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

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Unjustified seizure of electronic data protected by lawyer-client professional secrecy

In today's **Chamber** judgment[1] in the case of **Kırdök and Others v. Turkey** (application no. 14704/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life, the home and private correspondence) of the European Convention on Human Rights.

In this case the applicants, who are lawyers, complained about the seizure of their electronic data by the judicial authorities for the purposes of criminal proceedings against another lawyer (Ü.S.), who had shared their office.

The Court found, in particular, that the seizure of the applicants' electronic data, which were protected by lawyer-client professional secrecy, and the refusal to return or destroy them had not corresponded to a pressing social need or been necessary in a democratic society. The Court also noted the lack of sufficient procedural guarantees in the law as interpreted and applied by the judicial authorities.

Principal facts

The applicants, Mehmet Ali Kırdök, Mihriban Kırdök and Meral Hanbayat, Turkish nationals who were born in 1954, 1958 and 1980 respectively and live in Istanbul, are lawyers.

In 2011 the Istanbul public prosecutor's office instigated an investigation to detect and reveal the secret communication channels operating between Abdullah Öcalan and his former organisation (PKK – the Kurdistan Workers' Party, an illegal armed organisation – and the KCK). In that context a judge of the Istanbul Assize Court issued an order concerning the activities of Ü.S. (a lawyer), who was arrested the next day at his home. The police conducted searches of the office which the latter shared with the applicants. They made copies of all the data stored on the hard disk of the computer used jointly by all the lawyers, as well as of a USB stick belonging to Ms Hanbayat. A representative of the Istanbul Bar Association and an applicant were present during the search. The data seized by the police were placed in a sealed bag.

Subsequently, the applicants appealed against the order issued by the Assize Court judge both as the representatives of Ü.S. and in their own names. They requested, in particular, the restitution or destruction of their digital data, arguing that those data did not belong to Ü.S., that they were protected by legal professional secrecy and that they had been seized without any relevant order being issued. The public prosecutor's office submitted observations to the effect that since the data in question had not yet been transcribed, it was impossible to ascertain their precise owners. The Assize Court dismissed the applicants' appeal on the grounds that the impugned order had been issued in accordance with the law and the relevant procedure.

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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Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life, the home and private correspondence) and Article 13 (right to an effective remedy), the applicants complained that legal professional secrecy, which was based on the confidentiality of their exchanges with their clients, had been infringed because the digital files on the latter's cases had been copied by the judicial authorities during a search and the copies had been seized, even though they were irrelevant to the investigation being conducted against another lawyer.

The application was lodged with the European Court of Human Rights on 12 March 2012.

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

Robert **Spano** (Iceland), *President*,
Marko **Bošnjak** (Slovenia),
Valeriu **Griţco** (the Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Ivana **Jelić** (Montenegro),
Darian **Pavli** (Albania),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

Article 8 (right to respect for private and family life, as well as the home and private correspondence)

The Court noted that the applicants, who were not the subject of the criminal investigation, argued before the judicial authorities that the seized electronic data belonged to them and were covered by lawyer-client professional secrecy. It also noted that in his search order the judge of the Assize Court broadly indicated the scope of the search of the premises, stating that the aim of the operation was to "gather evidence and seize items" potentially proving that the suspect (Ü.S.) had been involved in activities within the terrorist organisation KCK/PKK. The order had not specified which concrete or specific items or documents were to be found at the specified addresses, including the premises of the applicants' law firm, or how those pieces of evidence were relevant to the criminal investigation. Thus, under the order, the authorities responsible for the investigation had been able, in general terms, to examine all the digital data stored in the applicants' offices, without worrying unduly that they were searching the premises of a law firm which might house documents submitted by clients to their legal representatives.

Furthermore, the broad scope of the order was reflected in the manner in which it had been enforced. Even though a representative of the Istanbul Bar Association and an applicant had been present during the search and the data seized had been placed in a sealed bag, no further special measures had been adopted to protect them against interference with professional secrecy. Indeed, there had been no mechanism for filtering electronic documents or data covered by professional secrecy or any explicit prohibition of the seizure of data covered by such confidentiality during the search. On the contrary, all the data on the hard disk of the computer jointly used by all the lawyers working on the premises and on one USB stick had been seized.

Once the applicants had requested the return of the digital data, relying on the professional secrecy of exchanges between lawyers and their clients, the judicial authorities had been under a legal obligation promptly to assess the data seized and to return the data protected by such secrecy to them or to destroy the data, as appropriate. However, domestic legislation and practice had been unclear as to the consequences of any failure by the judicial authorities to honour that obligation.

The Assize Court had definitively refused to return or destroy the seized copies of the data, based on reasoning which had merely mentioned the lawfulness of the searches conducted in the legal offices, and had not reacted to the specific allegation of an infringement of the confidentiality of exchanges between lawyers and their clients. It would appear that the Assize Court had implicitly accepted the grounds put forward by the public prosecutor's office in order to justify the refusal to return the data seized, to the effect that since the data in question had not yet been transcribed, it had been impossible to ascertain their precise owners. The Court took the view that not only was such a ground of refusal not clearly prescribed by law, but also it was incompatible with the substance of the professional secrecy protecting exchanges between lawyers and their clients. At any event, it could not be concluded that the examination of the applicants' request by the judicial authorities had complied with the obligation to provide for especially strict verification of measures relating to data covered by legal professional secrecy.

Lastly, the compensatory remedy (Article 141 of the Code of Criminal Procedure) referred to by the Government was very different from an application for a declaration of nullity of an impugned seizure, and would not have led to the return or the destruction of the copies protected by professional secrecy.

Consequently, the measures imposed on the applicants (the seizure of their digital data and the refusal to return or destroy them) had not corresponded to a pressing social need, had not been proportionate to the legitimate aims pursued (prevention of disorder, prevention of criminal offences and protection of the rights and freedoms of others), and had not been necessary in a democratic society. There had therefore been a violation of Article 8 of the Convention.

In the absence of sufficient procedural guarantees in the relevant legislation as interpreted and applied by the judicial authorities in the present case, the Court considered that the complaints under Article 13 of the Convention covered the same ground as the complaint under Article 8 of the Convention.

Just satisfaction (Article 41)

The Court held that Turkey was to pay each applicant 3,500 euros (EUR) in respect of non-pecuniary damage and EUR 3,000 jointly in respect of costs and expenses.

The judgment is available only in French.

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