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

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ECHR 172 (2022)
31.05.2022

# Unlawful and arbitrary pre-trial detention of the Chair of the Turkish branch of *Amnesty International*: several violations

The case concerned the initial and continued pre-trial detention of Mr Kılıç who, at the relevant time, was Chairperson of the Turkish branch of the NGO *Amnesty International*. Mr Kılıç was arrested in June 2017 on suspicion of belonging to the organisation FETÖ/PDY[1]. The authorities accused him, in particular, of using the ByLock messaging service, and of other offences.

In today's **Chamber** judgment[2] in the case of **Taner Kılıç (no. 2) v. Turkey** (application no. 208/18) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 5 § 1 (lack of reasonable suspicion justifying initial and continued pre-trial detention)** of the European Convention on Human Rights.

The Court held that the Government had been unable to show that, on the date at which the applicant was initially placed in pre-trial detention or during the subsequent phases of his pre-trial detention, the evidence cited by the national judges 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 had been detained. The Court also considered that the interpretation and application of the legislative provisions relied on by the domestic authorities had been unreasonable, so as to render Mr Kılıç's detention unlawful and arbitrary. It concluded that there was no reasonable suspicion that Mr Kılıç had committed an offence, either on the date that he was placed in pre-trial detention or when it was extended.

**a violation of Article 5 § 3 (failure to provide reasons for decisions concerning pre-trial detention).**

The Court reiterated that the persistence of a reasonable suspicion that the detainee had committed an offence was a *sine qua non* for the validity of his or her continued detention. In the present case, in the absence of such reasons, it considered that there had been a violation of Article 5 § 3.

**a violation of Article 5 § 5 (no compensatory remedy for unjustified pre-trial detention)**.

The Court considered that the action for damages provided for in Article 141 of the Code of Criminal Procedure could not be regarded as a compensatory remedy for the purposes of Article 5 § 5 of the Convention in respect of complaints alleging a lack of reasonable grounds to suspect a person of having committed an offence and a lack of relevant and sufficient reasons justifying pre-trial detention.

**a violation of Article 10 (freedom of expression)**

The Court considered that Mr Kılıç's initial placement in pre-trial detention in the context of the second set of criminal proceedings brought against him, on account of actions that were directly linked to his activity as a human-rights defender, amounted to a genuine and effective restriction and thus an "interference" in the exercise of his right to freedom of expression. In the Court's view, the interference with the exercise of Mr Kılıç's rights and freedoms as guaranteed by Article 10 of the Convention could not be justified, since it had not been prescribed by law.

[1] FETÖ/PDY (an organisation described by the Turkish authorities as "Gülenist Terror Organisation/Parallel State Structure").

2. 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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## Principal facts

The applicant, Taner Kılıç, is a Turkish national who was born in 1969. When he lodged his application, in December 2017, he was detained in İzmir (Turkey).

Mr Kılıç was arrested on 5 June 2017 on suspicion of belonging to the organisation FETÖ/PDY[1]. On 9 June 2017 he was brought before the İzmir 3rd Magistrate's Court which, after hearing the applicant, decided to place him in pre-trial detention. Mr Kılıç lodged an objection against the order for his pre-trial detention, but it was dismissed.

The authorities criticised him, among other points, for having allegedly downloaded and used the ByLock messaging service on his telephone; for subscriptions to certain publications, such as the Zaman newspaper (allegedly linked to FETÖ/PDY); the fact that his sister was married to the editor of the Zaman newspaper; the fact that his children were schooled in institutions that were allegedly run by FETÖ/PDY and had been closed down by decree-laws following the attempted coup of 15 July 2016; and for holding bank accounts with Bank Asya, which was allegedly linked to FETÖ/PDY.

Between June 2017 and August 2018, Mr Kılıç's pre-trial detention was extended on several occasions, initially by the magistrate's courts, then by the İzmir and Istanbul Courts of Appeal, before which two separate sets of criminal proceedings were brought against the applicant, on 9 August 2017 and 4 October 2017 respectively.

In the context of the second set of criminal proceedings, the authorities charged Mr Kılıç, among other charges, with membership of several terrorist organisations, not only on account of his alleged use of the ByLock messaging service but also on the basis of actions related to the defence of human rights. The two sets of criminal proceedings were later joined.

On 15 August 2018 the Istanbul Assize Court ordered that Mr Kılıç be released. Then, in July 2020, it convicted him of the offence of belonging to a terrorist organisation and sentenced him to six years and three months' imprisonment.

In the meantime, Mr Kılıç lodged an individual application with the Constitutional Court and an action for damages before the İzmir Assize Court; these were dismissed in 2018 and 2019 respectively. The action for damages is pending before a higher domestic court.

## Complaints, procedure and composition of the Court

Relying on Article 5 (right to liberty and security), Mr Kılıç complained about his initial placement in pre-trial detention and its continuation for 14 and a half months; he considered, among other arguments, that there had been no reasonable grounds for suspecting him of having committed a criminal offence.

Relying in particular on Article 10 (freedom of expression), he considered that his initial and continued pre-trial detention had breached his rights as guaranteed by that Convention provision.

Relying on Article 18 (limitation on use of restrictions on rights), he argued that his detention had been imposed for another purpose than that provided for in Articles 5, 10 and 11 of the Convention.

The application was lodged with the European Court of Human Rights on 6 December 2017.

The Section President gave leave to two non-governmental organisations (NGOs) to intervene in the written procedure.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Carlo **Ranzoni** (Liechtenstein),
Egidijus **Kūris** (Lithuania),

Pauliine **Koskelo** (Finland),
Jovan **Ilievski** (North Macedonia),
Saadet **Yüksel** (Turkey),
Diana **Sârcu** (the Republic of Moldova),

and also Hasan **Bakırcı**, *Section Registrar.*

## Decision of the Court

### Article 5 § 1: lack of reasonable suspicion that Mr Kılıç had committed an offence

**Mr Kılıç's placement in pre-trial detention**: the Court noted that, in contrast to the case of *Akgün v. Turkey*[3], the alleged use of the ByLock messaging service was not the only basis of the suspicions against Mr Kılıç.

With regard to the charges against Mr Kılıç, apart from his alleged use of ByLock, the Court considered that these had entailed mere circumstantial evidence which was incapable of giving rise to a reasonable suspicion that the applicant had committed the offence with which he was charged. In the Court's view, the acts in question enjoyed a presumption of lawfulness, in the absence of other evidence capable of justifying the suspicions in question, such as an intellectual link disclosing an element of responsibility in the suspect's conduct. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred.

With regard to the alleged use of the ByLock messaging service, the Court referred to its conclusions in the *Akgün*[3] case, in which it had found that, in 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 illegal or criminal activity was taking place. In the present case, it noted that the decisions ordering and extending Mr Kılıç's placement in pre-trial detention did not contain any evidence concerning the use of the messaging service in question, such as, for example, the content or context of the messages exchanged.

It also reiterated that the case file indicated that the decisive element underlying the suspicions that the applicant had committed the offence of membership of the FETÖ/PDY organisation was a brief document, entitled "result of the analysis", drawn up by the security directorate, which specified the date of the first connection. However, this was a blunt finding, without any clear indication of the basis on which the authorities had reached this conclusion, and particularly what data had been used. This document did not include the underlying data on which it was based or information on how it had been collected. In addition, although numerous expert reports had subsequently concluded that Mr Kılıç had never downloaded or used the messaging system in question, the national courts had totally ignored this development.

It followed that no factual evidence or information capable of giving rise to suspicions justifying Mr Kılıç's placement in detention had been mentioned or presented during the initial proceedings or in the period prior to the filing of the second bill of indictment on 4 October 2017.

**The continued pre-trial detention and the phase following the bill of indictment of 4 October 2017**: a second set of criminal proceedings were brought against the applicant on 4 October 2017, and his continued detention was ordered on the basis not only of the charges brought in the context of the investigation opened by the İzmir prosecutor's office, but also new facts. With regard to the new facts, the Court noted that, at first sight, these were the ordinary peaceful and legal acts of a human-

[3] *Akgün v. Turkey*, no. 19699/18, §§ 159-185), 20 July 2021

rights defender, namely: being one of the instigators of a "workshop" conducted on 5 July 2017 by members of various non-governmental human-rights organisations; exchanging WhatsApp messages about protest activities concerning a hunger strike by two activists; exchanging messages with a doctor who was allegedly a member of the PKK and had expressed a wish to join Amnesty International; participation in filming a video, in the context of an awareness-raising campaign about an alleged victim of police violence; and conducting awareness-raising activities concerning the Gezi Park events and human-rights violations allegedly perpetrated after the attempted coup of 15 July 2016. In the absence of other evidence which would establish the wrongfulness of these actions, it was not clear to the Court how such acts could in themselves justify the suspicions in question. Accordingly, no facts or information giving rise to a suspicion justifying the applicant's detention had been mentioned or produced during this phase of the proceedings.

**In conclusion**, the Court considered that the Government had been unable to show that, on the date at which the applicant was initially placed in pre-trial detention, the evidence cited by the national judges 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. It also noted that no measure taken to derogate from the Convention during the state of emergency had been applicable. It also considered that, in the present case, the interpretation and application of the legislative provisions relied on by the domestic authorities had been unreasonable, so as to render the applicant's detention unlawful and arbitrary. There had therefore been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion that the applicant had committed an offence, both on the date when the applicant was placed in pre-trial detention and after it was extended.

### Article 5 § 3: failure to provide sufficient reasons for the decisions concerning pre-trial detention

The Court referred to its finding that no facts or information capable of giving rise to a suspicion justifying Mr Kılıç's pre-trial detention had been put forward by the national courts at any time during the applicant's detention, and that there was therefore no reasonable suspicion that he had committed an offence. It reiterated that the persistence of a reasonable suspicion that the detainee had committed an offence was a *sine qua non* for the validity of his or her continued detention. In the absence of such reasonable suspicions, the Court considered that there had also been a violation of Article 5 § 3 of the Convention.

### Article 5 § 5: absence of a compensatory remedy complying with the requirements of Article 5

The Court specified that, in a situation where the applicant not only complained about the length of his pre-trial detention, but also alleged an absence of reasonable suspicion that he had committed an offence or of relevant and sufficient grounds to justify pre-trial detention within the meaning of Article 5 of the Convention, a claim for damages based on Article 141 § 1 of the Code of Criminal Procedure could not be considered an effective remedy. In addition, the Government had not submitted any judicial decision granting compensation, on the basis of the above Article 141 § 1, to any individual in a similar situation to the applicant. The Court therefore considered that the action for damages provided for in Article 141 of the Code of Criminal Procedure could not be regarded as a compensatory remedy for the purposes of Article 5 § 5 of the Convention in respect of complaints alleging the absence of reasonable suspicions that an individual had committed an offence and a lack of relevant and sufficient reasons justifying pre-trial detention. The Court further noted that the applicant's individual application to the Constitutional Court had been dismissed and that he had therefore been awarded no compensation by the national courts. It thus noted that, prior to the present judgment, there existed no remedy which would have enabled the applicant to obtain

compensation for the violations of Article 5 §§ 1 and 3 of the Convention. It followed that there had been a violation of Article 5 § 5 of the Convention.

### Article 10: freedom of expression

Given the importance of activities in the field of human rights, the Court considered that the principles regarding the detention of journalists and media professionals could be applied to the initial and continued pre-trial detention of human-rights defenders or of leaders or activists of such organisations, where the pre-trial detention had been imposed in the context of criminal proceedings brought against them for offences that were directly linked to activities for human-rights protection.

In this connection, the Court noted that in the context of the second set of criminal proceedings, the Istanbul Assize Court had ordered, on 22 November 2017, the applicant's continued pre-trial detention, basing that order on all of the evidence concerning the charges brought against the applicant, including those related to his activities as a human-rights defender.

The Court considered that the applicant's initial pre-trial detention on account of actions that were directly linked to his activity as a human-rights defender amounted to a genuine and effective restriction and thus an "interference" in the exercise of his right to freedom of expression. It considered that the applicant's detention had thus represented an interference in his rights under Article 10 of the Convention. It pointed out that the applicant's detention had not been justified by a reasonable suspicion that he had committed an offence within the meaning of Article 5 of the Convention, and that there had therefore been a violation of his right to liberty and security as enshrined in Article 5 § 1. It also noted that, under Article 100 of the Turkish Code of Criminal Procedure, a person could only be placed in pre-trial detention where there existed facts giving rise to a strong suspicion that her or she had committed an offence. It considered, in this connection, that the lack of reasonable suspicion should, *a fortiori*, have implied the absence of strong suspicions where the national authorities had been invited to review the lawfulness of the detention. It further reiterated that Article 5 § 1 of the Convention contained an exhaustive list of permissible grounds on which a person could be deprived of his or her liberty, and no deprivation of liberty would be lawful unless it fell within one of those grounds. Furthermore, the requirement of lawfulness set out in Articles 5 and 10 of the Convention was intended to protect the individual from arbitrariness. In consequence, a measure of detention which was not lawful, where it amounted to an interference with one of the freedoms protected by the Convention, could not be considered in principle as a restriction on that freedom provided for by national law. In consequence, the interference with the exercise of the applicant's rights and freedoms as guaranteed by Article 10 of the Convention could not be justified, since it had not been prescribed by law. It followed that there had been a violation of Article 10 of the Convention.

### Article 18: limitation on use of restrictions on rights

The Court noted that the parties' arguments under Article 18 of the Convention were essentially the same as their arguments with regard to Articles 5 and 10 of the Convention. In particular, it noted that, in the context of its assessment of the applicant's complaints under Article 10 of the Convention, it had taken sufficient account of the applicant's position as leader of an NGO and a human-rights defender. Accordingly, it saw no reason to conclude that the complaint under Article 18 related to a fundamental aspect of the case. It therefore concluded, by five votes to two, that there was no need to examine either the admissibility or the merits of this complaint.

### Article 5 § 4: right to a speedy decision on the lawfulness of detention

The Court considered that the applicant's complaints concerning the non-disclosure of the public prosecutor's opinion and the examination of his objections on the sole basis of the case file and without a hearing were manifestly unfounded.

It also noted that the applicant vaguely asserted that he had been subjected to numerous restrictions, without explaining how these alleged restrictions had prevented him from challenging effectively the decisions ordering and extending his pre-trial detention. Equally, in his observations submitted to the Court, he did not provide details about the reality and potential impact of these restrictions. It followed that this complaint was not sufficiently substantiated and had to be rejected.

### Just satisfaction (Article 41)

The Court held, unanimously, that Turkey was to pay the applicant 8,500 euros (EUR) in respect of pecuniary damage, EUR 16,000 in respect of non-pecuniary damage and EUR 10,000 in respect of costs and expenses. It dismissed, by five votes to two, the remainder of the applicant's claim for just satisfaction.

## Separate opinions

Judges E. Kūris and P. Koskelo expressed a partly dissenting opinion. Judge S. Yüksel expressed a partly concurring opinion. These opinions are annexed to the judgment.

*The judgment is available only in French.*

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