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

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In the absence of effective judicial review, a dismissal based on Emergency Legislative Decree No. 677 was in breach of the Convention

In today's **Chamber** judgment[1] in the case of Pişkin v. Turkey (application no. 33399/18) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, and

a violation of Article 8 (right to respect for private and family life).

The case concerned Mr Pişkin's dismissal on the grounds that he had links with a terrorist organisation, in the wake of the declaration of a state of emergency in Turkey following the failed military coup of 15 July 2016, as well as the subsequent judicial review of that measure.

Mr Pişkin complained that neither the procedure leading to his dismissal nor the subsequent judicial proceedings had complied with the guarantees of a fair trial. He also complained that he had been branded a "terrorist" and "traitor".

The Court noted that Legislative Decree No. 667 had not only authorised the dismissal of civil servants but also required public institutions such as Mr Pişkin's employer to dismiss civil service employees under a simplified procedure. The prior decision-making process for the termination of the employment contract had not necessitated any form of adversarial proceedings, and no procedural safeguards had been laid down in the Legislative Decree. It had therefore been sufficient for the employer to consider the employee as belonging, affiliated or linked to one of the illegal structures defined in the Legislative Decree, without any need to provide even cursory personalised reasoning.

As regards the right to a fair trial, the Court considered that the crucial question was whether Mr Pişkin's inability to take cognisance of the reasons for his employer's termination of his employment contract had been adequately counterbalanced by effective judicial review of the employer's decision. The Court held in that connection that the domestic courts had not conducted any thorough or in-depth examination of Mr Pişkin's ground of appeal, that they had not based their reasoning on the evidence presented by the applicant and that they had given no valid reasons for dismissing his arguments. Those shortcomings had thus put Mr Pişkin at a clear disadvantage *vis-à-vis* his opponent. Despite the fact that, theoretically, the national courts had had full jurisdiction to adjudicate the dispute between Mr Pişkin and the authorities, they had declined jurisdiction to consider all the factual and legal issues relevant to the case before them, as required under Article 6 § 1 of the Convention. Finally, the Court considered that the failure to comply with the requirements of a fair trial could not be justified by the Turkish derogation **(Article 15 of the Convention, derogation in time of emergency)**.

As regards respect for the right to private life, the Court held that Mr Pişkin's dismissal had had serious negative consequences on his family "inner circle", on his ability to forge and develop relationships with others and on his reputation. In particular, Mr Pişkin had been unemployed since the termination of his contract, and prospective employers did not dare offer him employment

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.

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owing to the fact that his dismissal had been based on Legislative Decree No. 667. Consequently, the termination of Mr Pişkin's employment contract had had major negative repercussions on his private life and had attained the severity threshold for the applicability of Article 8.

In the Court's view, even in cases where national security considerations had to be taken into account, the principles of lawfulness and the rule of law applicable in a democratic society required any measure affecting an individual's fundamental rights to be subject to some form of adversarial proceedings before a competent independent body, assessing the reasons for the impugned interference and the relevant evidence.

In the present case the national courts had failed to determine the actual concrete reasons for the termination of Mr Pişkin's employment contract. The judicial review of the implementation of the measure had therefore been inadequate, and Mr Pişkin had not benefited from the minimum level of protection against arbitrariness required under Article 8 of the Convention. Furthermore, the impugned measure could not be deemed to have complied with the strict measure necessitated by the particular circumstances of the state of emergency.

Principal facts

The applicant, Hamit Pişkin, is a Turkish national who was born in 1982 and lives in Bingöl (Turkey).

Mr Pişkin had been working since December 2010 as an expert at the Ankara Development Agency (*Ankara Kalkınma Ajansı*), a public-law entity responsible for coordinating the regional activities of various public and private bodies. His permanent employment contract had been governed by the Labour Code (Law No. 4857), and his legal status had been subject to the rules of private law.

On 26 July 2020, shortly after the failed military coup of 15 July 2016, the governing board of the Ankara Agency met in order to assess the status of their employees. On the same day it decided to terminate the employment contracts of six persons, including Mr Pişkin, pursuant to Legislative Decree No. 667, considering those persons as belonging, affiliated or linked to structures posing a threat to national security.

On 14 August 2016 Mr Pişkin lodged an appeal with the Ankara Labour Court seeking the annulment of the decision to terminate his employment contract. He submitted, among other things, that his dismissal had lacked any valid reason, and that it was abusive, null and void. He further claimed compensation for his dismissal.

On 25 October 2016 the court dismissed Mr Pişkin's administrative appeal. He then appealed, subsequently lodging an appeal on points of law, but his appeals were dismissed. He finally lodged an individual appeal with the Constitutional Court, which declared his complaints inadmissible on 10 May 2018.

On 5 September 2018 the Ankara Public Prosecutor's Office gave a discontinuance decision on Mr Pişkin's case, on the grounds of insufficient evidence in support of the suspicions required for commencing criminal proceedings against him.

Complaints, procedure and composition of the Court

Relying on the civil and criminal limbs of Article 6 (right to a fair trial), Mr Pişkin submitted that neither the dismissal procedure nor the subsequent judicial proceedings had complied with the guarantees of a fair trial.

Mr Pişkin also complained that he had been dismissed on the grounds of links to a terrorist organisation, and that he had been branded a "terrorist" and "traitor". The Court decided to examine that complaint under Article 8 (right to respect for private and family life).

The Section President had given leave to the following non-governmental organisations to intervene in the written procedure: Amnesty International, the International Commission of Jurists, and the Turkey Human Rights Litigation Support Project.

The application was lodged with the European Court of Human Rights on 6 July 2018.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Marko **Bošnjak** (Slovenia),
Aleš **Pejchal** (the Czech Republic),
Valeriu **Griţco** (the Republic of Moldova),
Branko **Lubarda** (Serbia),
Pauliine **Koskelo** (Finland),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

Article 6 § 1 (right to a fair trial)

Applicability of the civil and criminal limbs of Article 6

The Court considered that the civil limb of Article 6 of the Convention applied to Mr Pişkin's dismissal procedure, which clearly concerned a civil right. Indeed, all employment disputes, especially those relating to action to terminate employment in the private sector, concerned civil rights within the meaning of Article 6 § 1 of the Convention. Moreover, even supposing that Mr Pişkin were considered as having been an employee under contract discharging duties equivalent or similar to those discharged by civil servants, the Court reiterated that according to its case-law disputes between the State and its officials in principle fell within the ambit of Article 6, unless the following two conditions were simultaneously fulfilled[2]: firstly, the State in its national law had to have expressly excluded access to a court for the post or category of staff in question; and secondly, the exclusion had to be justified on objective grounds in the State's interest. In the instant case the first of those two conditions had not been fulfilled, because Turkish law permitted Development Agency employees to lodge appeals with the labour courts against terminations of their employment contracts. Mr Pişkin had had that option, and he had indeed availed himself of that remedy.

The Court considered that the criminal limb of Article 6 of the Convention was inapplicable to the present case, since the dismissal procedure had not amounted to a criminal charge under the "Engel" criteria[3].

Procedure for terminating the employment contract

The procedure used for terminating Mr Pişkin's employment contract had stemmed directly from the derogating measures adopted during the state of emergency. During that period the Council of Ministers, meeting under the chairmanship of the President of the Turkish Republic, had adopted 37 legislative decrees (nos. 667 to 703). Among those texts, Legislative Decree No. 667 had not only authorised the dismissal of civil servants but also required public institutions such as Mr Pişkin's employer to dismiss civil service employees under a simplified procedure. The prior decision-making process concerning the termination of Mr Pişkin's employment contract had not necessitated any form of adversarial proceedings. Likewise, the Legislative Decree had not laid down any procedural safeguards. It had been sufficient for the employer to consider the employee as belonging, affiliated

[2] See *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007 II.
[3] See *Engel and Others v. the Netherlands, 8 June 1976, § 82-83, Series A no. 22.*

or linked to one of the illegal structures defined in the Legislative Decree, without any need to provide even cursory personalised reasoning.

On that subject, the Court was prepared to accept that Legislative Decree No. 667 had been adopted in order to facilitate the immediate dismissal under simplified procedure of civil servants and other civil service employees who had clearly been involved in the failed military coup of 15 July 2016. As the Venice Commission[4] had rightly pointed out, "any action aimed at combating the conspiracy would not be successful if some of the conspirators are still active within the judiciary, prosecution service, police, army, etc."[5]. Such a procedure might be deemed justified in the light of the very particular circumstances of the state of emergency.

However, the Court attached importance to the fact, in particular, that the legislative decree in question had placed no restrictions on the judicial review to be exercised by the domestic courts after the termination of the employment contracts of the persons concerned, such as the applicant in the instant case. Indeed, the latter had been able to contest the impugned termination decision before the labour court, to appeal against that court's decision before the Regional Court and to lodge an appeal on points of law; and in fact he had also lodged an individual appeal with the Constitutional Court.

Thus the Court considered that the crucial question arising in the present case was whether Mr Pişkin's inability to have cognisance of the reasons which had led his employer to terminate his employment contract, on account of the alleged existence of links with a terrorist organisation, had been adequately counterbalanced by effective judicial review.

The judicial review

The Court noted that since Mr Pişkin had not benefited from any procedural safeguards during the procedure for the termination of his employment contract, his only recourse had been to apply to the national courts for factual or other evidence capable of justifying his employer's assessment. That was the only channel through which the applicant could contest the verisimilitude, the truth and the reliability of the evidence in question. Accordingly, it had been incumbent on the courts to examine all these factual and legal questions relevant to the case before them in order to afford the litigant concerned, namely Mr Pişkin, effective judicial review of the employer's decision. In the Court's view, that was the central issue of the case.

The national courts had thus been called upon to adjudicate on the legal basis for the impugned termination of contract and on the factors capable of justifying the employer's assessment that Mr Pişkin had links with an illegal structure. However, they had merely considered whether the dismissal had been decided by the relevant body and whether the decision had had a basis in law. Neither the legal regime of termination "with a valid reason" nor the question whether the employer had been in possession of any fact possibly justifying such grounds of dismissal, that is to say the alleged existence of links with an illegal structure, had ever really been discussed by the domestic courts. More specifically, at no stage in the proceedings before the different trial benches had the domestic courts considered the question whether the termination of the applicant's employment contract for presumed links with an illegal structure had been justified by his conduct or any other relevant evidence or information. Furthermore, it did not transpire from the dismissal decisions given by the trial courts that Mr Pişkin's arguments had ever been carefully considered.

As for the Constitutional Court, it could have played a fundamental role at the national level in protecting the right to a fair trial and remedying the breaches noted above. However, by giving a

[4] The Council of Europe's European Commission for Democracy through Law (the Venice Commission).

[5] Opinion on Emergency Legislative Decrees Nos. 667 to 676, adopted following the failed military coup of 15 July 2016 (CDL=AD(2016)037))

summary inadmissibility decision, the latter had failed to conduct any analysis of the legal and factual issues in question.

The judicial decisions given in the instant case did not demonstrate that the domestic courts had conducted an in-depth, thorough examination of Mr Pişkin's arguments, that they had based their reasoning on the evidence presented by the latter and that they had validly reasoned their dismissal of his challenges. The shortcomings noted above had put the applicant at a distinct disadvantage *vis-à-vis* his opponent. Consequently, whereas the domestic courts had theoretically held full jurisdiction to determine the dispute between Mr Pişkin and the administrative authorities, they had deprived themselves of jurisdiction to examine all questions of fact and law relevant to the dispute before them, as required by Article 6 § 1 of the Convention.

The derogation provided for in Article 15 of the Convention (derogation in time of emergency)

As regards the derogation provided for in Article 15, the Court noted that Legislative Decree No. 667 had placed no restrictions on the judicial review to be exercised by the domestic courts following the termination of the employment contracts of those concerned, such as the applicant in the instant case. The Court also pointed out that even in the framework of a state of emergency, the fundamental principle of the rule of law had to prevail. It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 - namely that civil claims should be capable of being submitted to a judge for an effective judicial review - if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.

Accordingly, in view of the seriousness of the consequences for the Convention rights of those persons, where an emergency legislative decree such as the one at issue in the present case did not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it had always to be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness could be avoided. In those circumstances, the failure to observe the requirements of a fair trial could not be justified by the Turkish derogation.

There had therefore been a violation of Article 6 § 1 of the Convention.

Article 8 (right to respect for private and family life)

Applicability of Article 8

Firstly, the Court noted that the domestic courts had at no stage referred to the criminal investigation, and, moreover, that the case file contained nothing to indicate that that investigation or the proceedings before the domestic courts concerning Mr Pişkin's dismissal had enabled the national authorities to obtain information or factual evidence capable of substantiating the grounds of dismissal. The Court concluded that there was absolutely no evidence to suggest that the termination of the employment contract in question had been the foreseeable consequence of the applicant's own actions.

Secondly, the Court noted that Mr Pişkin's dismissal had had serious negative consequences for his "inner circle", for his ability to forge and develop relationships with other people, and for his reputation. The applicant had lost his job, that is, his means of subsistence. Moreover, he stated that he had been unemployed since the termination of his contract, and that employers did not dare offer him a job because the termination had been based on Legislative Decree No. 667. Furthermore, the grounds of dismissal adopted, that is to say the existence of links with an illegal structure, had undoubtedly had very serious consequences for the applicant's professional and social reputation.

Consequently, the termination of Mr Pişkin's employment contract had had severe negative repercussions on his private life and had exceeded the threshold of severity for Article 8 to be applicable to the case.

Existence and justification of an interference

The Court considered that Mr Pişkin's dismissal had been based on a provision of Emergency Legislative Decree No. 667, which had required employers to terminate their employees' contracts if they considered that the latter had had links with an illegal structure. Consequently, the impugned dismissal might be regarded as an obligation deriving from the said legislative decree, which had far exceeded the legal framework governing Mr Pişkin's employment contract. Accordingly, the dismissal, based on his alleged links with an illegal structure, could be considered as an interference in Mr Pişkin's right to respect for his private life.

Having regard to the circumstances of the state of emergency and the fact that the domestic courts had held full jurisdiction to review measures adopted pursuant to section 4 (1) (g) of Emergency Legislative Decree No. 667, the Court was prepared to proceed on the assumption that the impugned interference was prescribed by law. It then noted that that interference had pursued several legitimate aims for the purposes of Article 8 § 2 of the Convention, that is to say the protection of national security and the prevention of disorder and crime.

As regards the necessity of the interference in a democratic society, the Court's scrutiny concerned two points: (1) whether the decision-making process leading to the applicant's dismissal had been surrounded by safeguards against arbitrary action; and (2) whether the applicant had benefited from procedural guarantees, and in particular whether he had had access to adequate judicial review, and whether the authorities had acted diligently and promptly.

As regards the first point, the Court observed that the decision-making process preceding the termination of the applicant's employment contract had been very cursory. Following a meeting on 26 July 2016 aimed at assessing the situation of the employees working for the Ankara Agency, it had been decided to terminate the employment contracts of six employees, including the applicant, pursuant to section 4 (1) (g) of Emergency Legislative Decree No. 667, on account of their membership of structures threatening national security or of the existence of links or connections with such structures. The Court noted the vagueness and uncertainty of that affirmation, and concluded that the decision taken by the Agency's governing board had been substantiated by a mere reference to the wording of section 4 (1) (g) of Emergency Legislative Decree No. 667, which provided for dismissing employees considered as belonging, affiliated or linked to an illegal structure.

The Court then observed that the applicant's employer had failed to specify the nature of the applicant's activities potentially justifying the assessment that he had links with an illegal structure. During the proceedings before the domestic courts, no concrete accusation had been explicitly levelled concerning the alleged existence of links with such a structure. It transpired from the Government's observations that the applicant had been dismissed on account of his voluntary involvement in activities linked to terrorist organisations. Similarly, it transpired from the domestic courts' decisions that the applicant's employer's assessment had concerned the alleged existence of links between the applicant and the FETÖ/PDY organisation[6]. In short, the applicant had been dismissed on the grounds that he had links with an illegal secret structure which the national authorities considered as having instigated the failed military coup of 15 July 2016.

The Court could accept, in keeping with its findings under Article 6, that the simplified procedure established under Legislative Decree No. 667 enabling civil servants and other civil-service

[6] FETÖ/PDY ("Fetullahist Terrorist Organisation/Parallel State structure"), considered by the Turkish authorities as an armed terrorist organisation, having planned the military coup of 15 July 2016.

employees to be dismissed might have been considered as justified in the light of the very specific circumstances of the situation in the wake of the failed military coup of 15 July 2016, given that the measures taken during the state of emergency had been subject to judicial review. Consequently, it considered that no further assessment was required of the procedure in question in view of the above-mentioned circumstances.

As regards the second point, that is, the thoroughness of the judicial review of the impugned measure, the Court reiterates the principle that any individual subject to a measure for reasons of national security must have safeguards against arbitrary action.

The Court was prepared to accept that membership of structures organised along military lines or establishing a rigid, irreducible form of solidarity among their members, or else pursuing an ideology contrary to the rules of democracy, a fundamental element of "the European public order", could raise an issue *vis-à-vis* national security and prevention of disorder where the members of such bodies were called upon to discharge public duties.

In the Court's view, the assessment by the public authorities or other bodies operating in the civil service sphere of what posed a threat to national security would naturally be of significant weight. Nevertheless, the domestic courts should be able to react in cases where invoking that concept had no reasonable basis in the facts or pointed to an arbitrary interpretation.

In the present case, the Court was in no real position to adjudicate on the domestic authorities' assessments which had formed the grounds for the applicant's dismissal. Indeed, even though that measure had been based on the alleged existence of links between the applicant and an illegal structure, the Government had merely referred to the judicial decisions given by the domestic courts. Those decisions had shed no light on the criteria that had been used to justify the employer's assessment and to determine the exact nature of the charges against Mr Pişkin. The domestic courts had accepted that the employer's assessment had been a valid reason for ordering the termination of his employment contract, without thoroughly assessing the impugned measure and despite the major repercussions of the latter on the applicant's right to respect for his private life.

In the Court's view, even where national security was at stake, the concepts of lawfulness and the rule of law in a democratic society required that measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence. Were it impossible to contest effectively a national security concern relied on by the authorities, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

Under those circumstances, the Court considered that in the instant case the domestic courts had failed to determine the real reasons why the applicant's employment contract had been terminated. Consequently, the judicial review of the impugned measure in the present case had been inadequate.

The Court therefore concluded that Mr Pişkin had not benefited from the minimum degree of protection against arbitrary interference required by Article 8 of the Convention. In addition, for the reasons set out in its review under Article 6, it considered that the impugned measure could not be said to have been strictly required by the special circumstances of the state of emergency.

There had accordingly been a violation of Article 8 de la Convention.

Just satisfaction (Article 41)

The Court held, by a majority, that Turkey was to pay the applicant 4,000 euros (EUR) in respect of non-pecuniary damage.

Separate opinions

Judges Bošnjak and Koskelo expressed concurring opinions. Judge Yüksel expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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