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

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Grouped follow-up case concerning convictions based on use of the ByLock messaging application for terrorism offences

In today's **Chamber** judgment[1] in the case of Demirhan and Others v. Türkiye (applications nos. 1595/20 and 238 others) the European Court of Human Rights held, by six votes to one, that there had been:

a violation of Article 7 (no punishment without law) of the European Convention on Human Rights, **and**

a violation of Article 6 § 1 (right to a fair trial) of the European Convention.

The case concerned the applicants' convictions 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*, referred to as "the FETÖ/PDY"). The authorities consider FETÖ/PDY to be behind the coup attempt that took place in Türkiye on 15 July 2016.

The 239 applications making up this case are part of the thousands of applications on the Court's docket that concern issues similar to those judged in the Court's Grand Chamber case *Yüksel Yalçınkaya v. Türkiye* (application no. 15669/20).

As in that judgment, the Court found that the Turkish courts' categorical approach to the use of the encrypted messaging application called "ByLock" – notably that anyone who had used the application could, in principle, be convicted on that basis alone of membership of an armed terrorist organisation – had breached the applicants' right to effective protection against arbitrary prosecution, conviction and punishment and their fair trial rights.

The Court underlined that the situation that led to a finding of a violation of Articles 7 and 6 § 1 of the Convention had stemmed from a systemic problem that affected a large number of persons and that that required resolution at the national level. Following the *Yüksel Yalçınkaya* judgment, the Court had already given notice to the Turkish Government of 5,000 similar applications, including those in the present case, and thousands were still accumulating on its docket.

Principal facts

The applicants are 239 Turkish nationals.

On the night of 15 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.

The day after, prosecutors' offices across the country launched widespread investigations against persons suspected of having links to the FETÖ/PDY, considered to be behind the coup attempt.

The applicants in the case were subsequently charged with membership of an armed terrorist organisation under Article 314 § 2 of the Turkish Criminal Code in view of their suspected membership of the FETÖ/PDY, and were subsequently convicted of that offence. Their convictions were based

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.

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decisively on their alleged use of ByLock, which the Turkish courts held had been designed for the exclusive use of FETÖ/PDY members under the guise of a global application.

The Constitutional Court summarily dismissed the individual applications lodged against their convictions.

Complaints, procedure and composition of the Court

Relying in particular on Article 7 (no punishment without law) of the European Convention on Human Rights, the applicants complained that their convictions had not been foreseeable as required under that provision and had been based on an extensive and arbitrary interpretation of the relevant laws.

Also relying on Article 6 § 1 (right to a fair trial) of the European Convention, they complained of shortcomings in the criminal proceedings against them with regard to the decisive evidence in question and their inability to effectively challenge it.

The applications were lodged with the European Court of Human Rights on various dates between 2019 and 2023.

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

Arnfinn **Bårdsen** (Norway), *President*,
Saadet **Yüksel** (Türkiye),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** (North Macedonia),
Oddný Mjöll **Arnardóttir** (Iceland),
Gediminas **Sagatys** (Lithuania),
Stéphane **Pisani** (Luxembourg),

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

Decision of the Court

The Court noted that the context to the present case had been set out by the Court in its Grand Chamber judgment *Yüksel Yalçınkaya v. Türkiye*.

In that judgment the Court had found violations of Articles 7 and 6 § 1 because of the Turkish courts' ruling that anyone who had used ByLock could, in principle, be convicted on that basis alone of membership of an armed terrorist organisation. The domestic courts' characterisation of the use of ByLock, and the uniform and global approach adopted by the Turkish judiciary *vis-à-vis* the ByLock evidence, had in practice the effect of equating the mere use of ByLock with knowingly and willingly being a member of an armed terrorist organisation. The situation that led to a finding of a violation of Articles 7 and 6 § 1 of the Convention in that judgment had, therefore, not been prompted by an isolated incident specific to that applicant's case, but had stemmed from a systemic problem affecting a large number of persons.

The Court saw no reason in this case to depart from the findings of violations made in *Yüksel Yalçınkaya*. The Court did not rule out that there might be other evidence in the applicants' case files – that is, evidence other than the applicants' mere use of ByLock – that might demonstrate, alone or cumulatively, their membership of the FETÖ/PDY. However, the fact remained that the establishment of the applicants' use of ByLock had served, on its own, as conclusive proof of the presence of all the constituent elements of the crime of membership of an armed terrorist organisation as defined in domestic law. Such an approach had been contrary to the object and purpose of Article 7 which is to provide effective safeguards against arbitrary prosecution, conviction and punishment and had unduly restricted the rights of the defence protected by Article 6 § 1.

Indeed, the question whether the evidence against the applicants, excluding the decisive weight given to their use of ByLock, would have sufficed for their conviction for the same offence in a reasonably foreseeable manner was for the Turkish courts to determine in the light of the *Yüksel Yalçınkaya* judgment. It was not for the Court to speculate, and all the more so given the scale and magnitude of the problem, as evidenced by the sheer number of similar cases pending.

Other articles

The Court considered that it had dealt with the main legal questions raised by the case and that there was no need to address any of the applicants' remaining complaints.

Just satisfaction (Article 41)

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for any damage sustained by the applicants. It noted that the applicants had the possibility under Turkish law to have the domestic proceedings reopened following the delivery of the present judgment, which would in principle constitute the most appropriate form of redress.

Lastly, given the Court's practice in cases raising systemic issues that generate a large number of repetitive applications, it considered that it was not justified to make any awards for costs and expenses in respect of follow-up applications of this type.

Separate opinions

Judge Arnardóttir expressed a partly concurring, partly dissenting opinion. Judge Yüksel expressed a partly dissenting opinion. These opinions are 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.