article 19 § 8 of the Constitution, which provides that everyone who is deprived of his or her liberty for any reason whatsoever is entitled to apply to a competent judicial authority for a speedy decision on his or her case and for his or her immediate release if the detention is not lawful, does not make any distinction based on the grounds for deprivation of liberty, this right clearly includes situations of detention after conviction by a competent court (*Mehmet İlker Başbuğ*, B. No: 2014/912, 6/3/2014, § 80).

47. However, the right to seek review of detention before a competent judicial authority as provided under Article 19 § 8 of the Constitution only comprises requests for review which are compatible with the nature of the detention in question. It cannot be said that requests for review which are not compatible with the nature of the detention fall within the scope of the guarantees set forth under Article 19 § 8 of the Constitution.

48. In this regard, given that the requirements for detention after conviction and pre-trial detention are different from each other, requests for review lodged by persons who are detained after conviction but who contest conditions relevant for pre-trial detention cannot benefit from the guarantees enshrined in Article 19 § 8 of the Constitution.

49. Since a custodial sentence is imposed in the post-conviction phase, the guarantees under Article 19 § 8 of the Constitution would only apply if the requests for release of the person detained after conviction are compatible with the nature of the detention in question. The grounds which can be put forward in this regard have been laid down by the Constitutional Court in a general manner (see § 33 above).

50. In addition to the foregoing, when persons detained after conviction apply to a competent judicial authority for their release by putting forward new issues with an impact on their conviction and which render their continued detention unlawful (such as the decriminalisation of acts giving rise to the conviction, the existence of a state of impunity or legislative amendments rendering the conviction inoperative), the guarantees under Article 19 § 8 of the Constitution would remain applicable. ..."

20. In an admissibility decision of 28 November 2018 (*Bilal Sönmezsoy*, no. 2015/2755), the Turkish Constitutional Court specifically examined the issue of the review of post-conviction detention where the public prosecutor's opinion had not been forwarded to the defendant and found unanimously that the matter complained of lacked "constitutional and individual importance". In reaching that conclusion, the Constitutional Court mainly relied on the fact that the opinion in question did not include any new factual or legal grounds which would require the applicant to provide a response, and had regard to the applicant's failure to substantiate the existence of such new grounds. The lack of any substantive reference to the content of the prosecutor's opinion by the domestic courts was also taken into account as a factor in concluding that there had been no significant disadvantage for the applicant concerned.

THE LAW

I.THE GOVERNMENT'S PRELIMINARY OBJECTION

21. As a preliminary objection, the Government argued that the applicant had not raised a complaint in his application form concerning the failure to provide him with the public prosecutor's opinion during the proceedings for review of his detention.
22. The applicant did not respond to the Government's preliminary objection.
23. The Court notes that the applicant clearly raised this complaint in his application form, albeit under Article 6 of the Convention, as noted in paragraph 24 below. Accordingly, the Government's preliminary objection in this regard should be dismissed.

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

24. The applicant complained of an infringement of the right to adversarial proceedings and the principle of equality of arms on account of the failure to provide him with the public prosecutor's opinion during the proceedings for judicial review of his detention that had been ordered at the time his sentence had been imposed. He invoked Article 6 of the Convention.
25. The Court reiterates that it is the master of the characterisation to be given in domestic law to the facts of the case and is not bound by the characterisation given by the applicant or the Government (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, 17 September 2009). It therefore

considers that this complaint should be examined under Article 5 § 4 of the Convention, which reads:

"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. Admissibility

1.The parties' submissions

26. The Government first argued that the applicant's complaint under Article 5 § 4 was manifestly ill-founded owing to his failure to substantiate his allegations. They argued in that connection that the applicant had failed to explain, with concrete evidence, how he had been put at a disadvantage by not being provided with the public prosecutor's opinion.

27. The Government further contended that the application was also inadmissible on account of the lack of a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention. They stated that the assessment of whether the principle of equality of arms had been breached as a result of the failure to forward the opinion of the public prosecutor hinged on the nature of the opinion in question. They argued that in the present case the public prosecutor's opinion, which simply reiterated that the detention of the applicant was lawful, had not included any new legal or factual information that required the applicant to respond or to adduce new evidence relevant for the court's consideration.

28. Lastly, referring to the decision given by the Turkish Constitutional Court in the applicant's case and to that court's earlier case-law concerning similar complaints (see paragraphs 19 and 20 above), the Government pointed out that under the principle of subsidiarity, it should be up to the national authorities to ensure respect for the fundamental rights guaranteed by the Convention. Consequently, as a general rule, the establishment of the facts of the case and the interpretation of domestic law should be a matter solely for the national courts and other competent national bodies, the conclusions of which would be binding on the Court. In that connection, the Government emphasised that the applicant's complaints had been carefully examined by the Constitutional Court in accordance with its settled case-law on the matter.

29. The applicant objected to the Government's observations and did not respond to the specific points raised by them with regard to the admissibility of his application.

2.The Court's assessment

30. The Court considers that the Government's objections on admissibility are closely linked to the substance of the applicant's complaint under Article 5 § 4 and must therefore be joined to the merits of that complaint. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1.The parties' submissions

(a) The applicant

31. The applicant maintained his complaint under Article 5 § 4 of the Convention that the review proceedings had violated the principle of equality of arms and the right to adversarial proceedings

as he had not been given a copy of the public prosecutor's written observations submitted to the trial court in relation to his detention ordered at the time of his conviction.

(b) The Government

32. The Government reiterated the arguments that they had raised in relation to the admissibility of this complaint, as noted in paragraphs 26-28 above. They further contested the applicant's allegation of a violation of Article 5 § 4 of the Convention, on several grounds.

33. First, the Government contended that the safeguards under Article 5 § 4 of the Convention were not applicable in the present case. Referring, *inter alia*, to the Court's findings in *Kafkaris v. Cyprus* ((dec.), no. 9644/09, § 58, 21 June 2011), they submitted that where a person was deprived of his liberty pursuant to a conviction by a competent court, the supervision required under Article 5 § 4 was incorporated in the court judgment at the close of the judicial proceedings and no further review was required, save where the grounds justifying the person's deprivation of liberty were susceptible to change with the passage of time or where fresh issues affecting the lawfulness of the detention arose. In that connection, the Government emphasised that the issues raised by the applicant in his objection to the detention order (see paragraph 9 above) were relevant to a review of detention at the pre-trial stage, whereas following the imposition of the sentence, the applicant's detention status had changed to detention after conviction. In the Government's submission, an additional review of the applicant's detention at that stage was therefore not necessary.

34. The Government further added that under Turkish law, it had not been envisaged that a detainee could enjoy all the safeguards governing detention following conviction. They argued, as an example, that the procedural guarantees that detention should be reviewed at intervals of thirty days at the most and that the detention order should be delivered after the suspect or his or her defence counsel had been heard were not applicable during that stage of the proceedings.

35. Second, the Government reiterated their argument that the applicant had not suffered a significant disadvantage. In the Government's submission, any assessment to be made by the Court under Article 5 § 4 had to take into account the scope and content of the opinion submitted by the public prosecutor. The public prosecutor's opinion of 28 April 2016 in the present case had simply called for the dismissal of the applicant's objection. It had not contained any new facts or legal arguments of which the applicant had been unaware and no new issues affecting the lawfulness of the applicant's detention had arisen. Nor had the applicant provided any explanation as to how he had suffered a disadvantage on account of not having been provided with the public prosecutor's opinion.

2.The Court's assessment

(a) General principles

36. The Court reiterates that by virtue of Article 5 § 4 of the Convention, an arrested or detained person is entitled to bring proceedings for review by a court of the procedural and substantive conditions which are essential for the "lawfulness", within the meaning of Article 5 § 1, of his or her deprivation of liberty (see *Idalov v. Russia* [GC], no. 5826/03, § 161, 22 May 2012). Article 5 § 4 of the Convention does not normally come into play as regards detention governed by Article 5 § 1 (a) of the Convention, save where the grounds justifying the person's deprivation of liberty are susceptible to change with the passage of time (see *Kafkaris*, cited above) or where fresh issues affecting the lawfulness of such detention arise (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 57, 6 November 2008). However, where the Contracting States provide for procedures which go beyond the requirements of Article 5 § 4 of the Convention, the guarantees of that provision nevertheless have to be observed in those procedures (see *Stollenwerk v. Germany*, no. 8844/12, § 36, 7 September 2017).

37. The Court notes further that Article 5 § 4 guarantees no right, as such, to appeal against decisions ordering or extending detention, since it speaks of "proceedings" and not of "appeal". The intervention of a single body will satisfy Article 5 § 4, on condition that the procedure followed has a judicial character and affords the individual concerned guarantees that are appropriate to the kind of deprivation of liberty in question (see *Jecius v. Lithuania*, no. 34578/97, § 100, ECHR 2000-IX). Nevertheless, a State which sets up a second level of jurisdiction for the examination of applications for release from detention must in principle afford the detainee the same guarantees on appeal as at first-instance (see *Toth v. Austria*, 12 December 1991, § 84, Series A no. 224).

38. Accordingly, a court examining an appeal against detention must provide guarantees of a judicial procedure. In this connection, the proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person, including offering them the opportunity to have knowledge of and comment on the observations filed by the other party (see *Graužinis v. Lithuania*, no. 37975/97, § 31, 10 October 2000; *Lietzow v. Germany*, no. 24479/94, § 44, ECHR 2001-I; and *Lanz v. Austria*, no. 24430/94, § 44, 31 January 2002). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment on them (see, *mutatis mutandis*, *Brandstetter v. Austria*, 28 August 1991, § 67, Series A no. 211, and *Lanz*, cited above, § 41).

(b) Application of the general principles to the present case

39. The applicant in the present case complained of a violation of the right to adversarial proceedings and the principle of equality of arms on account of the failure to provide him with the opinion of the public prosecutor in relation to the decision on his detention at the time of his conviction. It was undisputed between the parties that the detention in question pertained to the period following the applicant's conviction by the trial court.

40. As indicated in the general principles outlined above (see paragraphs 36-38 above), if, under domestic law, procedural rights offered to detainees extend beyond their conviction, then the guarantees of Article 5 § 4 have to be observed in the post-conviction stage as well (contrast *Filat v. the Republic of Moldova*, no. 11657/16, §§ 23-36, 7 December 2021, where the domestic law as interpreted and applied by the domestic courts did not afford the same procedural rights to persons detained following conviction at first-instance level as those available to persons detained prior to the judgment of the first-instance court). Although the Government contested the applicability of the guarantees under Article 5 § 4 to the present case, the Court notes from the wording of the relevant provisions of the CCP that Turkish law does not distinguish between the pre- and post-conviction periods in terms of the applicability of procedural guarantees in the context of challenges brought against detention (see paragraphs 15-18 above). This reading of the CCP is supported by the case-law of the Constitutional Court, which only limits the application of the relevant procedural guarantees in respect of claims that are wholly incompatible with the nature of post-conviction detention – such as requests for release where the applicant only contests the existence of a strong suspicion that the alleged offence has been committed (see paragraphs 46 and 33 of the *Ç.Ö.* decision quoted in paragraph 19 above). There are therefore no grounds to hold that the applicability of procedural safeguards could be excluded when the detained person's challenge involved other matters – such as the disproportionality of the detention order as alleged by the applicant in the present case – that are guaranteed under Article 101 of the CCP in respect of all persons deprived of

their liberty. This is indeed supported by the fact that neither in its subsequent *Bilal Sönmezsoy* decision, nor in the applicant's own case, did the Constitutional Court consider the "equality of arms" safeguard, protected expressly under Article 270 § 2 of the CCP, to be inapplicable in the post-conviction period. Instead, it declared that complaint to be inadmissible on the facts for lack of significant disadvantage.

41. In these circumstances, and having particular regard to the Constitutional Court's stance on the matter, the Court cannot but conclude that the relevant procedural safeguards under Article 5 § 4 were applicable to the facts of the present case, contrary to the Government's argument (see, *mutatis mutandis*, *Stollenwerk*, cited above, § 36).

42. The Court notes that the Government, following the Constitutional Court's line of reasoning, further contested the alleged violation of Article 5 § 4 on the grounds that the public prosecutor's opinion had not contained any new facts or arguments of which the applicant had been unaware and that, therefore, the applicant had not substantiated how he had been put at a disadvantage by not being provided with the relevant opinion. Reiterating its findings in *Stollenwerk* (cited above, § 41), the Court considers at the outset that it is neither for the domestic court conducting the proceedings, nor for this Court, to assess the substance of submissions made by either one of the parties to the proceedings and to make the exchange of observations conditional on the outcome of such an assessment. Rather, it is a matter for the detainee, or his or her counsel, to assess whether or not a submission by the prosecutor deserves a reaction (see *Lanz*, cited above, § 44). The Court agrees with the Government that the opinion issued by the public prosecutor in the present case was indeed rather succinct. Nevertheless, the possibility that the opinion weighed in the decision of the 9th Assize Court cannot be simply ruled out, given in particular that that court made an explicit reference to the opinion and eventually ruled in accordance with it (see *Hebat Aslan and Firas Aslan v. Turkey*, no. 15048/09, § 79, 28 October 2014).

43. More significantly, the Court notes that the proceedings relating to the applicant's detention, which had been ordered at the close of the trial stage, were in fact the first time that the detention was subject to judicial review, the applicant having been at liberty in the pre-trial period (compare with *Stollenwerk*, cited above, where there had been eleven prior reviews). Consequently, the opinion delivered in relation to the applicant's detention was the first involvement of the public prosecutor in the proceedings and the applicant could not therefore have known the position of the public prosecutor regarding his detention. In other words, what was at stake in the objection proceedings and their outcome were of substantial importance for the applicant, who was seeking to obtain a judicial decision on the lawfulness of his detention for the first time and to have it discontinued in the event that the court found it to be unlawful.

44. Accordingly, in the circumstances of the present case, the Court cannot accept that the applicant was not put at a disadvantage on account of the failure to provide him with the public prosecutor's opinion, as argued by the Government. In this connection, the Court recalls that, given the prominent place that the right to liberty has in a democratic society, it has so far rejected the application of the "no significant disadvantage" admissibility criterion in relation to complaints under Article 5 of the Convention (see *Zelčs v. Latvia*, no. 65367/16, § 44, 20 February 2020, and the cases cited therein; see also *Hebat Aslan and Firas Aslan*, cited above, §§ 68-83).

45. The foregoing considerations are sufficient to enable the Court to conclude that the proceedings before the Assize Court were not truly adversarial and that the lack of opportunity for the applicant to comment on the prosecutor's opinion infringed the principle of equality of arms.

46. The Court therefore dismisses the Government's objections as to the admissibility of the applicant's complaints under this head and finds that there has been a violation of Article 5 § 4 of the Convention in the specific circumstances of the present case.

III.APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 50,000 Turkish liras (TRY – approximately 7,840 euros (EUR) at the material time) in respect of non-pecuniary damage. He argued that as a consequence of the breaches of the Convention, he had suffered emotional pain and distress.
49. The Government argued that the applicant's claim for the alleged non-pecuniary damage was unsubstantiated.
50. The Court considers that, in the circumstances of the present case, the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant (see *Stollenwerk*, cited above, § 49).

B. Costs and expenses

51. The applicant also claimed TRY 26,650 (approximately EUR 2,480 at the material time) for the costs and expenses incurred before the Court. In respect of his claims, he referred to the Ankara Bar Association's scale of fees pertaining to the year 2021.
52. The Government disputed that the costs and expenses had actually been incurred. They submitted that the applicant had failed to provide any document as to the fee agreement signed with his representative. In any event, the applicant's claim was excessive and unsubstantiated, especially given the lack of complexity of the procedure.
53. 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. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met (see *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 94, ECHR 2013). In the present case, the applicant has not substantiated that he has actually incurred the costs claimed. Accordingly, the Court makes no award under this head (see *Nalbant and Others v. Turkey*, no. 59914/16, § 57, 3 May 2022).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1.*Decides* to join to the merits the Government's preliminary objections on admissibility and *dismisses* them;
2.*Declares* the application admissible;
3.*Holds* that there has been a violation of Article 5 § 4 of the Convention;
4.*Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
5.*Dismisses* the remainder of the applicant's claim for just satisfaction.
Done in English, and notified in writing on 23 May 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar
Arnfinn Bårdsen President