



Arrest and pre-trial detention of UN judge despite his diplomatic immunity, amid 2016 attempted military coup in Türkiye

In today's **Chamber judgment**¹ in the case of [Aydın Sefa Akay v. Türkiye](#) (application no. 59/17) 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, and

a violation of Article 8 (right to respect for private life and home) of the European Convention.

The case concerned a UN judge's arrest and pre-trial detention, as well as the search of his house and person, in the aftermath of the 2016 attempted military coup in Türkiye, in spite of his diplomatic immunity. He was working remotely from his home in Istanbul for the United Nations International Residual Mechanism for Criminal Tribunals ("the UN Criminal Tribunals Mechanism") when arrested.

The Court was not convinced by the national courts' interpretation of international law when rejecting his claim for diplomatic immunity. It also found that Mr Akay appeared to have been entitled to full diplomatic immunity, including the inviolability of his person and private residence and being shielded from any form of arrest or detention, under international law. His arrest, pre-trial detention, search of his house and person had thus been unlawful. Moreover, the courts had only first examined the issue of the applicant's diplomatic immunity after over eight months, rendering futile any protection Mr Akay had had as an international judge, and had not examined it at all in relation to the searches of his house and person.

A legal summary of this case will be available in the Court's database HUDOC ([link](#)).

Principal facts

The applicant, Aydın Sefa Akay, is a Turkish national who was born in 1950. He started working as a legal advisor for the Ministry of Foreign Affairs in 1987 and since then has held a number of overseas postings, including at the Permanent Representation of Türkiye to the Council of Europe, where he represented Türkiye before the European Court. He is currently detained in Rize (Türkiye) following his conviction in 2021 of being a member of an armed terrorist organisation.

Shortly after the attempted military coup in Türkiye of 2016, a criminal investigation was opened against employees of the Ministry of Foreign Affairs suspected of being involved in what the authorities referred to as the "Fetullahist Terror Organisation / Parallel State Structure" (*Fetullahçı Terör Örgütü / Paralel Devlet Yapılanması* – "FETÖ/PDY"). Fetullah Gülen, the leader of FETÖ/PDY, was blamed for the coup. Many people who were suspected of being part of the structural organisation of FETÖ/PDY in various public, health, educational, commercial and media institutions were arrested and placed in pre-trial detention.

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.

Against that background, in September 2016, Mr Akay, at the time a judge for the UN Criminal Tribunals Mechanism and working remotely from his home in Istanbul, was arrested.

He was placed in pre-trial detention and subsequently indicted with being a member of an armed terrorist organisation. The indictment referred to Mr Akay's use of Bylock, an encrypted messaging application allegedly used exclusively by members of FETÖ/PDY, and two books found during the search of his home by Fetullah Gülen and one of his senior managers.

Mr Akay's counsel raised the issue of diplomatic immunity throughout the proceedings in numerous applications for his release. In particular, in October 2016, he submitted a letter from the President of the UN Criminal Tribunals Mechanism and a *note verbale* from the UN Office of Legal Affairs to the Permanent Mission of Türkiye to the UN, confirming that Mr Akay was entitled to diplomatic immunity. The *note verbale*, as well as a subsequent order by the President of the UN Criminal Tribunals Mechanism, also requested Mr Akay's immediate release and the termination of all legal proceedings against him.

Mr Akay's pre-trial detention was however extended on the grounds, among other things, that there was concrete evidence to suspect him of being a member of an armed terrorist organisation, and the risk that he would flee or tamper with evidence.

The case went to trial, with Mr Akay being found guilty as charged at first instance in June 2017. The trial court rejected his claim for diplomatic immunity. It found that he had immunity for acts related to his duties as a UN judge but not in the jurisdiction of Türkiye. He was sentenced to seven years and six months' imprisonment, and immediately released on bail with a ban on leaving the country.

Mr Akay's subsequent appeals in the courts were unsuccessful. His conviction was upheld in February 2021 in a final judgment by the Court of Cassation and he is now serving his sentence in Rize L-Type Prison.

In the meantime, Mr Akay had also lodged an application with the Constitutional Court, alleging among other things that he had been placed in pre-trial detention without respect for diplomatic guarantees. It was rejected in 2019. The Constitutional Court found in particular that his pre-trial detention had had a legal basis under the Constitution because, according to the relevant international law, he could not claim immunity in the State he represented or of which he was a national. He lodged another application with the Constitutional Court in 2021 concerning his conviction, which is apparently still ongoing.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security) and Article 8 (right to respect for private life and home), Mr Akay alleged that his arrest, pre-trial detention and searches of his home and person had been unlawful because they were in blatant disregard of his diplomatic immunity. He also specifically alleged under Article 5 § 1 (c) a lack of any reasonable suspicion warranting his pre-trial detention, which had been based predominantly on his use of the ByLock smartphone application and, under Article 5 § 4 (right to have lawfulness of detention decided speedily by a court), that the courts had failed to address his arguments concerning his diplomatic immunity when examining his objections against his pre-trial detention.

Lastly, relying on Article 46 (binding force and enforcement), he asked the European Court to urgently order his immediate release.

The application was lodged with the European Court of Human Rights on 21 December 2016.

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

Arnfinn Bårdsen (Norway), *President*,
Jovan Ilievski (North Macedonia),

Pauliine Koskelo (Finland),
Saadet Yüksel (Türkiye),
Lorraine Schembri Orland (Malta),
Frédéric Krenc (Belgium),
Diana Sârcu (the Republic of Moldova),

and also Dorothee von Arnim, *Deputy Section Registrar*.

Decision of the Court

Article 5 § 1

First, the Court emphasised that the special role of the judiciary as the guarantor of justice, and the need for safeguards to protect its members from interference by the executive were also applicable in respect of international judges.

It went on to note that the national courts had only carried out the first detailed assessment of Mr Akay's immunity when convicting him in June 2017, that is more than eight and a half months after his arrest and placement in pre-trial detention and more than seven and a half months after his counsel had requested his release on that ground. Such a delay was incompatible with Article 5 § 1 and rendered futile any protection he had on account of his diplomatic immunity.

The Court was not convinced either that the national courts' interpretation of the nature of Mr Akay's immunity had been compatible with Article 5 § 1. As concerned the Constitutional Court's finding, it pointed out firstly that the judges of the UN Criminal Tribunals Mechanism did not represent the States nominating them for election to the UN under the applicable rules. Indeed, that would be incompatible with the very independence that defines a judge and the judiciary, be it national or international.

Secondly the fact that Mr Akay enjoyed the privileges and immunities "accorded to diplomatic envoys, in accordance with international law" did not mean that he had been a diplomatic envoy. Therefore, the provisions of the Vienna Convention on Diplomatic Relations, relied on by the Constitutional Court, although certainly relevant, were not wholly transposable to Mr Akay, who benefited from such privileges and immunities in his capacity as a judge of the UN Criminal Tribunals Mechanism, with the ultimate aim being to protect the independence of the judges, and hence of the tribunal, *vis-à-vis* any State. That being the case, there was no question of his not being entitled to his immunity in "the sending State", namely in Türkiye.

Accordingly, the Court concluded that Mr Akay could not have foreseen such an interpretation of his diplomatic immunity. Nor was it in keeping with the principle of legal certainty under Article 5 § 1.

Contrary to the national courts, the Court considered that Mr Akay appeared to have been entitled to *full* diplomatic immunity, including personal inviolability and being shielded from any form of arrest or detention, during his term of office as a UN judge from July 2016 to June 2018. Such interpretation had been based on the wording of the relevant international legal texts and confirmed in the order issued by the President of the UN Criminal Tribunals Mechanism and the UN's *note verbale*.

Lastly, the Court concluded that Mr Akay's pre-trial detention could not be justified under Article 15 (derogation in time of emergency). States could adopt measures derogating from their obligations under the Convention provided that they were "strictly required by the exigencies of the situation" and were "consistent with other obligations under international law". The Court was not convinced however that that had been the case despite the attempted *coup d'état* and the state of emergency, given the delay in the courts' assessing Mr Akay's diplomatic immunity and the Court's findings above.

Accordingly, Mr Akay's pre-trial detention had been unlawful and there had been a violation of Article 5 § 1 of the Convention. In view of that finding, the Court held that there was no need to examine separately his complaints under Article 5 §§ 1 (c) and 4.

Article 8

The Court noted that its findings regarding the interpretation of the scope of Mr Akay's diplomatic immunity under Article 5 § 1 meant that he had also been entitled to enjoy under international law the inviolability of his person and his private residence.

Moreover, since the applicant had been working for the UN Criminal Tribunals Mechanism from Türkiye at the relevant time, the Court found that his place of residence had been under heightened protection, similar to the protection afforded to searches of a lawyer's office in its case-law under Article 8 of the Convention. Furthermore, none of the domestic courts had examined that aspect of Mr Akay's diplomatic immunity and certain items found during the search in the criminal proceedings against him had been used against him in the criminal proceedings.

Nor had the applicant's failure to raise his diplomatic immunity at the time of the searches been conclusive, given the Government's failure to obtain a waiver of that immunity from the UN Secretary General and the absence of any *ex post facto* consent either by the UN or Mr Akay to the searches in question.

Accordingly, it concluded that the search of his house and person in September 2016 had interfered with his rights and that that interference had not been "prescribed by law", in violation of Article 8.

Lastly, the Court concluded that the searches of Mr Akay's house and person had not been justified under Article 15 (derogation in time of emergency), as they were inconsistent with Türkiye's "other obligations under international law" within the meaning of that provision.

Article 41 (just satisfaction)

The Court held that Türkiye was to pay Mr Akay 21,100 euros (EUR) in respect of non-pecuniary damage, and EUR 7,000 in respect of costs and expenses.

Article 46 (binding force and enforcement)

The Court dismissed Mr Akay's request under Article 46 to be released because its findings only concerned his pre-trial detention, which ended in June 2017, and not his current deprivation of liberty, which stemmed from the enforcement of the sentence imposed on him by the Court of Cassation.

Separate opinion

Judge Krenč, joined by Judge Schembri-Orland expressed a separate opinion, which is annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.