



An application concerning the lawfulness of a judge's pre-trial detention following the *coup d'état* of 15 July 2016 has been rejected for failure to exhaust domestic remedies

In its decision in the case of [Merçan v. Turkey](#) (application no. 56511/16) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned the pre-trial detention of a judge who was dismissed from office following the attempted *coup d'état* of 15 July 2016.

The Court held, in particular, that Ms Merçan was required to lodge an individual application with the Constitutional Court with regard to her complaint concerning the lawfulness and duration of her pre-trial detention, which she had not done in the present case. It therefore rejected this complaint for failure to exhaust domestic remedies.

The Court also rejected Ms Merçan's complaint regarding the conditions of detention, as the applicant had not brought this complaint before the domestic authorities.

Lastly, the Court held that the complaint concerning the right to a fair trial was premature at this stage.

Principal facts

The applicant, Zeynep Merçan, is a Turkish national who was born in 1986 and lives in Giresun (Turkey).

In the night of 15 to 16 July 2016 a group of individuals belonging to the Turkish armed forces, accused of having links to the FETÖ/PDY (Fetullahçı Terör Örgütü/Paralel Devlet Yapılanması – a Gülenist terrorist organisation/alternative State structure), were involved in a failed *coup d'état*. Over the ensuing few days the authorities carried out a large number of dismissals and arrests of military and judicial officers.

Ms Merçan, who was a judge in the town of Giresun, was arrested on 17 July 2016 and placed in pre-trial detention on 18 July 2016. The applicant's appeal against that decision was dismissed by the Ordu Assize Court on 8 August 2016.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 2 September 2016.

Relying on Article 5 §§ 1 and 3 (right to liberty and security), Ms Merçan complained about her placement in detention pending trial in the absence of any evidence, the failure to provide any reasons in the decision to place her in detention, and the length of her detention. Further relying on Article 3 (prohibition of inhuman or degrading treatment) and Article 6 (right to a fair trial), Ms Merçan complained of her conditions of detention and alleged a breach of her right to a fair trial.

The decision was given by a Chamber of seven, composed as follows:

Julia Laffranque (Estonia), *President*,
Işıl Karakaş (Turkey),
Nebojša Vučinić (Montenegro),
Valeriu Griţco (the Republic of Moldova),

Ksenija Turković (Croatia),
Jon Fridrik Kjølbro (Denmark),
Stéphanie Mourou-Vikström (Monaco), *Judges,*

and also Hasan Bakırcı, *Deputy Section Registrar.*

Decision of the Court

Article 5 §§ 1 and 3 (right to liberty and security)

Ms Mercan alleged that her placement in pre-trial detention was unlawful and complained about its length, explaining that she did not have available an effective remedy that would enable her to challenge that measure. In particular, she indicated that two members of the Constitutional Court, as well as lawyers working in that court, had been arrested and detained on remand. She argued that in such a context the Constitutional Court was not in a position to reach a decision impartially. She added that no appeal was possible against measures taken by legislative decree, in the context of the state of emergency.

The Court noted that Article 148 § 3 of the Constitution granted the Constitutional Court jurisdiction to examine, after examination of the ordinary remedies, applications lodged by individuals who considered that they had been deprived of their fundamental rights and freedoms as guaranteed by the Constitution and by the Convention and its protocols. It reiterated that it had already examined this remedy (*Hasan Uzun v. Turkey*¹) and found that it had no evidence to suggest that the remedy in question was not capable of affording, in principle, appropriate redress for complaints under the Convention. With regard more specifically to complaints under Article 5 of the Convention, the Court had declared inadmissible a complaint about the length of pre-trial detention in the case of *Koçintar v. Turkey*² for failure to exhaust that remedy, after noting that an application to the Constitutional Court could have led to the prisoner's release and that it offered reasonable prospects of success.

In the present case the Court could see no reason to depart from its case-law, and considered that recent judgments delivered by the Constitutional Court supported that position: in particular, in its judgment of 25 February 2016 concerning journalists E.G. and C.D., the Constitutional Court had found that the placement of the two journalists in pre-trial detention was in breach of Article 19 § 3 of the Constitution, on the grounds that there were no tangible facts giving rise to strong suspicion that the defendants had committed the offences with which they were charged and that the need to deprive the journalists of their liberty had not been shown.

As to whether there existed in the present case special circumstances that could have dispensed Ms Mercan from the requirement to avail herself of the remedy in question, the Court considered that the arguments submitted by the applicant on this point were not such as to cast doubt on the effectiveness of an application of this type to the Constitutional Court, noting that Ms Mercan's fears as to the impartiality of the Constitutional Court's judges did not in themselves relieve her of the obligation to lodge an application before that court, so as to comply with the requirements of Article 35 § 1 of the Convention.

The Court could therefore see no special circumstance which could have dispensed Ms Mercan from the obligation to apply to the Constitutional Court, and found that the applicant had failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, that of the European Court being subsidiary to theirs. In addition, since Ms Mercan's placement in pre-trial detention was not a measure that had been adopted by legislative decree in the context of the state of emergency, the Court considered that Ms Mercan's

¹ *Hasan Uzun v. Turkey* ((dec.), no. 10755/13, §§25-27, 30 April 2013).

² *Koçintar v. Turkey* ((dec.), no. 77429/12, §44, 1 July 2014).

argument that it was impossible for her to appeal against her placement in detention was unfounded.

In consequence, **the Court dismissed the complaint under Article 5 of the Convention for failure to exhaust domestic remedies**, in application of Article 35 §§ 1 and 4 of the Convention.

Other articles

The Court rejected Ms Mercan's complaint concerning the conditions of detention and held that the domestic remedies had not been exhausted, given that the applicant had not submitted this complaint to the domestic authorities.

The Court dismissed the complaint concerning the right to a fair trial, considering that it was premature at this stage.

The decision is available only in French.

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Press contacts

echrpess@echr.coe.int | tel: +33 3 90 21 42 08

Inci Ertekin (tel: + 33 3 90 21 55 30)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Denis Lambert (tel: + 33 3 90 21 41 09)

George Stafford (tel: + 33 3 90 21 41 71)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.