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

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Pre-trial detention of an applicant suspected of belonging to the organisation FETÖ/PDY on account of his use of the ByLock messaging application: violation of the Convention

In today's **Chamber** judgment[1] in the case of Akgün v. Turkey (application no. 19699/18) the European Court of Human Rights held, by six votes to one, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights;

a violation of Article 5 § 3 (entitlement to trial within a reasonable time or to release pending trial), and

a violation of Article 5 § 4 (**right to a speedy decision on the lawfulness of detention**).

The case concerned the applicant's placement in pre-trial detention on suspicion of being a member of an organisation referred to by the Turkish authorities as "FETÖ/PDY" ("Gülenist Terrorist Organisation/parallel State structure").

The Court considered that when ordering the applicant's pre-trial detention on 17 October 2016, the Ankara 9th magistrates' court had not had sufficient information on the nature of ByLock to conclude that this messaging application was used exclusively by members of the FETÖ/PDY organisation for the purposes of internal communication. In the absence of other evidence or information, the document in question, stating merely that the applicant was a user of ByLock, could not, in itself, indicate that there were reasonable suspicions that could satisfy an objective observer that he indeed used ByLock in a manner that could amount to the alleged offences.

The Court concluded that the Government had been unable to show that, at the date on which the applicant was placed in pre-trial detention, the evidence available to the 9th magistrate's court had met the standard of "reasonable suspicion" required by Article 5 of the Convention, such as to satisfy an objective observer that the applicant could have committed the offences for which he was detained.

The Court held that there had been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence.

The Court held that there had also been a violation of Article 5 § 3 of the Convention with regard to the failure to provide sufficient reasons for the applicant's pre-trial detention.

Lastly, the Court considered that neither the applicant nor his lawyer had had sufficient knowledge of the substance of this evidence, available exclusively to the prosecution, which had been of crucial importance for challenging the detention in issue before the Ankara 1st magistrate's court when it ruled on the objection against the disputed measure. It therefore followed that there had also been a violation of Article 5 § 4 of the Convention.

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.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Principal facts

The applicant, Tekin Akgün, is a Turkish national who was born in 1979 and lives in Ankara (Turkey).

During the night of 15 to 16 July 2016 a group of members of the Turkish armed forces calling themselves the "Peace at Home Council" attempted to carry out a military coup aimed at overthrowing the Parliament, Government and President of Turkey. During the night of violence, 251 people were killed and 2,194 were injured. The day after the attempted military coup, the national authorities blamed the network linked to Fetullah Gülen, a Turkish citizen living in Pennsylvania (United States of America) and considered to be the presumed leader of FETÖ/PDY. On 16 July 2016 the Bureau for Crimes against the Constitutional Order at the Ankara public prosecutor's office initiated a criminal investigation.

On 20 July 2016 the government declared a state of emergency for a period of three months as from 21 July 2016; the state of emergency was subsequently extended for further periods of three months by the Council of Ministers. At the same time the Turkish authorities gave notice to the Secretary General of the Council of Europe of a derogation from the Convention under Article 15 (derogation in time of emergency). On 18 July 2018 the state of emergency was lifted.

On 17 October 2016 Mr Akgün, a former police officer, was questioned by the Istanbul public prosecutor on suspicion of being a member of FETÖ/PDY.

After having questioned Mr Akgün, the public prosecutor referred his case to the magistrates' court, requesting that the applicant be placed in detention on the grounds that he had made use of ByLock, the messaging system used by FETÖ/PDY.

On 25 October 2016 the Ankara 1st Magistrate's Court dismissed an objection by Mr Akgün against the order for his pre-trial detention. On 15 November 2016 the Ankara 1st Magistrate's Court ruled on the public prosecutor's request under Article 108 of the Code of Criminal Procedure for a review and extension of the detention. It ordered that the applicant should remain in pre-trial detention, on the grounds that there was a strong suspicion that he had committed the offence in question. It also took into consideration the nature of the alleged offence and the fact that there was still a clear and present danger associated with the attempted coup, which had led to the imposition of a state of emergency. It considered that there was concrete evidence grounding a strong suspicion that the applicant might abscond, and took account of the penalty to which he was liable and the fact that the alleged offence was among the so-called 'catalogue' offences listed in Article 100 § 3 of the Code of Criminal Procedure (CCrP).

On 5 December 2016 Mr Akgün lodged an application with the Constitutional Court. On 15 December 2017 the Constitutional Court ruled that application inadmissible.

Between 23 December 2016 and 26 May 2017 Mr Akgün's detention was reviewed by various Ankara magistrates' courts, which held that the measure was to be maintained.

On 6 June 2017 Mr Akgün was charged with membership of a terrorist organisation under Article 314 § 2 of the Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713). The trial opened before the Ankara 22nd Assize Court, which decided that he was to remain in pre-trial detention. At the close of the third hearing on 11 January 2018, the 22nd Assize Court decided to release Mr Akgün subject to judicial supervision, on the grounds that most of the evidence had been gathered, that there was no evidence in the file that could be altered by the defendants, including the applicant, and that there was nothing in the file to indicate that he might abscond.

On 10 September 2020 the trial was still pending before the 22nd Assize Court.

Complaints, procedure and composition of the Court

Relying on Article 5 (right to liberty and security), the applicant complained that he had been placed in pre-trial detention in the absence of evidence giving rise to a strong suspicion that he had committed the offence of which he was accused, namely membership of an illegal organisation. He submitted that no good reasons had been put forward for the decision to remand him in custody, which he criticised. In his view, that decision had contained no concrete evidence that there existed a strong suspicion, or any factual information confirming the grounds for detention cited by the court.

The application was lodged with the European Court of Human Rights on 16 April 2018.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Marko **Bošnjak** (Slovenia),
Valeriu **Griţco** (the Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Branko **Lubarda** (Serbia),
Carlo **Ranzoni** (Liechtenstein),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

Article 5 § 1

The Court reiterated that a deprivation of liberty for the purposes of Article 5 § 1 (c) was permitted where there was a reasonable suspicion that the person concerned had committed an offence.

The Court noted that the applicant, who was suspected of being a member of FETÖ/PDY, had been placed in pre-trial detention on 17 October 2016, then charged on 6 June 2017. The public prosecutor sought his conviction under Article 314 of the Turkish Criminal Code for membership of an armed terrorist organisation. His trial was still pending before the Ankara 22nd Assize Court.

The Court took note of the applicant's position that his alleged use of ByLock could not justify his placement in detention.

The Court noted that the questions put to the applicant during his interview with the public prosecutor and then with the magistrate had concerned his alleged use of the ByLock messaging system.

The Court further noted the Government's submissions that the suspicions which led to the applicant's placement in detention had been based solely on the finding that he had used ByLock. The applicant confirmed this point. Thus, the Court is prepared to accept that this finding with regard to the applicant's use of the ByLock messaging service was the only evidence which, at the time of his initial placement in pre-trial detention, had provided grounds for suspecting him, for the purposes of Article 5 § 1 (c) of the Convention, of having committed the offence of membership of FETÖ/PDY.

The Court noted that the only fact underlying the accusations against the applicant was, according to the authorities' findings, that he had used ByLock.

The Court wished to emphasise that, as a matter of principle, the mere fact of downloading or using a means of encrypted communication or indeed the use of any other method of safeguarding the private nature of exchanged messages could not in itself amount to evidence capable of satisfying an

objective observer that an illegal or criminal activity was being engaged in. It was only when the use of an encrypted communication tool was supported by other evidence about that use, such as, for example, the content of the exchanged messages or the context of such exchanges, that one could speak of evidence that could satisfy an objective observer that there were reasonable grounds to suspect the individual using that communication tool of being a member of a criminal organisation. In addition, the information submitted to the national court about such use had to be sufficiently precise, so as to enable the relevant court to conclude that the messaging system in question had in reality been intended for use only by members of a criminal organisation. However, that evidence was absent in the present case.

The Court considered that when it had ordered the applicant's pre-trial detention on 17 October 2016, the Ankara 9th magistrates' court had not had sufficient information on the nature of ByLock to conclude that the application was used exclusively by members of the FETÖ/PDY organisation for the purposes of internal communication.

The Court noted that it appeared from the order placing the applicant in detention that the magistrates' court had simply cited the wording of Article 100 of the CCP without taking the trouble to specify what exactly was the "concrete evidence giving rise to a strong suspicion". In the Court's view, the vague and general references to the wording of that provision or to the evidence in the file could not be regarded as sufficient to justify the "reasonableness" of the suspicion on which the detention order was allegedly based, in the absence either of a specific assessment of the individual items of evidence in the file, or of any information that could have justified the suspicion against the applicant, or of any other kinds of verifiable material or facts.

Further, the Ankara 1st magistrates' court's review of the order for pre-trial detention had not enabled this defect to be remedied, in that it had dismissed the applicant's objection against the detention order on the grounds that no inaccuracy had been found. The same applied to the review conducted by the Constitutional Court, which had dismissed the applicant's individual application by a mere reference to the bill of indictment lodged on 6 June 2017 – long after the applicant's initial placement in detention – as justification for the suspicion against him when he was initially detained.

The Court considered that the document concluding that the applicant had used ByLock did not specify and did not set out any illegal activity on the applicant's part, in that it did not identify either the dates of this presumed activity or its frequency, and did not contain any additional details. Furthermore, neither this document nor the pre-trial detention order explained how this presumed activity by the applicant would indicate his membership of a terrorist organisation.

In consequence, the Court considered that in the absence of other evidence or information, the document in question, stating merely that the applicant was a user of ByLock, could not, in itself, demonstrate that there were reasonable suspicions that could satisfy an objective observer that he had indeed used ByLock in a manner that could amount to the alleged offences.

The Court concluded that the Government had been unable to show that at the date on which the applicant was placed in pre-trial detention the evidence available to the 9th magistrate's court had met the standard of "reasonable suspicion" that was required by Article 5 of the Convention, such as to satisfy an objective observer that the applicant could have committed the offences for which he had been detained.

As to the concept of the "reasonableness" of the suspicions, the Court noted that this complaint did not strictly involve a measure taken to derogate from the Convention during the state of emergency. The 9th magistrates' court ordered the applicant's placement in pre-trial detention for membership of a terrorist organisation in application of Article 100 of the CCrR, a provision that was not amended during the state of emergency. The difficulties facing Turkey in the aftermath of the attempted military coup were undoubtedly a contextual factor which the Court had fully to take into account in

interpreting and applying Article 5 of the Convention. This did not mean, however, that the authorities had carte blanche to order an individual's detention during the state of emergency without any verifiable evidence or information or without a sufficient factual basis satisfying the minimum requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion. The "reasonableness" of the suspicion on which deprivation of liberty had to be based formed an essential part of the safeguard laid down in Article 5 § 1 (c) of the Convention.

The Court concluded that there had been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence.

Article 5 § 3

With regard to the alleged lack of relevant reasons to justify pre-trial detention, the Court had already found that no specific facts or information that could give rise to a suspicion justifying the applicant's pre-trial detention had been put forward by the national courts and that there was therefore no reasonable suspicion that he had committed an offence.

The Court reiterated that the existence of a reasonable suspicion that the detainee had committed an offence was a condition *sine qua non* for the validity of his or her placement in detention. In the absence of such suspicion, the Court considered that there had also been a violation of Article 5 § 3 of the Convention with regard to the failure to provide reasons for the initial pre-trial detention order. Equally, it had not been established that the failure to meet the requirements described above could be justified by the derogation communicated by Turkey.

Article 5 § 4

The Court noted that the Constitutional Court had not pointed out that no decision had been taken to restrict access to the investigation file; it had examined the merits of the complaint as though there had indeed been a restriction order, and had dismissed the complaint as being manifestly ill-founded.

The Court noted that the suspicions on which the order for the applicant's pre-trial detention had been based arose exclusively from the prosecution office's finding that his name appeared on the red list of ByLock users. The applicant had learned about this material only through the detailed questioning conducted by the police and the public prosecutor during his police custody. No information or document concerning this single item of evidence, allegedly proving his membership of the organisation in question, had been provided to him throughout his pre-trial detention. In addition, during this initial phase of his detention, the case file had remained inaccessible to the applicant, and remained so until the bill of indictment was lodged on 6 June 2017.

The Court therefore considered that neither the applicant nor his lawyer had had sufficient knowledge of the substance of this evidence, available exclusively to the prosecution, which had been of crucial importance for challenging the detention in issue before the Ankara 1st magistrate's court when it had ruled on the objection against the disputed measure. It followed that there had also been a violation of Article 5 § 4 of the Convention.

Just satisfaction (Article 41)

The Court held that Turkey was to pay the applicant EUR 12,000 in respect of non-pecuniary damage and EUR 1,000 in respect of costs and expenses.

Separate opinions

Judge Yüksel expressed a dissenting opinion which is annexed to the judgment.

The judgment is available only in French.

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