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

Press Release
issued by the Registrar of the Court

ECHR 198 (2024)
27/08/2024

Court finds that applicant's legally justified conviction for membership of armed terrorist organisation was reasonably foreseeable and that his detention conditions were not in breach of Convention

In today's **Chamber** judgment[1] in the case of Yasak v. Türkiye (application no. 17389/20) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights**, and**

no violation of Article 7 (no punishment without law) of the Convention.

The case concerned the applicant's conviction for membership of an armed terrorist organisation described by the Turkish authorities as the "Fetullahist Terror Organisation/Parallel State Structure" (*Fetullahçı Terör Örgütü / Paralel Devlet Yapılanması* – "FETÖ/PDY").

The Court considered that the applicant's detention conditions in Çorum Prison had not reached the threshold of severity required to characterise the treatment to which he had been subjected as inhuman or degrading within the meaning of Article 3 of the Convention.

As to the foreseeability of the applicant's conviction for membership of an armed terrorist organisation, the Court considered that the offence of which he had been convicted had had a basis in the relevant national law at the time when it was committed and that this offence had been defined sufficiently clearly to meet the requirement of foreseeability and thus to enable the applicant to regulate his conduct for the purposes of Article 7 of the Convention. The Court further considered that the domestic courts' interpretation of the provisions of Article 314 § 2 of the Criminal Code had not been expansive and that the solution in the present case had been consistent with the essence of the offence and had to be regarded as reasonably foreseeable.

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

Principal facts

The applicant, Şaban Yasak, is a Turkish national who was born in 1987 and was an inmate at Çorum L-Type Prison at the time when the application was lodged. The case originated in the criminal proceedings brought against the presumed members of the FETÖ/PDY, an organisation considered by the Turkish authorities to have been behind the coup attempt that took place in Türkiye on 15 July 2016.

In 2015 the Çorum prosecutor's office opened a criminal investigation into the FETÖ/PDY's activities in Çorum Province. In the context of this investigation, a report was drawn up by the police officers of the anti-terror directorate on 11 July 2016. The report was based, in particular, on the analysis of the GSM line used by E.B., who was suspected of being the head, in Çorum Province, of a secretive structure within the organisation in question responsible for recruiting and training pupils and

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.

students. The report specified that E.B. and his spouse had been in contact with numerous individuals, including the applicant.

Following the attempted coup of 15 July 2016, criminal investigations were opened by the Çorum prosecutor's office into the organisation's activities in that province.

On 26 January 2017, by order of the Çorum Magistrate's Court, the police conducted a search of the applicant's home.

On 30 January 2017 the applicant went to the Nevşehir police station to turn himself in. He was taken into police custody on suspicion of being a member of an illegal organisation and was taken to Çorum the same day, where he was held in custody at the headquarters of the provincial police.

On 6 February 2017 the applicant appeared before the Çorum Magistrate's Court, which remanded him in custody on a charge of membership of an illegal organisation.

On 4 August 2017 the Çorum prosecutor's office filed a bill of indictment with the Çorum Assize Court. He was accused of being a member of the proscribed organisation and of having, in and prior to 2016, engaged in activities in Çorum Province on behalf of that organisation, acts which fell within the scope of Article 314 § 2 of the Criminal Code. On 14 February 2018 the Assize Court found the applicant guilty of the offences as charged and sentenced him to seven years and six months' imprisonment, pursuant to Article 314 § 2 of the Criminal Code. The applicant lodged an appeal on 9 March 2018. In a judgment of 3 July 2018 the Samsun Regional Court of Appeal dismissed the appeal, holding that the first-instance court had not erred in its assessment.

On 23 July 2018 the applicant lodged an appeal on points of law. On 21 January 2019 the Court of Cassation upheld the applicant's conviction, holding, in particular, that the relevant acts had been accurately classified and had conformed to the offence set out under the law, and that both the verdict and the sentence had been determined in an individualised manner.

On 22 May 2019 the applicant lodged an individual application with the Constitutional Court in which he complained, in particular, that his conviction had been unlawful.

In a summary judgment delivered on 25 February 2020, the Constitutional Court examined all the applicant's complaints. It dismissed his complaint alleging a lack of fairness of the proceedings as a whole, holding that it was manifestly ill-founded. It similarly dismissed his complaint concerning alleged restrictions of his defence rights, holding that the ordinary remedies had not been exhausted. Lastly, it dismissed his complaint that his right to liberty had been infringed on the ground that this complaint had already been submitted to it in the context of another individual application.

Following a complaint made by the applicant, the Çorum Prison Governing and Monitoring Board issued a decision on 15 October 2018 which explained, in particular, that the establishment's initial capacity of 477 inmates had been increased by adding bunk beds and had thus been raised to 1,592 inmates. The Board clarified that the establishment was currently holding some 1,950 to 2,000 inmates. On 18 February 2019 the applicant appealed against that decision. He mainly complained of overcrowding in the unit in which he was being held. He explained that these conditions were causing him acute mental suffering and having an adverse effect on his psychological state. On 21 February 2019 the Çorum Sentence Enforcement Judge dismissed the applicant's appeal.

In December 2020 the prison authorities conducted an inquiry in order to identify inmates who were complaining about their detention conditions, with a view to their transfer to other prisons. As part of that process, a transfer was proposed to the applicant, which he refused, stating that he was satisfied with his material conditions of detention.

In the meantime, the applicant had lodged an individual application with the Constitutional Court on 24 April 2019 in which he complained of his detention conditions at Çorum Prison. The Constitutional Court dismissed his individual application as manifestly ill-founded.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), the applicant complained of the conditions in which he had been held while in police custody and subsequently at Çorum Prison.

Relying on Article 7 (no punishment without law), he submitted that the acts that had formed the basis of his conviction had been lawful at the relevant time and that, in holding him criminally liable for those acts, the authorities had relied on an expansive and arbitrary interpretation of the relevant laws, in violation of the principle enshrined in Article 7 of the Convention.

The application was lodged with the European Court of Human Rights on 2 April 2020.

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

Arnfinn **Bårdsen** (Norway), *President*,
Jovan **Ilievski** (North Macedonia),
Saadet **Yüksel** (Türkiye),
Lorraine **Schembri Orland** (Malta),
Frédéric **Krenc** (Belgium),
Diana **Sârcu** (the Republic of Moldova),
Gediminas **Sagatys** (Lithuania),

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

Decision of the Court

Article 3

As a preliminary consideration, the Court noted that, at the relevant time, Türkiye had been faced with a situation of overcrowding in some of its prisons owing to circumstances linked to the coup attempt of 15 July 2016. Çorum Prison had been one of the prisons affected by this overcrowding.

As calculated according to the criteria used by the Court, the applicant's personal space appeared to have ranged from 3.6 to 4.6 sq. m during the fourteen months he had spent in unit F-5 and from 4 to 6 sq. m during the period of over two years he had spent in unit F-10.

As to the sanitary and hygiene conditions of the applicant's detention, on the basis of the material available to it, the Court could not conclude that the cleanliness of the facilities, the number of available toilets and washbasins, or the time available to each inmate in which to use them had failed to comply with Convention standards.

Admittedly, during a long stretch of his detention, the applicant had endured the effects of prison overcrowding, including having had to sleep on a mattress on the floor in that time. To date, the Court had never found a violation of Article 3 simply because an inmate had had to sleep on a mattress laid directly on the floor, save in cases where, in addition to inappropriate sleeping arrangements, he or she had had less than 3 sq. m of personal space.

In sum, the Court did not deny that the applicant might have experienced some distress and hardship on account of his detention in the conditions described; it nevertheless found, having regard to the cumulative effect of such conditions, that they had not reached the threshold of severity required to characterise the treatment to which the applicant had been subjected as inhuman or degrading within the meaning of Article 3 of the Convention.

Consequently, there had been no violation of Article 3.

Article 7

The Court considered that it was necessary from the outset to clarify that the present case differed markedly from the *Yüksel Yalçınkaya* case, which had concerned Mr Yalçınkaya's conviction for membership of an armed terrorist organisation based decisively on the use of the encrypted messaging application ByLock, without establishing the constituent material and mental elements of the offence under Article 314 § 2 of the Criminal Code in an individualised manner. In the present case the applicant had been convicted – as a result of acts committed, in particular, from 2011 to 2014 and on the basis of a wide range of evidence – of the offence of membership of an armed terrorist organisation under the aforementioned statute, the foreseeability of which he disputed under Article 7 of the Convention.

As the Court had noted in its *Yüksel Yalçınkaya* judgment, the fact that the FETÖ/PDY had not yet been designated as an armed terrorist organisation in the manner provided for in domestic law when the applicant was deemed to have committed the acts for which he was convicted did not suffice to render the applicant's conviction incompatible with Article 7 of the Convention. The Court therefore considered that the issue raised by the present case was whether his conviction for membership of an armed terrorist organisation had been sufficiently foreseeable given the requirements of domestic law, in particular as regarded the cumulative constituent material and mental elements of the offence such as they appeared in Article 314 § 2 of the Criminal Code, the Prevention of Terrorism Act and in the relevant case-law of the Court of Cassation.

Firstly, as to the material element of the offence, the Court noted above all that, in establishing the facts, the Assize Court, in a judgment which had contained very lengthy reasoning as to the facts and the law, had found that the applicant had deliberately joined the organisation in question and had engaged in covert activities as part of the position he occupied in the organisation's secretive structure, and that it had concluded that those acts were punishable under Article 314 § 2 of the Criminal Code.

In particular, the Court observed that the applicant had been found guilty of the acts of which he was accused, namely of having engaged in illegal activities as part of the secretive structure of the organisation in question from at least 2011 to 2014. The judgment of the Çorum Assize Court, especially, had given reasons on this point by carrying out a detailed analysis of each element in the light of its interpretation of the statute on which the charges were based. Thus, having examined the evidence before it (witness statements, HTS records, etc.), it had established that the applicant had covertly engaged in activities within the organisation in issue, using a codename, and that he was one of the main regional leaders of pupils within the organisation's secretive structure. In its assessment of the applicant's activities, the Assize Court had observed that all these acts should be considered as a whole and that the accused's guilt should be determined accordingly. It had noted that, on this reasoning, the requisite conditions of continuity, diversity and intensity had been met and it could be held to have been established that the accused had been a member of the organisation in question.

The Court observed in this connection that it was evident that the acts mentioned above had not enjoyed a presumption of legality at the time when they had been committed and had not pertained to the applicant's exercise of his Convention rights. Nor could it be argued that the attachment of these acts to a criminal aim was unverifiable. The applicant had not been accused of having engaged in these activities within a legal organisation acting in compliance with the law: it had been made out that the applicant's activities had aimed, in particular, to broaden the support base from which the organisation in question had meant to recruit, especially among students, and to infiltrate public institutions. The domestic courts had also established that the members of the organisation in question had carried out their activities in secret in order to achieve that organisation's goals, and that the organisation had also resorted to illegal actions, such as stealing university or civil-service

entry exam questions for its supporters. Consequently, the Court was not persuaded by the applicant's argument to the effect that he had been convicted for lawful acts.

It followed that the material element of the offence resided in the fact that the applicant, by making himself available to carry out the commands and instructions he received from the organisation, had become part of its hierarchical structure and had engaged secretly, intensely and continuously in activities aimed at achieving that organisation's goals.

Secondly, as to the mental element of the offence, the Court noted in particular that, under Turkish law, the offence of membership of an armed terrorist organisation could only be committed with direct intent and that the Court of Cassation itself had accepted that not all members of the organisation could be considered to have possessed the knowledge and direct intent required for a finding of guilt under Article 314 § 2 of the Criminal Code. The Court observed that in the present case the domestic courts had referred to a wide range of incriminating evidence showing that the applicant, as a senior officer of the organisation's secretive structure, had carried out his activities in the service of that organisation. On this point, therefore, the present case differed from the *Yüksel Yalçınkaya* case, in that, in the latter case, it had been the mere use of ByLock that had been equated with knowingly and willingly being a member of an armed terrorist group, whereas in the present case, the applicant had not been found guilty of the offence of membership of an armed terrorist organisation because of an established use of ByLock, but because he had been part of the organisation's secretive structure. The case-law of the domestic courts showed, moreover, that they had had to undertake an assessment under the mistake provision set out in Article 30 § 1 of the Turkish Criminal Code. Indeed, where a member of a structure which carried out its activities on a legal basis claimed to have been unaware of the fact that the relevant structure was a terrorist organisation, he or she could rely on the mistake provision in the aforementioned Article of the Criminal Code. However, where it had been made out, following proceedings conducted in accordance with the right to a fair trial, that a defendant belonged to the hierarchy of the organisation, that he or she had engaged in continuous, diverse and intense activities aimed at achieving that organisation's ultimate goals and that he or she had occupied a specific position in that structure, it was considered, as in the present case, that the accused had been aware of the existence of the goals and methods of the organisation in question.

In the Court's view, this assessment by the domestic courts of the mental element in the applicant's case represented a foreseeable, and not an expansive, interpretation and application of the criminal statute in question.

In conclusion, the Court was satisfied not only that the offence of which the applicant had been convicted had had a basis in the relevant "national … law at the time when it was committed" but also that this law had defined the offence sufficiently clearly to meet the requirement of foreseeability and thus to enable the applicant to regulate his conduct for the purposes of Article 7 of the Convention. It further considered that the domestic courts' interpretation of the provisions of Article 314 § 2 of the Criminal Code had not been expansive and that the solution in the present case had been consistent with the essence of the offence and had to be regarded as reasonably foreseeable.

There had been no violation of Article 7 of the Convention.

Separate opinion

Judge Krenc expressed a concurring opinion, which is annexed to the judgment.

The judgment is available only in French.

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