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Remand in custody of Constitutional Court judge and search of his home after attempted coup: several violations of Convention

The case concerned the remanding in custody of a former judge of the Turkish Constitutional Court (Mr Tercan) and his continued pre-trial detention, together with a search of his home, in the aftermath of the attempted coup of 15 July 2016, on suspicion of belonging to a terrorist organisation.

In today's **Chamber** judgment[1] in the case of Tercan v. Turkey (application no. 6158/18) the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights on account of the unlawfulness of Mr Tercan's arrest and remand in custody. The Court found that remanding him in custody, in conditions which breached the procedural safeguards afforded to members of the Constitutional Court, had not been lawful.

A violation of Article 5 § 1 (right to liberty and security) on account of the lack of plausible reasons, at the time when Mr Tercan was remanded in custody, to suspect him of committing an offence. The suspicions against Mr Tercan at the time of his arrest had not attained the requisite minimum level of plausibility. Even though the detention measure had been imposed under the oversight of the judicial system, it had been based on a mere suspicion of membership of an armed organisation. Such a level of suspicion could not suffice to justify remanding a person in custody.

A violation of Article 5 § 3 (right to liberty and security: reasoning of decisions to remand in custody and length of detention). The Court took the view that there had been no relevant or sufficient grounds to justify keeping Mr Tercan in pre-trial detention for over two years and eight months. It further noted that no alternatives to detention had been envisaged.

A violation of Article 8 (right to respect for private and family life and for one's home). As the search at Mr Tercan's home had been carried out before the plenary assembly of the Constitutional Court had ruled on that measure (procedure under section 17(3) of Law no. 6216), the interference with Mr Tercan's right to respect for his home had not been "in accordance with the law".

As to his complaint about a lack of impartiality and independence of the magistrates in his case, the Court declared it inadmissible, by a majority, finding that it was manifestly ill-founded.

Principal facts

The applicant, Erdal Tercan, is a Turkish national who was born in 1961. He is currently being held in prison. While serving as a professor at the Law Faculty of Akdeniz University, Mr Tercan was appointed as a judge of the Turkish Constitutional Court by the President of the Republic on 7 January 2011, to serve until the age of 65.

In the aftermath of the attempted coup on 15 July 2016, Mr Tercan was arrested and taken into custody on suspicion of being a member of the FETÖ/PDY ("Fetullahist Terrorist

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.

Organisation/Parallel State Structure"). On the same day, the police conducted a search of his home and seized computers and other IT equipment. Subsequently, a magistrate decided to restrict the access of Mr Tercan and his lawyer to the investigation file.

On 20 July 2016, based on Article 100 of the Code of Criminal Procedure, the magistrate before whom Mr Tercan appeared remanded him in custody, taking the view that there was concrete evidence to justify strong suspicions that the offence of belonging to a criminal organisation had been committed and that there was a clear and imminent danger related to the attempted coup.

On 4 August 2016 the Constitutional Court, meeting in plenary session, dismissed Mr Tercan from office on the basis of Article 3 of Decree-Law no. 667, published in the Official Gazette on 23 July 2016.

On 4 April 2019 the Ninth Criminal Division of the Court of Cassation, acting as a court of first instance, sentenced Mr Tercan to a term of imprisonment of 10 years, 7 months and 15 days under Article 314 of the Criminal Code and section 5 of Law no. 3713 on Counter-Terrorism, for belonging to an armed terrorist organisation. Mr Tercan appealed against this decision on points of law and the proceedings are still pending before the plenary Criminal Divisions of the Court of Cassation.

In the meantime, on 7 September 2016 and 9 October 2017, Mr Tercan lodged two individual applications with the Constitutional Court. In its judgment of 12 April 2018 that court rejected Mr Tercan's complaints about his detention, the lack of plausible reasons for it, the infringement of his right to be presumed innocent, and the lack of independence and impartiality of the judges who ordered the custody measure. It found a breach of the equality of arms principle on account of the failure to hold a hearing when his detention was reviewed, but no breach in respect of his complaint concerning the length of the detention.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), Mr Tercan complained that he had been arrested and remanded in custody arbitrarily, in breach of Law no. 6216 on the establishment of the Constitutional Court and the procedure before it.

Under Article 5 § 1 (right to liberty and security), he also alleged that there had been no concrete evidence of any reasonable grounds for suspecting him of having committed a criminal offence which necessitated remanding him in custody.

Under Article 5 § 3 (right to liberty and security), he further complained about the length of his detention and the failure to give reasons for the decisions to extend it. He also complained that no alternatives to custody had been considered.

Relying on Article 8 (right to respect for private and family life and for one's home), Mr Tercan complained that the search of his home had been unlawful, as the search warrant had been issued without the prior authorisation of the Constitutional Court, contrary to the specific provisions concerning judges of that court. He also complained of a lack of effective review of this measure.

Relying on Article 6 (right to a fair trial), Mr Tercan complained of a lack of impartiality and independence of the magistrate's courts, together with an infringement of the principle of equality of arms due to a restriction of his access to the investigation file.

The application was lodged with the European Court of Human Rights on 22 January 2018.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Carlo **Ranzoni** (Liechtenstein),
Aleš **Pejchal** (the Czech Republic),

Valeriu **Griţco** (the Republic of Moldova),
Pauliine **Koskelo** (Finland),
Marko **Bošnjak** (Slovenia),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

Article 5 § 1: whether the arrest and remand in custody were lawful

The Court noted that Mr Tercan had been arrested and remanded in custody on the basis of Article 100 et seq. of the Code of Criminal Procedure, notwithstanding the safeguards afforded to members of the Constitutional Court by section 17 of Law no. 6216, specifically paragraphs 1 and 3 thereof, which provided for a specific procedure when preventive measures – such as pre-trial detention – were to be ordered against those judges.

Mr Tercan had not been arrested and remanded in custody while in the process of committing an offence related to the attempted coup of 15 July 2016. He had been subjected to a custodial measure mainly because he was suspected of belonging to the FETÖ/PDY organisation.

The present case and the *Alparslan Altan* judgment[2] revealed a systemic lack of legal clarity and foreseeability regarding the issues of arrest and detention of judges who were members of apex courts in Turkey at the relevant time.

In judgments of 2017 and 2019 the Court of Cassation had taken the view that, at the time of the arrest of the judges suspected of the offence of belonging to an armed organisation, the offence had been discovered *in flagrante delicto*.

According to the case-law of the Court of Cassation, any suspicion – within the meaning of Article 100 of the Code of Criminal Procedure – of membership of a criminal or armed organisation would suffice to characterise an offence discovered *in flagrante delicto* without the need to identify any concomitant factual evidence or any other indication revealing the existence of such evidence.

In the Court's view, this was clearly a broad interpretation of the *in flagrante delicto* concept. Moreover, that interpretation was unreasonable, since it was tantamount to admitting that the authorities could deprive judges, such as Mr Tercan, a judge sitting on the Constitutional Court and therefore enjoying protection under Law no. 6216, of the judicial protection afforded by Turkish law to members of the judiciary, solely on the basis of the information available to them and without having to identify any concomitant factual evidence or any other indication revealing the existence of such evidence. Consequently, in circumstances similar to those of the present case, that interpretation negated the procedural safeguards afforded to the judiciary in order to protect judges from interference by the executive and from arbitrary or unjustified deprivation of liberty. The interpretation was also problematic for the principle of legal certainty because not only did it negate the procedural safeguards afforded to the judiciary, it also had legal consequences going far beyond the statutory framework of the state of emergency.

More importantly, the broad interpretation of the *in flagrante delicto* concept, which was not based on any legislative provision, did not only affect the judicial immunity granted to members of the apex courts and the elected members of the Council of Judges and Prosecutors or even to other judges and prosecutors: it could also concern any person enjoying judicial immunity, for example members of parliament (Article 83 of the Constitution). Therefore, with regard to the offence of

[2] *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019

membership of an armed organisation, as defined in Article 314 of the Criminal Code, in the light of the judgment adopted on 2 July 2019 by the plenary Criminal Divisions of the Court of Cassation, the investigating authorities could deprive such persons of their judicial immunity, on the assumption that an offence discovered *in flagrante delicto* was made out, when they had – or, as in this case, wrongly believed they had – evidence which justified the suspicion in question, without needing to identify any concomitant factual evidence or other indication revealing the existence of such evidence.

This finding was of crucial importance for the judicial system in general, since the guarantees of the right to liberty and security would be rendered meaningless if it were accepted that, notwithstanding the protection afforded by national law, members of the judiciary, and in particular of the Constitutional Court, could be remanded in custody without there being any concomitant criminal act or serious indication that they had committed or were in the process of committing the offence of membership of an armed organisation within the meaning of Article 314 of the Criminal Code. In the Court's view, it would be illusory to believe that the judiciary could uphold the rule of law and give effect to the principle of the rule of law if they were deprived of the protection of the Convention arising from their right to liberty and security.

Consequently, the detention of Mr Tercan, which had been ordered under Article 100 of the Code of Criminal Procedure, in conditions that deprived him of the benefit of the procedural safeguards afforded to members of the Constitutional Court, had not been lawful within the meaning of Article 5 § 1 of the Convention. The measure at issue could not be said to have been strictly required by the exigencies of the state of emergency. **There had thus been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of Mr Tercan's arrest and remand in custody**.

Article 5 § 1: complaint about an alleged lack of plausible reasons to suspect Mr Tercan of committing an offence

The Court noted that Mr Tercan had clearly not been suspected of involvement in the events of 15 July 2016. It was true that on 16 July 2016, i.e. the day after the attempted coup, the Ankara public prosecutor's office had issued an instruction describing the applicant as a member of the FETÖ/PDY terrorist organisation and requesting that he be remanded in custody. However, the Government had not referred to any "facts" or "intelligence" that could have provided a possible factual basis for this instruction from the prosecutor. The fact that Mr Tercan had been questioned by the police on 20 July 2016, prior to being remanded in custody, on the charge of membership of an illegal organisation, could not, by itself, persuade an objective observer that he might have committed that offence.

In particular, the Court noted that, although it referred to "concrete evidence in the file", the magistrate's decision of 20 July 2016 to remand the applicant in custody had contained nothing that would convince an objective observer that there were plausible grounds for suspecting Mr. Tercan of having committed the offence. The magistrate had merely cited Article 100 of the Code of Criminal Procedure and had listed the incriminating evidence, without providing specific and individualised elements, even though the evidence concerned not only Mr Tercan but also 13 other suspects.

In the Court's view, the vague and general references to the material in the file could not be regarded as sufficient to justify the "plausibility" of the suspicions underlying the decision to remand Mr Tercan in custody, in the absence, firstly, of an individualised and concrete assessment of the evidence and, secondly, of information capable of justifying the suspicions against the applicant or other types of verifiable elements or facts. Moreover, the subsequent review by another magistrate had not remedied that situation, as that judge had dismissed Mr Tercan's objection to the custody decision without considering his arguments.

The Court therefore found that no specific facts or information of such a nature as to give rise to suspicions justifying Mr Tercan's detention had been mentioned or presented at the initial stage of the proceedings, even though it had resulted in the taking of this measure against him.

As to the notion of the "plausibility" of the suspicions on which arrest or detention during a state of emergency must be based, the Court pointed out that the Constitutional Court had considered that the guarantees of the right to liberty and security would be rendered meaningless if it were accepted that persons could be remanded in custody without there being any serious indication that they had committed a crime. The same conclusion applied to the Court's examination here. In the Court's view, this point was of crucial importance in the present case, since it concerned the detention of a member of an apex court, namely the Constitutional Court, which played a key role at national level in protecting the right to liberty and security.

Therefore, the suspicions against Mr Tercan at the time of his arrest and remand in custody did not meet the minimum level of plausibility required. Although imposed under the oversight of the judicial system, the detention had been based on a mere suspicion of membership of an armed organisation. Such a level of suspicion was not sufficient to justify an order to remand a person in custody. In such circumstances, the measure at issue could not be said to have been strictly required by the exigencies of the situation. To conclude otherwise would negate the minimum requirements of Article 5 § 1 (c) as to the level of plausibility of suspicions justifying custodial measures and would defeat the purpose of Article 5 of the Convention. **There had therefore been a violation of Article 5 § 1 on account of the lack of plausible reasons, at the time of Mr Tercan's arrest and remand in custody, to suspect him of committing an offence**.

Article 5 § 3: complaint about an alleged lack of reasoning of decisions concerning the pre-trial detention and its duration

The Court took the view that, having regard to the lack of plausible reasons to justify the suspicions against Mr Tercan at the time he was remanded in custody, it would be unnecessary to consider whether the authorities had fulfilled their obligation to put forward relevant and sufficient reasons on 20 July 2016, the date on which the magistrate had made the relevant order.

With regard to the subsequent decisions on the extension of the pre-trial detention, the Court observed that, until the filing of the indictment on 16 January 2018, the evidence indicated by the Government or considered by the Constitutional Court had never been cited in the decisions to extend the detention or brought to Mr Tercan's attention. During this initial phase of detention, he had been deprived of access to the case file.

As regards the "grounds" for extending the detention during this initial phase, the Court observed that the reasons given in the relevant decisions had been quite general and abstract; the vast majority of the decisions concerned more than a hundred suspects and merely made abstract references to the "state of the evidence", the seriousness of the offence with which he was charged and the existence of a risk that the suspect might engage in activities that perverted the course of justice. No individual examination had therefore been carried out by the national courts.

With regard to the risk that the suspect might tamper with evidence or otherwise pervert the course of justice, the decisions had not revealed any considerations that could substantiate such risks, nor had they established the reality of these risks in relation to Mr Tercan. In fact no evidence had been made available to Mr Tercan until the indictment was filed. In order for this initial phase of the detention – which lasted more than 18 months until the indictment was filed – to be justified under Article 5 § 3, the national courts, with due regard for the principle of the presumption of innocence, should have put forward relevant and sufficient grounds for depriving him of liberty, but they clearly had not done so.

As regards the period after the filing of the indictment, the reasons given by the Court of Cassation for ordering the extension of Mr Tercan's detention had also been formulaic and abstract. In particular, it had not been explained how a former member of the Constitutional Court, who had been in custody for more than 18 months prior to the filing of the indictment, could have tampered with evidence that had apparently already been collected during the criminal investigation. The Court of Cassation had also failed to present convincing arguments to substantiate the risk that he might abscond.

The domestic judicial authorities had failed to take into account the possibility of alternatives to detention. Nor had they explained why such measures could not have been implemented in the present case or could not have prevented the risk of perverting the course of justice – explanations which would have shown that detention had been decided upon as a measure of last resort.

The Court concluded that there had been no relevant and sufficient grounds to keep Mr Tercan in detention for more than two years and eight months pending trial. Furthermore, it had not been established that the failure to comply with the safeguards described above could be justified by the derogation communicated by Turkey. **There had thus been a violation of Article 5 § 3 of the Convention.**

Article 8: whether the search of Mr Tercan's home was unlawful

The Court found that there had been an interference with Mr Tercan's right to respect for his home. The search of his home had been carried out without the plenary Constitutional Court having taken a decision on the measure. However, section 17(3) of Law no. 6216 allowed a search of the home of a judge of that court to be ordered only in cases of offences discovered *in flagrante delicto*. In this connection, the Court referred to its finding under Article 5 § 1 of the Convention as regards the legal basis for Mr Tercan's arrest and remand in custody. That finding – that the extension of the scope of the *in flagrante delicto* concept by way of case-law and the application of domestic law by the national courts in the present case posed a problem for legal certainty – could appropriately be transposed to the complaint that the house search was unlawful.

Accordingly, the Court concluded that, although the spirit and letter of the domestic provision, namely section 17(3) of Law no. 6216, were sufficiently precise, the national authorities had applied it in a manner that was manifestly unreasonable and therefore not foreseeable for the purposes of Article 8 of the Convention. The interference at issue had not therefore been "in accordance with the law" within the meaning of that Article. It followed that Mr Tercan had not enjoyed the sufficient degree of protection required by the rule of law in a democratic society. Furthermore, it had not been established that the failure to comply with the safeguards described above could be justified by the derogation communicated by Turkey. **There had thus been a violation of Article 8 of the Convention.**

Other Articles: impartiality and independence of the magistrates and equality of arms

As to Mr Tercan's complaint about a lack of impartiality and independence on the part of the magistrates who ruled on his detention, and the fact that his appeals had been examined by magistrates and not by a higher court, the Court referred back to its case-law in *Baş v. Turkey*[3] where it had declared this complaint inadmissible as manifestly ill-founded. It did not see any reason to depart from that conclusion in the present case.

As to Mr Tercan's complaint about an alleged breach of the "equality of arms" principle on the ground that he had not been able to access case-file documents concerning his detention, the Court took the view that it had sufficiently taken account of the circumstances complained of by Mr Tercan

[3] *Baş v. Turkey* (no. 66448/17, 3 March 2020).

in its analysis under Article 5 § 3 of the Convention. It thus found that there was no need for a separate examination of either the admissibility or the merits of this complaint.

Just satisfaction (Article 41)

The Court held that Turkey was to pay Mr Tercan 20,000 euros in respect of non-pecuniary damage.

Separate opinion

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

The judgment is available only in French.

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