



## ECHR rejects two cases related to 2015 curfews in Turkey as inadmissible, cites non-exhaustion of domestic remedies

The European Court of Human Rights has today declared two cases related to events during curfews imposed in south-eastern Turkey in December 2015 inadmissible.

Its inadmissibility decision in **Elçi v. Turkey** (application no. 63129/15) was unanimous.

It also unanimously declared inadmissible complaints under Articles 2, 3, 8, 13, 15 and 17 in the case of **Ahmet Tunç and Others v. Turkey** (no. 4133/16), and **Tunç and Yerbasan v. Turkey** (no. 31542/16) and made the same decision by a majority about complaints under Article 34.

The Court essentially found that the applicants in these two cases had not exhausted domestic remedies, either because the Turkish Constitutional Court was still considering applications about the same circumstances, or because no application at all had been made to that or other courts.

In particular, the Court held that the applicants had not shown that an individual application to the Constitutional Court was either ineffective, inadequate or both, or that they were exempted by special circumstances from using such a remedy.

### Principal facts

The applications concerned events in the south-eastern Turkish town of Cizre, where a round-the-clock curfew was imposed on 14 December 2015 following clashes between the military and armed groups affiliated with the PKK (the Workers' Party of Kurdistan), an illegal armed organisation.

#### **Elçi v. Turkey** (application no. 63129/15)

The applicant, Ömer Elçi, is a Turkish national who was born in 1951 and lives in Şırnak.

He alleged that the imposition of the curfew in December 2015 meant that he and his family, living in the Nur neighbourhood of Cizre, had been confined to their house while fighting went on around them, including military tanks surrounding the area and shelling buildings.

On one occasion, shrapnel from a mortar had allegedly landed in his yard, smashing the windows of his house. The neighbouring house, owned by his brother, had allegedly been burned down by the security forces. The applicant, his family and around 40 neighbours moved in January to another area of the town and did not return to their homes until 26 February 2016.

The applicant and 15 other people applied to the Court in late December 2015 and sought an interim measure under Rule 39 of the Rules of Court. The Court rejected the interim measure request in January 2016 on the basis of a lack of information about the circumstances, but asked for all reasonable measures to be taken to provide reasonable care to applicants in a vulnerable situation.

In September 2015 Mr Elçi had challenged an earlier curfew in Mardin Administrative Court. The administrative court rejected his request for an interim measure to suspend the curfew and later dismissed his complaint on the merits that the curfew was unlawful. He did not appeal against that decision. The Constitutional Court also rejected a request for an interim measure in September 2015. It is still considering his application on the merits, related to the lawfulness of the curfew imposed in September 2015 and the alleged risk to his life during that curfew.

#### **Ahmet Tunç and Others v. Turkey** (no. 4133/16), and **Tunç and Yerbasan v. Turkey** (no. 31542/16)

The applicants, Ahmet Tunç, Zeynep Tunç and Güler Yerbasan, are Turkish nationals born in 1943, 1980 and 1999. They live in Cizre. The applications concerned the death of their relative, Orhan Tunç.

On 18 January 2016, during the curfew imposed in December 2015, Orhan Tunç left home to go to his brother Mehmet's house elsewhere in Cizre. He came under fire, allegedly from armoured vehicles, and was injured. Despite repeated calls to the emergency services, no ambulance was sent for him because of security concerns. The callers were told to move him to a location allegedly some 1.5 km away so he could be picked up. The Government states that the distance was 400 metres.

The next day Mehmet Tunç lodged an application with the Court and requested an interim measure concerning his brother. The Court granted the request, indicating to the Government that they should take all measures within their power to protect Orhan Tunç's life and physical integrity.

In early February the applicants' legal representative informed the Court that Orhan had still not been taken to hospital and had taken shelter in the basement of a house. They alleged that the authorities were not making any effort to help Orhan or others in a similar situation, other than telling them to go to a location which was 400 metres away to be picked up.

Later that month lawyers for 31 people, including Orhan Tunç, applied to the Turkish Constitutional Court and asked for an interim measure to ensure their immediate access to medical facilities.

On 11 February 2016 20 of the 31 people, including Orhan Tunç, lodged an application with the Court in Strasbourg, stating that they had all been injured and were trapped in the basement of a building in Cizre. They complained that the Constitutional Court was not examining their application speedily and requested a measure under Rule 39 to ensure their immediate transfer to hospital.

The Court asked for information from the Government and reminded it of the earlier Rule 39 indication in favour of Orhan Tunç. The Constitutional Court rejected the applicants' request for an interim measure, referring to information from the office of the local governor that paramedics had been unable to find the injured people but had seen a number of bodies.

On 15 February 2016 the Government informed the Court that the security forces had found a body with a driving licence in the name of Orhan Tunç in a building in Cizre, along with the bodies of eight other people and various items of weaponry. An investigation into his death led to a decision in March 2017 not to prosecute. The Magistrates Court dismissed two objections to that decision.

In December 2017 Orhan Tunç's family lodged an application with the Constitutional Court, separate from the one lodged previously, complaining, among other things, of a violation of the right to life, and a breach of the duty to carry out an effective investigation.

The Constitutional Court is still considering both applications.

According to the Government, Ahmet Tunç in February 2018 began proceedings in Mardin Administrative Court for compensation for the lack of care for Orhan Tunç. That case is still ongoing.

The applicants in application no. 4133/16 also alleged that their lawyer, Ramazan Demir, was detained from March-September 2016 because of curfew cases he had lodged in Strasbourg.

## Complaints, procedure and composition of the Court

Mr Elçi's application was lodged with the European Court of Human Rights on 29 December 2015.

He complained under Article 2 (right to life) that the security forces had conducted their operations in Cizre in complete disregard of the principles on the use of force and had endangered civilians' lives. He argued that the respondent State had been under an obligation to take appropriate steps to safeguard lives, and alleged that his life, and those of others in Cizre, had been put at risk.

He alleged that the decision by the local governor to impose the curfew, which had no basis in domestic law, had breached his rights under Article 5 § 1 (right to liberty and security).

Application no. 4133/16 was lodged on 19 January 2016 on behalf of Orhan Tunç by his brother Mehmet, a Turkish national born in 1977 who lived in Cizre. After Mehmet's death in February 2016, their father, Ahmet Tunç, and Mehmet's wife, Zeynep Tunç, pursued the application. Ahmet Tunç and Orhan Tunç's partner Güler Yerbasan pursued application no. 31542/16, lodged on 11 February 2016, after Orhan Tunç's death.

The applicants complained under Article 2 that the authorities had caused Orhan Tunç's death, both because they had failed to take him to hospital after he had been shot and seriously injured and then because he had been killed by the security forces. Under the same provision they complained of a failure to hold an effective investigation into his death. The applicants in application no. 31542/16 also alleged a violation of Article 13 (right to an effective remedy) related to these issues.

The applicants alleged that the fear Orhan Tunç must have felt when he heard the constant bombing in the vicinity of the basement where he had been trapped as an injured person was ill-treatment under Article 3 (prohibition of torture and inhuman or degrading treatment). The applicants in application no. 4133/16 submitted that their own rights under Article 3 and Article 8 (right to respect for private and family life) had been breached by the authorities' indifference to their calls for help to retrieve his body. The applicants in application no. 31542/16 argued that imposing the curfew without a state of emergency had breached Article 15 (derogation in time of emergency) and Article 17 (prohibition of abuse of rights).

The applicants in application no. 4133/16 complained that the Government, by failing to comply with the Court's interim measure and by detaining their lawyer, had breached Article 34 (right of individual application).

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

Robert **Spano** (Iceland), *President*,  
 Paul **Lemmens** (Belgium),  
 Ledi **Bianku** (Albania),  
 Işıl **Karakaş** (Turkey),  
 Nebojša **Vučinić** (Montenegro),  
 Valeriu **Griţco** (the Republic of Moldova),  
 Jon Fridrik **Kjølbro** (Denmark),

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

## Decision of the Court

### **Elçi v. Turkey** (application no. 63129/15)

The Government argued that Mr Elçi had failed to exhaust domestic remedies. He submitted that he had unsuccessfully launched legal challenges and sought interim measures over the September 2015 curfew, so following those procedures for the December 2015 curfew would have been fruitless.

However, the Court noted in relation to his complaint under Article 2 that the Constitutional Court's September 2015 decision had been a refusal of an interim measure. A decision on the merits of the complaint – the lawfulness of the curfew and the alleged risks to his life – had not yet been delivered. Requests for interim measures were particular kinds of action, referring to urgent situations, and

were limited in scope to the specific facts of those situations; the refusal of such a request could not be seen as prejudging the outcome of the rest of the case, or the outcome of a future request concerning new circumstances.

As regards his complaint under Article 5, the Court observed that Mr Elçi had never appealed against the administrative court decision upholding the lawfulness of the September 2015 curfew. It reiterated its point that the Constitutional Court's ruling on that question was also still awaited. A complaint to Strasbourg under this provision was therefore premature.

The Court was aware of the dangers of the passage of time, however, a period of just over three years since his application to the Constitutional Court in 2015 did not mean that that remedy had become ineffective, at least not for the time-being.

Mr Elçi had not shown that the domestic remedies available to him were inadequate or ineffective or that there were special circumstances which exempted him from pursuing them. The application therefore had to be rejected as inadmissible for non-exhaustion of domestic remedies.

**Ahmet Tunç and Others v. Turkey (no. 4133/16), and Tunç and Yerbasan v. Turkey (no. 31542/16)**

The Court again highlighted the rule of exhaustion of effective domestic remedies and that Strasbourg could not, and must not, take the place of the Contracting States. It also decided to deal with the applicants' complaints under Article 2 and Article 13 under Article 2 alone.

The Court noted that the Constitutional Court was still considering their two applications related to Orhan Tunç so their case in Strasbourg, with the same submissions, was *prima facie* premature.

However, the applicants had argued that the Constitutional Court did not provide an effective remedy, owing to an alleged practice of impunity for rights violations by the authorities during curfews, and an alleged erosion in judicial independence and impartiality. The Court also took note of comments in that regard by the Commissioner for Human Rights of the Council of Europe.

Overall, the Court did not accept the applicants' arguments that an administrative and judicial practice of impunity had exempted them from the obligation to exhaust domestic remedies. It emphasised that the Constitutional Court could provide an examination of allegations of impunity, or of any other complaints, that was similar to its own, and it reiterated its case-law that doubts about the effectiveness of a remedy did not exempt applicants from the obligation to use it.

The Court found that the applicants had not provided enough evidence for their allegations about the lack of independence and impartiality of the judiciary, allegations it could not consider in the abstract, but which had to be related to the circumstances of the case. In particular, the Constitutional Court's refusal of an interim measure, one of the reasons for their allegations, did not on its own cast doubt on that court's independence, impartiality or both. It reiterated that decisions on such measures did not predetermine a decision on the merits.

The length of time the Constitutional Court had been dealing with their applications – since February 2016 and December 2017 – had also not made that remedy wholly ineffective.

In particular, the investigation into Orhan Tunç's death had had to take place first and the constitutional proceedings had become more active since it had ended. The applicants had also failed to present concrete, consistent evidence for their submission that prosecutors or the lower courts would not implement any Constitutional Court decision in their favour over Orhan's death.

In conclusion, the Court found that there were no exceptional circumstances exempting the applicants from using the remedy of the Constitutional Court, or that such a procedure would be inadequate or ineffective. They had therefore not complied with the requirement to exhaust domestic remedies and this part of the application had to be declared inadmissible.

If developments showed that the remedy was not effective, for instance if the proceedings lasted too long, the applicants were not prevented from lodging a new application in Strasbourg.

In relation to the applicants' complaints under Article 3 and Article 8, the Court again observed that they had not pursued any domestic remedies, such as an action for compensation or an application with the Constitutional Court. The applicants had argued that such remedies were ineffective, but the Court disagreed. It noted that it had already found similar complaints inadmissible and saw no reason to depart from those findings in this case, therefore rejecting them for non-exhaustion.

The Court noted that the applicants' complaints under Article 34 were focussed on the alleged failure by the authorities to comply with the Court's interim measure indicated for Orhan Tunç.

The measure in question had asked that the Turkish authorities "take all measures within their power to protect Orhan Tunç's life and physical integrity". Deciding whether that had been done required an assessment of the circumstances at the time, however, the domestic proceedings were still continuing on that point and the relevant facts had not yet been established.

Furthermore, the duty under Article 34 was closely linked to a State's positive obligations under Article 2 to protect the right to life, which was part of the Turkish Constitutional Court's ongoing assessment. It was therefore premature for the Court in Strasbourg to examine this part of the complaint. It also decided that it did not have enough elements to conclude that the measures taken against Mr Demir, part of an investigation begun in 2011, had hindered the applicants' right of individual application.

Lastly, it rejected their complaints under Article 15 and Article 17 as manifestly ill-founded, as it had done with similar complaints in the case of [Koç and Others v. Turkey](#).

*The decision is available only in English.*

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**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.