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

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Violations of the Convention on account of the pre-trial detention of journalists and managers of the Turkish newspaper *Cumhuriyet*

In today's **Chamber** judgment[1] in the case of Sabuncu and Others v. Turkey (application no. 23199/17) 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;

a violation of Article 10 (freedom of expression) of the Convention.

- unanimously, that there had been:

no violation of Article 5 § 4 (right to speedy review of the lawfulness of detention).

- by a majority, that there had been:

no violation of Article 18 (limitation on use of restrictions on rights).

The case concerned the applicants' initial and continued pre-trial detention on account of the editorial stance taken by the daily newspaper *Cumhuriyet* in its articles and in posts on social media, criticising certain government policies.

The Court found in particular that:

- the decisions of the domestic courts ordering the applicants' initial and continued pre-trial detention had been based on mere suspicion that did not reach the required level of reasonableness;

- the acts for which the applicants had been held criminally responsible came within the scope of public debate on facts and events that were already known, amounted to the exercise of Convention freedoms, and did not support or advocate the use of violence in the political sphere or indicate any wish on the applicants' part to contribute to the illegal objectives of terrorist organisations, namely to use violence and terror for political ends;

- the applicants' pre-trial detention in the context of the criminal proceedings against them, for offences carrying a heavy penalty and directly linked to their work as journalists, had amounted to an actual and effective constraint and constituted "interference" with the exercise of their right to freedom of expression;

- the interference with the exercise of the applicants' right to freedom of expression had not been prescribed by law, as Article 100 of the Turkish Code of Criminal Procedure required the existence of factual evidence giving rise to strong suspicion that the person concerned had committed an offence, which had not been the case here.

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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The Court also found that:

- although the review by the Constitutional Court in the present case could not be described as "speedy" in an ordinary context, in the specific circumstances of the present case the time taken had not contravened Article 5 § 4 (right to speedy review of the lawfulness of detention);

- it had not been established beyond reasonable doubt that the applicants' pre-trial detention had been ordered for a purpose not prescribed by the Convention within the meaning of Article 18 (limitation on use of restrictions on rights).

Lastly, the Court rejected the part of the application concerning the applicants Turhan Günay and Ahmet Kadri Gürsel, with the exception of their length-of-proceedings complaint, as the Constitutional Court had already found a breach of the rights relied on by those applicants.

Principal facts

The applicants are ten Turkish nationals. At the time of the events they were journalists with the daily newspaper *Cumhuriyet* or managers of the Cumhuriyet Foundation (the principal shareholder of the company that publishes the newspaper).

The applicants are: Mehmet Murat Sabuncu (born in 1969), Akın Atalay (born in 1963), Önder Çelik (born in 1956), Turhan Günay (born in 1946), Mustafa Kemal Güngör (born in 1959), Ahmet Kadri Gürsel (born in 1961), Hakan Karasinir (born in 1963), Hacı Musa Kart (born in 1954), Güray Tekin Öz (born in 1949), and Bülent Utku (born in 1955).

In November 2016 the applicants were placed in pre-trial detention by a magistrate who considered, among other findings, that there were strong suspicions that they were responsible for the ongoing activities of the newspaper *Cumhuriyet* consisting in promoting and disseminating propaganda on behalf of terrorist organisations, notably the PKK/KCK (the Workers' Party of Kurdistan (an illegal armed organisation)/Kurdistan Communities Union) and an organisation referred to by the Turkish authorities as FETÖ/PDY (Fethullahist Terror Organisation/Parallel State Structure).

On various dates the applicants lodged applications for release and objections against the orders for their continued pre-trial detention. Their applications were rejected.

In April 2017 the Istanbul public prosecutor's office filed a bill of indictment against the ten applicants with the Istanbul 27th Assize Court. The public prosecutor alleged primarily that, over a period of three years leading up to the attempted coup of 15 July 2016, the editorial stance of *Cumhuriyet* had changed as a result of the applicants' influence, running counter to the editorial principles to which the newspaper had adhered for 90 years. The criminal proceedings concerning eight of the applicants (who were convicted by the Istanbul Assize Court) are still pending before the plenary criminal divisions of the Court of Cassation. Two of the applicants were acquitted by the Istanbul 27th Assize Court (Turhan Günay, in April 2018, and Ahmet Kadri Gürsel, in November 2019).

In July 2017, following a hearing, the Istanbul Assize Court ordered the release of seven of the applicants. It ordered the release of the remaining three applicants in September 2017 (Ahmet Kadri Gürsel), March 2018 (Mehmet Murat Sabuncu) and April 2018 (Akın Atalay).

In the meantime, in December 2016, the applicants lodged individual applications with the Constitutional Court, alleging a breach of their right to liberty and security and their right to freedom of expression and freedom of the press. The Constitutional Court found a breach of those rights in the case of Turhan Günay (January 2018) and Ahmet Kadri Gürsel (May 2019), and found no violation of the rights of the remaining eight applicants (May 2019).

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), the applicants argued that their initial and continued detention had been arbitrary and not based on any concrete evidence grounding a reasonable suspicion that they had committed a criminal offence.

Relying on Article 5 § 4 (right to speedy review of the lawfulness of detention), the applicants complained about the length of the proceedings before the Constitutional Court.

Under Article 10 (freedom of expression), the applicants alleged a breach of their freedom of expression, complaining in particular of the fact that the editorial stance of a newspaper criticising certain government policies had been considered as evidence in support of charges of assisting terrorist organisations or disseminating propaganda in favour of those organisations.

Relying on Article 18 (limitation on use of restrictions on rights), the applicants alleged that their detention had been designed to punish them for their criticism of the government.

The application was lodged with the European Court of Human Rights on 2 March 2017.

The Commissioner for Human Rights of the Council of Europe exercised his right to intervene in the proceedings and submitted written comments (Article 36 § 3 of the Convention and Rule 44 § 2 of the Rules of Court). The Section President also granted leave to the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and to several non-governmental organisations, to intervene under Article 36 § 2 of the Convention and Rule 44 § 3.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Marko **Bošnjak** (Slovenia),
Egidijus **Kūris** (Lithuania),
Ivana **Jelić** (Montenegro),
Arnfinn **Bårdsen** (Norway),
Saadet **Yüksel** (Turkey),
Peeter **Roosma** (Estonia),

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

Decision of the Court

1. Admissibility

The Court noted that the Turkish Constitutional Court had found a violation of the "right to liberty and security of person" with regard to Turhan Günay and Ahmet Kadri Gürsel and also a violation of "freedom of expression" and "freedom of the press" with regard to the latter. Accordingly, those applicants could no longer claim victim status in respect of those facts. The part of the application concerning them was therefore inadmissible, except in relation to their complaints under Article 5 § 4 of the Convention (right to speedy review of the lawfulness of detention) concerning the length of the Constitutional Court proceedings.

2. Merits

Article 5 § 1 (right to liberty and security): complaint concerning eight applicants

The Court observed that the published materials referred to by the judicial authorities in ordering and extending the applicants' pre-trial detention could be divided into four groups. They comprised:

1. articles criticising the political authorities' policies and the public conduct of their sympathisers (for instance, articles concerning "MİT lorries" (lorries of the national intelligence agency) and an explosives attack in the town of Reyhanlı, and an article under the heading "Peace in the world, but what about at home?");

2. articles, messages and news items reporting statements made by persons allegedly representing illegal organisations (for example, an article reporting on the views of one of the PKK's leaders, M. Karayilan, and tweets by the applicant Mehmet Murat Sabuncu containing excerpts from an interview with the family of F. Gülen and from a BBC interview with Gülen himself);

3. assessments and criticisms made by *Cumhuriyet* journalists concerning the administrative and judicial authorities' actions to combat the illegal organisations (for instance, two articles entitled "War at home, war in the world" and "The witch hunt has begun");

4. sensitive information arousing public interest (for example, an article entitled "He went missing for a week … we've discovered where Erdoğan was" and an article featuring photographs of an incident in which a prosecutor had been taken hostage and a telephone interview with one of the hostage-takers).

The Court considered that, even assuming that all the newspaper articles cited by the national authorities had been attributable to the applicants, the latter could not be reasonably suspected, at the time of their placement in detention, of having committed the offences of disseminating propaganda on behalf of terrorist organisations or assisting those organisations. In other words, the facts of the case did not support the conclusion that a reasonable suspicion had existed against the applicants. Accordingly, the suspicion against them had not reached the required minimum level of reasonableness. Although imposed under judicial supervision, the contested measures had thus been based on mere suspicion.

Moreover, it had likewise not been demonstrated that the evidence added to the case file after the applicants' arrest, in particular in the bill of indictment and during the applicants' detention, amounted to facts or information capable of giving rise to other suspicions justifying their continued detention. The fact that the first-instance and appeal courts had accepted the facts relied on by the prosecution as evidence of the applicants' guilt did nothing to alter that finding.

In particular, the Court noted that the acts for which the applicants had been held criminally responsible came within the scope of public debate on facts and events that were already known, that they amounted to the exercise of Convention freedoms, and that they did not support or advocate the use of violence in the political sphere or indicate any wish on the applicants' part to contribute to the illegal objectives of terrorist organisations, namely to use violence and terror for political ends.

With regard to the derogation under Article 15 of the Convention (derogation in time of emergency), the Court noted that the applicants had been placed in pre-trial detention under Article 100 of the Code of Criminal Procedure, which required the presence of factual evidence giving rise to strong suspicion that the person concerned had committed an offence. That Article had not been amended during the state of emergency, during which the Turkish Council of Ministers had passed several legislative decrees placing significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention. Hence, the pre-trial detention measures complained of in the present case had been taken on the basis of legislation which had been in force prior to and after the declaration of the state of emergency. Consequently, those measures had not satisfied the conditions laid down by Article 15 of the Convention, since, ultimately, no derogating measure had been applicable to the situation.

The Court therefore found a **violation of Article 5 § 1 of the Convention** owing to the lack of reasonable suspicion that the eight applicants concerned had committed a criminal offence.

Article 5 § 4 (right to speedy review of the lawfulness of detention): complaint concerning all the applicants

The Court noted that the periods of detention to be taken into consideration were 16 months in the case of Akın Atalay, 14 months and 11 days in the case of Mehmet Murat Sabuncu, eight months and 29 days in the case of Ahmet Kadri Gürsel, and seven months and two days in the case of the remaining applicants, and that these periods had all fallen within the period of the state of emergency, which had not been lifted until 18 July 2018.

The Court considered that its findings in the cases of *Akgün*[2], *Mehmet Hasan Altan*[3] and *Şahin Alpay*[4] were also applicable in the context of the present case, although the situation of Akın Atalay appeared to be borderline in terms of possible parallels with the cases cited above. It noted that the applicants' applications to the Constitutional Court had been complex, as this had been one of the first cases raising complicated issues concerning the pre-trial detention of journalists on account of their newspaper's editorial stance, and because the applicants had pleaded their case extensively before the Constitutional Court, arguing not only that their detention had not been based on any valid grounds, but also that the accusations against them were unconstitutional.

In the Court's view, account also had to be taken of the exceptional caseload of the Constitutional Court during the state of emergency in force from July 2016 to July 2018, and of the measures taken by the national authorities to tackle the problem of that court's backlog. In that connection the Court stressed the distinction to be made between the present case and the case of *Kavala v. Turkey*[5] in which the applicant had remained in pre-trial detention for the eleven months elapsing between the lifting of the state of emergency on 18 July 2018 and the delivery of the Constitutional Court's judgment on 28 June 2019.

Consequently, although the review by the Constitutional Court in the present case could not be described as "speedy" in an ordinary context, in the specific circumstances of the present case the Court considered that **there had been no violation of Article 5 § 4 of the Convention**.

Article 10 (freedom of expression): complaint concerning eight applicants

The Court considered that the applicants' pre-trial detention in the context of the criminal proceedings against them, for offences carrying a heavy penalty and directly linked to their work as journalists, had amounted to an actual and effective constraint and constituted "interference" with the exercise of their right to freedom of expression.

The Court also observed that it had already found that the applicants' detention had not been based on reasonable suspicion that they had committed an offence, and that there had therefore been a violation of their right to liberty and security under Article 5 § 1. It further noted that under Article 100 of the Turkish Code of Criminal Procedure, a person could be placed in pre-trial detention only where there was factual evidence giving rise to strong suspicion that he or she had committed an offence. It considered in that connection that the absence of reasonable suspicion should, *a fortiori*, have implied an absence of strong suspicion when the national authorities had been called upon to assess the lawfulness of the applicants' detention. The Court reiterated in that regard that Article 5 § 1 contained an exhaustive list of permissible grounds on which persons could be deprived of their liberty and that no deprivation of liberty would be lawful unless it fell within one of those grounds.

[2] *Akgün v. Turkey* (dec.), no. 19699/18, 2 April 2019.

[3] *Mehmet Hasan Altan v. Turkey,* no. 13237/17, 20 March 2018.

[4] *Şahin Alpay v. Turkey,* no. 16538/17, 20 March 2018.

[5] *Kavala v. Turkey,* no. 28749/18, § 195, 10 December 2019.

The Court further observed that the requirements of lawfulness under Articles 5 and 10 of the Convention were aimed in both cases at protecting the individual from arbitrariness. It followed that a detention measure that was not lawful, as long as it constituted interference with one of the freedoms guaranteed by the Convention, could not be regarded in principle as a restriction of that freedom prescribed by national law.

Consequently, the interference with the applicants' rights and freedoms under Article 10 of the Convention could not be justified since it had not been prescribed by law. **There had therefore been a violation of Article 10 of the Convention.**

Article 18 (limitation on use of restrictions on rights)

With regard to the complaint under Article 18 of the Convention, the Court had to ascertain whether – in the absence of a legitimate purpose – there had been an identifiable ulterior one (that is, a purpose not prescribed by the Convention within the meaning of Article 18).

In the present case, after examining the elements relied on by the applicants, the Court considered that they did not form a sufficiently homogeneous whole for it to find that the applicants' detention had pursued a purpose not prescribed by the Convention and representing a fundamental aspect of the case. Accordingly, it had not been established beyond reasonable doubt that the applicants' pre-trial detention had been ordered for a purpose not prescribed by the Convention. **There had therefore been no violation of Article 18 of the Convention**.

Just satisfaction (Article 41)

The Court held that Turkey was to pay 16,000 euros (EUR) to each of the eight applicants concerned in respect of non-pecuniary damage.

Separate opinions

Judge Yüksel expressed a partly concurring opinion. Judges Kūris expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

Press contacts
During the new lockdown, journalists can continue to contact the Press Unit via echrpress@echr.coe.int

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