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

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SECOND SECTION

Application no. 11503/24
Şerafettin Can ATALAY
against Türkiye
lodged on 16 April 2024
communicated on 27 August 2024

STATEMENT OF FACTS

1. The applicant, Mr Şerafettin Can Atalay, is a Turkish national, who was born in 1976 and lives in Istanbul. He is represented before the Court by Mr F. İlkiz and Mr E. İşler, lawyers practising in Istanbul.

2. The application concerns the applicant's continued detention following his election as an MP in the general elections of 14 May 2023 and the Court of Cassation's refusal to release him despite the Constitutional Court's judgments in his favour, wherein that court found a violation of the applicant's right to liberty and security, as well as of his right to be elected and engaged in political activity under the Constitution.

3. The applicant complains of a violation of Articles 5, 6, 7, 10, 11 and 18 of the Convention, as well as Article 3 of Protocol No. 1 to the Convention.

The circumstances of the case

4. The facts of the case, as submitted by the applicant, may be summarised as follows.

5. The applicant is a lawyer. On 25 April 2022 the Istanbul Assize Court convicted him of attempting to overthrow the Government through force and violence and sentenced him to eighteen years' imprisonment, pursuant to Article 312 § 1 of the Criminal Code, for his acts in the context of the Gezi Park events which had taken place in 2013. The Assize Court stated that, with

his acts before and during the course of the Gezi Park events, the applicant had aided Mr Kavala, the main perpetrator, and was one of the important members of the Taksim Solidarity, a collective which the court considered to have provided for the acceleration of violence during the events (for more information on the Gezi Park events, see *Kavala v. Turkey*, no. 28749/18, §§ 15-22, 10 December 2019). Taking account of the nature of his conviction and holding that there was a risk of his absconding, the Assize Court ordered the applicant's detention.

6. The applicant was placed in detention following the ruling.

7. On 28 December 2022 the Istanbul Regional Court of Appeal upheld the judgment. The applicant appealed against that decision before the Court of Cassation.

8. While his appeal was still pending, the applicant was elected as an MP from Hatay from the Workers Party of Türkiye in the parliamentary elections of 14 May 2023.

9. Subsequently, the applicant filed a petition with the Court of Cassation, requesting his release and the suspension of the criminal proceedings against him, in line with Article 83 of the Constitution regulating parliamentary immunity. Referring to previous judgments of the Constitutional Court and a decision of the Joint Criminal Chambers of the Court of Cassation, he argued that while Article 83 mentioned the situations listed in Article 14 of the Constitution (see paragraph 24 below) as exceptions to parliamentary immunity, those exceptions could not be clearly and foreseeably established.

10. By decisions of 13 and 17 July 2023, respectively, the Court of Cassation rejected the applicant's request for release and his objection to that rejection. It stated that although the Constitutional Court had found in previous cases that Article 14 of the Constitution did not establish the exceptions to parliamentary immunity in a clear and foreseeable manner, that court could not render a Constitutional provision unenforceable through its decisions within the scope of the individual application mechanism. Considering that legal certainty could also be provided by judicial decisions, the Court of Cassation concluded that the offence the applicant was convicted of, namely, attempting to overthrow the Government through force and violence, fell within the scope of Article 14 of the Constitution. Accordingly, he could not benefit from parliamentary immunity.

11. On 20 July 2023 the applicant filed an individual application with the Constitutional Court, complaining of violations of his right to liberty and security, right to a fair trial and right to be elected and to engage in political activity.

12. While his individual application was pending before the Constitutional Court, on 28 September 2023 the Court of Cassation upheld the applicant's conviction and forwarded a copy of its decision to the Turkish Grand National Assembly ("the National Assembly"), pursuant to Article 84

§ 2 of the Constitution, which provides that loss of MP status would occur when the final conviction decision was notified to the National Assembly.

13. On 25 October 2023 the Constitutional Court found a violation of the applicant's right to liberty and security and his right to be elected and to engage in political activity under Articles 19 and 67 of the Constitution, respectively. Reiterating its findings in a previous case, the Constitutional Court stated that there were no clear and foreseeable constitutional or legal provisions that allowed to establish the content of the situations listed in Article 14 of the Constitution. According to it, Articles 83 and 14 of the Constitution should be interpreted by a rights-based approach. However, not only had the domestic courts failed to adopt such an approach, but there existed also no clear and foreseeable provisions to guide them to do so. It concluded accordingly that neither the interference with the applicant's right to be elected nor his continued detention were prescribed by law.

14. The Constitutional Court forwarded its judgment to the Istanbul Assize Court, ordering the latter to suspend the execution of the applicant's sentence, to ensure his release from prison, to reopen the criminal proceedings against him and to suspend the criminal proceedings following the reopening.

15. By a decision of 1 November 2023, the Assize Court forwarded the file to the Court of Cassation, stating that the violations found by the Constitutional Court's judgment actually stemmed from the decision of the Court of Cassation. It also noted that the Court of Cassation had upheld the applicant's conviction in the meantime, and that that court must make a fresh assessment in view of the new legal situation.

16. On 8 November 2023 the Court of Cassation reiterated the findings in its decision of 13 July 2023 and stated that the legislator had intentionally omitted to list specific offences in Article 14 of the Constitution which allowed for the interpretation of each offence attributed to MPs in its specific circumstances by the first instance and appeal courts. In that respect, it concluded once again that the offence of which the applicant had been convicted fell within the scope of Article 14 of the Constitution. It also noted that the Constitutional Court had disregarded its decision upholding the applicant's conviction, which had been delivered before its finding of a violation. Considering that the Constitutional Court acted like a fourth instance court over the other supreme courts and went so far as to threaten the members of the Court of Cassation, it stated that the former had exceeded the limits of its jurisdiction and abused its authority.

17. The Court of Cassation therefore decided, unanimously, not to comply with the decision of the Constitutional Court, which, according to it, did not have any legal value, and to forward the decision to the National Assembly for the latter to remove the applicant's MP status. It also decided to file a criminal complaint against the members of the Constitutional Court, who had

voted for a violation of the applicant's rights, for unlawfully exceeding the limits of their authority.

18. On 24 November 2023 the applicant filed a fresh individual application with the Constitutional Court, this time additionally complaining of the non-execution of the Constitutional Court's judgment in his favour and the decisions of the Assize Court and Court of Cassation to that effect.

19. On 21 December 2023 the Constitutional Court once again found a violation of the applicant's right to liberty and security and his right to be elected and to engage in political activity. It also found a violation of the applicant's right to individual application under Article 148 § 3 of the Constitution. The Constitutional Court stated that the binding nature of its judgments was regulated by the Constitution and that the decisions of the Assize Court and Court of Cassation lacked any legal grounds. In that respect, it referred to previous decisions of the Court of Cassation wherein the latter had underlined that point, as well as a decision of the Joint Criminal Chambers of the Court of Cassation which concluded that the scope of Article 14 of the Constitution needed to be interpreted and determined by the Constitutional Court. Reiterating its orders as to the redress, it decided to forward the decision to the Istanbul Assize Court.

20. On 27 December 2023 the Assize Court decided to forward the case to the Court of Cassation on the same grounds it had relied on in its previous decision dated 1 November 2023.

21. On 3 January 2024 the Court of Cassation decided not to comply with the Constitutional Court's judgment, mainly on the basis of the reasoning in its previous decision. It noted that the present case was not the first time it refused to comply with the Constitutional Court's judgments regarding individual applications and that the latter could not interpret Constitutional provisions in a manner that would deprive them of all meaning. It once again submitted the decision to the National Assembly.

22. On 12 January 2024 the applicant filed another application with the Constitutional Court, reiterating the complaints in its previous application. This time, he also complained of a violation of Article 18 of the Convention.

23. On 30 January 2024 Court of Cassation's decision of 3 January 2024 was read in the Plenary of the National Assembly and it was announced that the applicant lost his status as an MP pursuant to Article 84 § 2 of the Constitution.

RELEVANT LEGAL FRAMEWORK

24. Articles 14 and 83 of the Constitution were set out in *Selahattin Demirtaş v. Turkey (no. 2)* ([GC], no. 14305/17, §§ 129 and 134, 22 December 2020).

COMPLAINTS

25. The applicant complains under Article 5 of the Convention that his continued detention was not lawful and amounted to an arbitrary deprivation of liberty as he acquired parliamentary immunity with his election as an MP on 14 May 2023. In that connection, relying also on Article 7, he argues that the Court of Cassation unlawfully interpreted Articles 14 and 83 of the Constitution while that interpretation could only be made by the Constitutional Court, and rejected his requests for release, disregarding his parliamentary immunity.

26. He maintains under Article 3 of Protocol No. 1 to the Convention that he was prevented from sitting as an MP and performing his parliamentary duties as a result of the Court of Cassation's unlawful and restrictive interpretation of Article 14 of the Constitution, which, as also concluded by the Constitutional Court, did not clearly and foreseeably establish the exceptions to parliamentary immunity. In that respect, he also relies on Articles 10 and 11 of the Convention.

27. Relying on Articles 5 and 6 of the Convention, the applicant states that despite the Constitutional Court's repeated findings of violations of his right to liberty and security and his right to be elected, which required his release and the reopening and suspension of the criminal proceedings against him, the Istanbul Assize Court and the Court of Cassation failed to comply with those decisions. He argues that the non-execution of the Constitutional Court's judgments led to a judicial crisis.

28. He complains under Article 18, in conjunction with Articles 5, 6, 10 and 11 of the Convention and Article 3 of Protocol No. 1 to the Convention, that his rights were restricted for purposes other than those prescribed by the Convention, which, according to him, have been demonstrated by certain statements of the President of the Republic and other State officials.

QUESTIONS TO THE PARTIES

1. Was the applicant deprived of his liberty in breach of Article 5 § 1 of the Convention, taking into account the Constitutional Court's finding of a violation on account of his continued detention following his election as an MP? In particular, in view of the Constitutional Court's judgments of 25 October and 21 December 2023 ordering the applicant's release from prison, as well as the reopening and suspension of the criminal proceedings against him, was his continued deprivation of liberty "lawful" and "in accordance with a procedure prescribed by law" for the purposes of Article 5

§ 1 (see, *mutatis mutandis*, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 139, 20 March 2018)?

2. Did the applicant have at his disposal an effective procedure by which he could challenge the lawfulness of his detention, as required by Article 5 § 4 of the Convention? In particular, has there been a violation of that provision due to the Court of Cassation's refusal to release the applicant despite the Constitutional Court's finding that the applicant's continued detention was not lawful (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 128-31, 15 December 2016, and *Yılmaz Aydemir v. Türkiye*, no. 61808/19, §§ 36-38, 23 May 2023)?

3. Is Article 6 of the Convention applicable to the proceedings concerning the non-execution of the Constitutional Court's judgments finding a violation of the applicant's rights corresponding to Article 5 of the Convention and Article 3 of Protocol No. 1 to the Convention? Has there been a violation of the applicant's right of access to a court under Article 6 § 1 of the Convention on account of the non-execution of the Constitutional Court's judgments at issue (see for the relevant principles *Bursa Barosu Başkanlığı and Others v. Turkey*, no. 25680/05, §§ 133-35, 19 June 2018, with further references)?

4. Has there been a breach of the applicant's right under Article 3 of Protocol No. 1 to the Convention to sit as a member of parliament once elected in free elections (see *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 386, 22 December 2020), in view of his continued detention following his election and the eventual loss of his MP status?

5. Has the applicant exhausted the domestic remedies with regard to his complaint under Article 18 of the Convention? If so, were the restrictions imposed by the State in the present case applied for a purpose other than those envisaged by Articles 5 and 6 and Article 3 of Protocol No. 1, contrary to Article 18 (see *Selahattin Demirtaş*, cited above, §§ 421-22, with further references)?