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

SECOND SECTION

DECISION

Application no. 42883/19
Metin ÇAMURŞEN
against Türkiye

The European Court of Human Rights (Second Section), sitting on 12 November 2024 as a Committee composed of:

Jovan Ilievski*, President*,
Péter Paczolay,
Stéphane Pisani*, judges*,

and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 42883/19) 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") on 23 July 2019 by a Turkish national, Mr Metin Çamurşen ("the applicant"), who was born in 1975, is detained in Tekirdağ and was represented by Mr F.Topal, a lawyer practising in Erzurum;

the decision to give notice of the application to the Turkish Government ("the Government"), represented by their then Agent, Mr Hacı Ali Açıkgül, former Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The present application concerns the retention of the internet traffic data (such as GPRS Internet connection information, IP addresses, communications data, etc.) of the applicant by the Information and Communication Technology Authority ("*Bilgi Teknolojileri ve İletişim Kurulu*", "BTK") and the access provider company beyond legal time-limits, and communication of such data by the BTK to the Tekirdağ 2nd Assize

Court for the purposes of the criminal proceedings conducted against the applicant for membership of a terrorist organisation.

A. Circumstances of the case

2. On 29 July 2016 the applicant was placed in pre-trial detention and a criminal investigation was initiated against him on account of membership of an organisation described by the Turkish authorities as the "Fetullahist Terror Organisation / Parallel State Structure" (*Fetullahçı Terör Örgütü / Paralel Devlet Yapılanması*, hereinafter referred to as "FETÖ/PDY"), which was considered by the authorities to be behind the coup attempt of 15 July 2016.

3. On 14 September 2017 the trial court asked the BTK to examine the applicant's internet traffic data for the years 2014, 2015 and 2016 and to provide information on whether the applicant's mobile phone number was connected to IP addresses of the encrypted messaging application "Bylock", which, according to authorities, was being used exclusively by the members of the FETÖ/PDY organisation for internal communication, as well as the CGNAT data, which indicate the internet traffic between the two sources. The BTK communicated the data to the trial court accordingly.

4. On 29 March 2018 the applicant was found guilty as charged and convicted to nine years' imprisonment. The conviction was based on, *inter alia*, the applicant's Bylock records.

5. On 28 June 2018 the applicant filed a criminal complaint against the BTK and the access provider company, relying on Article 138 of the Turkish Criminal Code (Law no. 5237) which prescribes the offence of not destroying data within legal time-limits, alleging that his internet traffic data had been retained longer than the time-limit under the domestic legislation.

6. On 10 July 2018 Ankara Chief Prosecutor's Office rendered a decision not to process the criminal complaint. It stated that the applicant's allegations should have been raised as defence submissions during the criminal proceedings conducted against him and that they cannot give rise to a criminal complaint. The decision was final.

7. Following an individual application lodged by the applicant, the Constitutional Court, its decision of 21 June 2019, found his complaints inadmissible for failure to exhaust the available effective domestic remedies.

8. Relying on Article 8 of the Convention, the applicant complained that the BTK and the access provider company had retained his internet traffic data beyond the statutory time-limits and that the BTK had communicated these data to the trial court during the criminal proceedings against him, in breach of the right to respect for his private life. Relying on Article 13 of the Convention, he further claimed to have been deprived of an effective remedy in this regard.

B. Relevant domestic law and practice

1. Domestic law

9. Article 12 of the Code of Administrative Procedures (Law no. 2577) provides:

> "Those who suffer damage as a result of an administrative act may directly bring an action for a full remedy or a joint action for annulment and full remedy before the Supreme Administrative Court or Administrative and Tax Courts. They may also first bring an action for annulment and then, upon its conclusion, bring an action for a full remedy, within the required time-limits, as from the notification of the judgment delivered in the action for annulment or the judgment to be delivered after the possible use of any judicial remedies in this regard. A full remedy action for the damages resulting from the execution of an act may also be brought in due time as from the execution of such act. (...)"

10. Article 13 § 1 of the Law no. 2577 provides:

> "Persons who have suffered damage from an administrative act shall apply to the relevant administrative body within one year from the date on which they learned of that act through written notification or other means, and in any case within five years from the commission of that act, to request the restoration of their rights before filing an administrative claim. In the event of partial or complete rejection of their request, administrative proceedings may be brought within the statutory time-limit from the day following the notification of this decision or, if no response is given within thirty days, from the end of this period."

11. Article 58 of the Code of Obligations (Law no. 6098) provides:

> "A person who suffers damage from the violation of his personality rights may request the payment of a sum of money as compensation for non-pecuniary damage.
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> The judge may decide on another form of compensation instead of this payment, or in addition to it; in particular, the judge may issue a decision condemning the violation and may order the publication of this decision."

2. Relevant case-law of the Constitutional Court

12. In its judgment in the case of *Ertan Erçıktı (3)* (application no. 2018/14040, 30 June 2021), the Constitutional Court examined a complaint on retention of internet traffic data beyond the limits prescribed under the domestic legislation and communication of the data to trial courts. It declared the application inadmissible for failure to bring a full remedy action under Law no. 2577 against the BTK or a compensatory remedy under Law no. 6098 against the access provider company.

13. The Constitutional Court held that in cases where the impugned acts and perpetrators are already known and the main objective is to redress the damage sustained, compensatory remedies were more effective compared to criminal remedies. It further found that in the case at issue, where the applicant complained about retention of his personal data by an administrative body contrary to the provisions of domestic law, an

acknowledgement of the violation and an obtaining of redress for the personal damage lie at the core of the dispute. In that connection, and considering their capacity to effectively redress personal damage, the Constitutional Court considered compensatory remedies before administrative and civil courts to be available and effective domestic remedies which should have been exhausted.

14. The relevant part of the Constitutional Court's judgment reads as follows:

> "50. (...) the identification of perpetrators and clarification of the incident within the context of an act defined as a criminal offence by law, through effective criminal investigation and prosecution, is a requirement of the State's positive obligations. Nevertheless, particularly in the context of the obligation to investigate, in cases where the perpetrator is known and the aim is to remedy personal damage through a criminal complaint, it can be said that a civil remedy is an effective legal remedy, provided that the circumstances of each specific case are taken into consideration. On the other hand, the mere provision of compensation for an act deemed criminal is not sufficient for a civil remedy to be considered an effective legal remedy in itself. The compensation remedy should also provide a reasonable prospect of success concerning the complainant's grievances and a solution suitable for the complainant's objective. In this context, the remedy that will be considered effective for the specific case must be a remedy that essentially establishes whether there was a violation of the right to protection of personal data under the guarantees provided in the Constitution and offers sufficient redress.
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> 51. In the case at issue, it is understood that the applicant filed a criminal complaint regarding the retention of internet traffic data for longer than the period specified in the legislation and the sending of this information to the relevant court. Following the investigation, it was decided by the Chief Public Prosecutor's Office that there was no ground for prosecution. Considering that there is no dispute regarding the acts and perpetrators [of these acts] subject to the applicant's complaint, it can be said that the applicant aimed to have the violation of his rights acknowledged, remedy personal harm, and punish the perpetrators through the criminal complaint. However, it is understood that the act subject to the complaint originated from the corporate activities of the Internet Service Providers and the BTK. In this case, it is clear that unless an intentional or negligent act is identified at the end of the criminal proceedings, the individual criminal responsibility of the BTK and internet provider company employees cannot be established, and corporate responsibility cannot, in any case, be the subject of criminal proceedings. Moreover, the applicant does not have a claim in the application form regarding the individual responsibility of the BTK and company employees.(...)
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> 52. (...), it is not possible for the applicant's alleged personal damage to be remedied through criminal proceedings. (...) it is understood that the acts the applicant was subjected to were unlawful and that the claim regarding the violation of the right to protection of personal data can be investigated by administrative and civil courts, which can establish any unlawfulness and violation of rights if present. Additionally, if an unlawful act is established, non-pecuniary compensation can be awarded to remedy personal damage. Unlike in criminal proceedings, both individual and corporate responsibility can be invoked in the compensation proceedings, and under general provisions, a judge can decide on additional remedies and measures alongside the compensation for the violation of rights identified. When examining the cited court decisions, it is clear that similar claims to those of the applicant have been thoroughly

examined on their merits by both civil and administrative courts, enabling the parties to effectively participate in the proceedings with their claims and defences, and that the decisions of the first instance courts are subject to review by higher courts. In this context, there is therefore an effectively functioning legal remedy available to the applicant through civil and administrative courts.

53. When the aforementioned explanations and court decisions are considered together, it is shown that in the context of establishing and remedying the violation of the right to protection of personal data, compensation claims offer a more suitable and reasonable chance of success compared to criminal proceedings for the applicant's purpose. (...) In this case, considering the applicant's alleged violations, it is concluded that examining the application without exhausting the compensation remedy, which appears to offer an initially accessible remedy with sufficiently remedial capacity related to the alleged violations, would not be consistent with the subsidiary nature of individual applications."

THE COURT'S ASSESSMENT

A. Alleged violation of Article 8 of the Convention

15. The applicant complained under Article 8 of the Convention that the retention of his internet traffic data beyond the statutory time-limits and the communication of these data through the BTK to the trial court for the purposes of the criminal proceedings infringed his right to respect for private life. Relying on Article 13 of the Convention, the applicant further claims to have been deprived of an effective domestic remedy.

16. The Government invited the Court to declare the application inadmissible for non-exhaustion of domestic remedies. They indicated that the applicant had failed to use the full remedy action (*tam yargı davası*) against the BTK as per Law no. 2577 on administrative procedure (see paragraph 9 above) or alternatively, the compensatory remedy made available under Law no. 6098 (see paragraph 11 above) against the access provider company. They referred to the Constitutional Court's judgment in *Ertan Erçıktı (3)* (see paragraphs 12-14 above) and cited a number of decisions in which the domestic administrative and civil courts had examined the merits of similar claims and found that the BTK and the access provider companies acted in accordance with their legal obligation to communicate the internet data to the prosecution bodies for the purposes of a criminal investigation, and afforded no compensation to the claimants in this respect.

17. The applicant argued that he had exhausted domestic remedies by lodging a criminal complaint. He had not been required to use another remedy which essentially served the same purpose. He further raised certain doubts as to the prospects of success of the compensatory remedies available before the administrative and civil courts, stating that the case-law cited by the Government in their observations does not include any decision where the domestic courts found that the BTK and the access provider companies acted

contrary to the domestic provisions and granted compensation to the claimants.

18. The general principles concerning the exhaustion of domestic remedies have been summarised in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). The Court accordingly recalls that, to be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

19. The Court observes that the Constitutional Court dismissed the applicant's complaint for failing to avail himself of the available and effective domestic remedies. Although the Constitutional Court did not make any reference to its case-law in its decision concerning the applicant's individual application, the Court observes that the high court explained in more detail the principles concerning the effective domestic remedies relating to complaints as those of the applicant in its subsequent case-law, in particular, in the judgment of *Ertan Erçıktı (3)* of 30 June 2021 (see paragraphs 12-14 above). In this latter judgment, the Constitutional Court explained that the compensatory remedies before administrative and civil courts constituted effective and sufficient remedies concerning allegedly unlawful acts of the BTK and of the access provider companies within the context of retention of personal data and transfer of such data to courts.

20. The Court observes that Article 12 of Law no. 2577 provides a remedy for obtaining compensation to those who allegedly suffered personal damage as a result of an administrative act. It further takes note of the provisions of Article 58 of Law no. 6098 which allow the bringing of a compensatory action against private persons where the claimant alleges to have suffered personal damage. In the instant case, the Court observes that the measure complained of is mainly about retention of personal data beyond the limits prescribed by domestic law by the BTK and the access provider company. It further notes that there is no dispute between the parties that the measure complained of falls within the ambit of Article 12 of Law no. 2577 and Article 58 of Law no. 6098.

21. As regards the question of availability and effectivity of the remedies in question, the Court takes note of the applicant's doubts as to whether they offer reasonable prospects of success, given that in the decisions of the administrative and civil courts referred to by the Government these courts had rejected similar claims by finding that the BTK and the access provider companies had acted in accordance with law.

22. In this connection, the Court reiterates that the existence of mere doubts as to the prospects of success of a particular remedy cannot dispense an applicant from making use of that remedy (see *Vučković and Others*, cited above, §§ 74-84), and that the mere fact that the complaints were dismissed

is not in itself sufficient to determine whether or not the remedy was "effective" (see, *mutatis mutandis*, *Amann v. Switzerland* [GC], no. 27798/95, § 89, ECHR 2000-II, and *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI). On the contrary, it is in the applicant's interests to apply to the appropriate court to give it the opportunity to develop existing rights through its power of interpretation (*Ciupercescu v. Romania*, no. 35555/03, § 169, 15 June 2010).

23. The Court also emphasises that Contracting States are afforded some discretion as to the manner in which they conform to their obligation to provide a domestic remedy that would allow the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (*Popovski v. the former Yugoslav Republic of Macedonia*, no. 12316/07, § 79, 31 October 2013). The Contracting States, who are in the best position to assess the practicalities, priorities and conflicting interests on a domestic level, are free to choose the remedies and form of appropriate relief (ibid., § 84).

24. The Court notes that, according to domestic law as interpreted and implemented by the Constitutional Court, the most effective remedies concerning complaints as those of the applicant were the compensatory remedies before the administrative and civil courts. The Court further notes that, as clarified by the Constitutional Court in its judgment in *Ertan Erçıktı (3),* in cases raising similar issues the administrative and civil courts thoroughly examined the merits of the claims made by the parties, who were able to effectively participate in the proceedings, and the decisions of the first instance courts were subject to review by higher courts (see paragraph 14 above). Giving weight to the subsidiary character of its role, the Court is of the opinion that, as such, there is nothing to indicate that the review carried out by the domestic courts in connection with the above-mentioned remedies would be limited in any way or was clearly doomed to fail (see, *mutatis mutandis*, *Mustafa Avci v. Turkey*, no. 39322/12, § 64, 23 May 2017). Thus, the Court sees no reason to doubt the effectiveness of the above-mentioned remedies or to find that they could not present any prospect of success to the applicant.

25. In the light of the above, the Court considers that there is no reason to call into question the Constitutional Court's finding that the compensatory remedies before administrative and civil courts were capable of leading to an acknowledgment of the alleged violation and an award of compensation (see, *mutatis mutandis*, *Harizanov v. Bulgaria* (dec.), no. 53626/14, §§ 93-97, 5 December 2017, and *Gülen v. Turkey* (dec.), nos. 38197/16, 38384/16, 38389/16, 38394/16, 38400/16 and 38410/16, § 68, 8 September 2020).

26. Therefore, the Court is of the opinion that as the applicant did not avail himself of the compensatory remedies before the administrative and civil courts set out in Article 12 of Law no. 2577 and Article 58 of Law no. 6098, he cannot be deemed to have done everything that could reasonably be

expected of him to exhaust domestic remedies (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116, ECHR 2007-IV).

27. The Court points out, however, that this conclusion in no way prejudices any subsequent review of the question of the effectiveness of the remedies concerned, and in particular of the domestic courts' ability to develop a uniform, Convention-compliant approach to the full remedy action concerning retention of personal data (compare also *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 102, 20 March 2018).

28. In view of the foregoing, the Court allows the Government's objection and rejects the complaint under Article 8 of the Convention on grounds of failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

B. Remaining complaint

29. The applicant further claimed that he did not have at his disposal an effective remedy to complain about the unlawful retention and communication of his internet traffic data, as required by Article 13 of the Convention in conjunction with Article 8 of the Convention.

30. The Court has established above that the applicant had at his disposal an effective domestic remedy with regard to his complaints under Article 8 of the Convention. It therefore follows that the complaint under Article 13 of the Convention is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 5 December 2024.

Dorothee von Arnim Deputy Registrar	Jovan Ilievski President