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

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Holding two investigative journalists in pre-trial detention for over a year breached the Convention

In today's Chamber judgments in the cases of **Nedim Şener v. Turkey** (application no. 38270/11) and **Şık v. Turkey** (application no. 53413/11), which are not final[1], the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 § 3 (right to liberty and security) of the European Convention on Human Rights;

a violation of Article 5 § 4 (right to have the lawfulness of detention decided speedily); and,

a violation of Article 10 (freedom of expression).

The cases concerned the continued pre-trial detention of investigative journalists accused of aiding and abetting the criminal organisation Ergenekon, whose members were convicted in 2013 of fomenting a *coup d'état*.

The Court held that the authorities had kept the journalists Mr Şener and Mr Şık in pre-trial detention for reasons that were neither "relevant" nor "sufficient" to justify its length, which exceeded one year. It considered that neither the journalists nor their lawyers had had an opportunity to challenge in a satisfactory manner the reasons given to justify that detention. Indeed, custodial measures of this kind were liable to create a climate of self-censorship for any investigative journalist wishing to conduct research and comment on the conduct and actions of State bodies.

Principal facts

The applicant in the first case, Nedim Şener, is a Turkish national who was born in 1966 and lives in Istanbul (Turkey). He is an investigative journalist whose work has focused mainly on misappropriation by politicians and businessmen, the links of certain members of the security forces with Mafia-type and terrorist organisations, offences committed by the intelligence services and the influence of religious circles on the police.

The applicant in the second case, Ahmet Şık, is a Turkish national who was born in 1970 and lives in Istanbul. He is an investigative journalist, a freelance reporter, photographer and writer. His articles deal with freedom of expression, a number of unsolved killings, problems with the operation of the judicial system, police violence and Kurdish issues.

Both applicants have received numerous awards for their journalism.

In 2007 the Istanbul public prosecutor's office commenced a criminal investigation into the suspected members of a criminal organisation by the name of Ergenekon who had allegedly planned and committed acts of violence with the aim of creating a climate of insecurity and paving the way

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

for a military *coup d'état*. The public prosecutor's office also brought criminal proceedings against army officers and generals, members of the intelligence services, businessmen, politicians and journalists. They were accused of fomenting a *coup d'état* aimed at overthrowing the democratic constitutional order, a crime punishable by life imprisonment. In the judgment delivered in the main Ergenekon trial, the Istanbul Assize Court sentenced most of the accused to prison terms.

On 3 March 2011 the police searched the homes and work premises of Mr Şener and Mr Şık. The two journalists were taken into police custody. Mr Şık's arrest produced an immediate reaction and protests both nationally and internationally, including from the Commissioner for Human Rights of the Council of Europe and the organisation Reporters without Borders. On 5 March 2011 the judge of the Istanbul Assize Court remanded the two journalists in custody on suspicion of membership of the terrorist organisation Ergenekon. The same day Mr Şener was questioned first by the police, then by the prosecutor and lastly by the judge of the Istanbul Assize Court. He was accused, among other offences, of participating in the production of a book which was sharply critical of the Ergenekon judicial investigation and of contributing to another book that spread propaganda on behalf of Ergenekon. Mr Şener was suspected of aiding and abetting the organisation by covering up its activities and manipulating public opinion. He was immediately placed in pre-trial detention.

Mr Şener and Mr Şık lodged several applications for release which were all rejected.

On 26 August 2011 the prosecuting authorities indicted Mr Şener and Mr Şık before the Assize Court on charges of aiding and abetting the criminal organisation Ergenekon and participating or assisting in the production of two books which accused the government of promoting the infiltration of Islamists into State structures. The books also insinuated that the Ergenekon trial had been diverted from its proper purpose by the same Islamist leaders, seeking to stifle opposition to the government. These proceedings against the applicants are still pending.

The applicants were released on 12 March 2012.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment), Mr Şener alleged that his arrest amounted to degrading treatment. Under Article 5 §§ 1 and 3 (right to liberty and security), both applicants complained that the judicial decisions concerning their pre-trial detention and rejecting their applications for release had not been based on any specific evidence. Relying on Article 5 § 4 (right to have lawfulness of detention decided speedily), they alleged that they had been unable to contest effectively the lawfulness of their pre-trial detention, and maintained that the judicial authorities that had refused to inform them of the evidence against them had infringed the principle of equality of arms and the adversarial principle. Relying on Article 10 (freedom of expression), the applicants complained of an infringement of their right to freedom of expression on account of the decisions ordering and extending their pre-trial detention.

Mr Şener's application was lodged with the European Court of Human Rights on 1 July 2011. Mr Şık's application was lodged on 25 August 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Işıl **Karakaş** (Turkey),
Peer **Lorenzen** (Denmark),
András **Sajó** (Hungary),
Helen **Keller** (Switzerland),
Paul **Lemmens** (Belgium),
Robert **Spano** (Iceland),

and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 3

The Court considered that there was nothing in the case file to suggest that Mr Şener's arrest and the conditions in which he had been held in police custody and questioned had had an impact going beyond the unavoidable level of humiliation and constraint inherent in any arrest or detention, or that they had attained the minimum threshold of severity required by Article 3 of the Convention. This complaint therefore had to be rejected.

Article 5 § 3

The Court observed at the outset that when the authorities had arrested the applicants and questioned them, they had informed them that they were suspected of membership of a criminal organisation. The Court noted that the offence of "bringing pressure to bear on the judicial authorities in charge of a criminal investigation" had been central to the accusations against the applicants. However, that offence was not one of those referred to in Article 100 § 3 of the Code of Criminal Procedure, which listed the offences for which pre-trial detention was deemed to be warranted when there were strong suspicions against the person concerned. In the Court's view, it was therefore doubtful whether it was necessary to remand the accused in custody for over a year in the context of a preliminary investigation.

The Court also noted that the reasons given for refusing the applicants' requests for release on bail during the first year of the criminal investigation had not been substantiated. In the Court's view, the lack of detailed reasons meant that there had been no specific evidence demonstrating the need to keep the applicants in pre-trial detention. A stereotyped list of general reasons was not sufficient to compensate for this deficiency.

The Court further noted that Mr Şener and Mr Şık had been accused of using "black propaganda" methods to insidiously undermine public confidence in the judiciary. The Court observed that this act as such was not punishable under the Criminal Code. Even if the books in question had contained assertions that were untrue, the Court pointed out that the offences of defamation or bringing pressure to bear on the judiciary were less serious in nature than the crimes of belonging to or assisting a terrorist organisation, and did not warrant such a long period of pre-trial detention.

The Court therefore held that, in accusing the applicants from the outset of the investigation of "serious terrorist offences" and in presuming a need to keep them in pre-trial detention, the authorities had based that detention on reasons that were neither "relevant" nor "sufficient" to justify its length.

There had therefore been a violation of Article 5 § 3 of the Convention in both cases.

Article 5 § 4

The Court reiterated that proceedings concerning an appeal against detention had to be adversarial and to guarantee equality of arms between the parties, that is, between the prosecution and the person in detention. The method chosen by the domestic legislation had to guarantee that the opposing party was made aware of any observations submitted and had a genuine opportunity of commenting on them.

The Court noted that the prosecuting authorities' accusations against Mr Şener and Mr Şık had been based mainly on documents and computer files seized on the premises of third parties rather than those of the applicants. Invoking the need for confidentiality, the public prosecutor's office had refused the applicants permission to examine these key items of evidence. The Court thus

considered that neither the applicants nor their lawyer had had sufficient knowledge of the content of the documents, which were of crucial importance for the purpose of challenging the lawfulness of their detention. There had therefore been a violation of Article 5 § 4 of the Convention in both cases.

Article 10

The Court considered that, in detaining the applicants for such a long period without relevant or sufficient reasons, the judicial authorities had had a chilling effect on the applicants' willingness to express their views on matters of public interest. Applying a custodial measure in this manner was liable to create a climate of self-censorship for any investigative journalist planning to carry out research and comment on the conduct and actions of State bodies. The applicants' placement in pre-trial detention and their continued detention for over a year had not met a pressing social need. The measures in question had not been proportionate to the legitimate aims pursued and thus had not been necessary in a democratic society. There had therefore been a violation of Article 10 of the Convention in each case.

Just satisfaction (Article 41)

The Court held that Turkey was to pay 20,000 euros (EUR) to Mr Şener and EUR 10,000 to Mr Şık in respect of non-pecuniary damage.

The judgment is available only in French.

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