



Pre-trial detention of two journalists who published emails from a Minister, initially disclosed on Wikileaks: several violations

The case concerned the detention (from December 2016 to December 2017) of two journalists for membership of terrorist organisations. Both journalists had published, in the press entities in which they worked, emails from the account of the then Turkish Energy Minister (Mr Berat Albayrak, son-in-law of the President of the Republic), which had been hacked and published on the Wikileaks site in December 2016.

The authorities accused the two applicants, who were placed in pre-trial detention on suspicion of membership of an armed terrorist organisation, of having downloaded the emails of the minister in question, and also accused Mr Kanaat of possessing investigation reports concerning the “17-25 December” criminal investigation.

In today’s Chamber judgment¹ in the case of [Öğreten and Kanaat v. Turkey](#) (applications nos. 42201/17 and 42212/17) 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: the Court held that the applicants’ alleged offences were linked to the exercise of their rights under the Convention, specifically their freedom of expression. Their detention had not been based on a reasonable suspicion that they had committed an offence. In addition, the interpretation and application of the legal provisions relied on by the domestic authorities had been unreasonable to the point of rendering the applicants’ detention unlawful and arbitrary. In the Court’s view, there was no doubt that downloading the emails in question and publishing an article about them were protected by freedom of the press.

a violation of Article 5 § 4 (refusal of access to the case file): the Court considered that neither the applicants nor their lawyers, who were deprived of access to the case file without valid reason, had had an opportunity to properly contest the reasons given to justify the applicants’ pre-trial detention. They had not had access to essential evidence, namely the reports on the content of the IT equipment which had been used to justify their placement in pre-trial detention until such time as the indictment was filed.

a violation of Article 10 (freedom of expression): the Court held that the applicants had been detained on account of their journalistic activities, and that the interference with their right to freedom of expression had not been prescribed by law, since there were no plausible grounds to suspect them of having committed an offence.

The Court also noted that the pre-trial detention of anyone expressing critical views produced a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, would inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices.

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.

Principal facts

The applicants, Tunca İlker Öğreten and Mahir Kanaat, are Turkish nationals who were born in 1981 and 1978 respectively. They live in Istanbul (Turkey).

They are journalists, and well known for their critical attitude towards the government's policies. Prior to their arrest Mr Öğreten worked for *www.diken.com.tr*, an Internet news outlet, and Mr Kanaat was employed by the national daily newspaper *Birgün*.

In 2016 a group named "RedHack" announced that it had copies of the personal emails of Mr Berat Albayrak, the then Turkish Minister of Energy, who was also the son-in-law of the President of Turkey. In December 2016 the Wikileaks website published more than 50,000 emails, presented as having been sent from the address of the Minister in question, covering the period from 2000 to 2016. The applicants published some of those emails in the press entities in which they worked.

That same year the Istanbul public prosecutor's office opened a criminal investigation into those facts and ordered that the applicants be taken into police custody. A magistrate imposed a restriction on access to the investigation file in respect of the suspects and their lawyers. Searches were carried out at the applicants' homes and their computer equipment was seized.

The applicants were taken into police custody in December 2016 on suspicion of belonging to a terrorist organisation, then placed in pre-trial detention in January 2017. An indictment was filed with an assize court in Istanbul in their connection in June 2017. The applicants were released in December 2017, at the close of a hearing held before the assize court. The criminal proceedings brought against them are still pending before that court.

Their individual applications to the Constitutional Court were dismissed on different dates. Compensation proceedings lodged by them before the domestic courts are still pending.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 3 (right to liberty and security) of the Convention and referring to their right to freedom of expression, the applicants alleged that their pre-trial detention had been arbitrary and that there had been no plausible reasons for suspecting them of having committed a criminal offence. They also considered that the domestic courts had given insufficient reasons for their decisions concerning pre-trial detention.

Relying on Article 5 § 4 (right to have lawful detention decided speedily by a court), they complained that it was impossible to obtain access to the investigation file and about the length of the proceedings before the Constitutional Court.

Relying on Article 10 (freedom of expression), they considered that their right to freedom of expression had been infringed as a result of their pre-trial detention.

Lastly, they alleged a breach of their right as protected by Article 18 (limitation on use of restrictions on rights) taken together with Article 5 of the Convention.

The applications were lodged with the European Court of Human Rights on 15 May 2017.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Marko **Bošnjak** (Slovenia),
Valeriu **Grițco** (the Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Branko **Lubarda** (Serbia),
Carlo **Ranzoni** (Liechtenstein),
Saadet **Yüksel** (Turkey),

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

Article 5 §§ 1 and 3 (right to liberty and security)

The applicants had been taken into police custody on 25 December 2016, in the context of a criminal investigation conducted into the hacking of private emails from the then Turkish Energy Minister. On 17 January 2017 the Istanbul Magistrate's Court ordered that they be placed in pre-trial detention on suspicion of membership of an armed terrorist organisation, on the sole basis of certain reports about the content of the applicants' IT equipment; however, it did not cite their content. It merely referred to the existence of these reports.

In the Court's view, this vague and general reference to the evidence in the file could not be regarded as sufficient grounds for the reasonableness of the suspicion on which the applicants' pre-trial detention was supposed to have been based, in the absence either of a specific assessment of the individual items of evidence in the file, or of any information that could have justified the suspicion against the applicant, or of any other kinds of verifiable material or facts.

That being stated, even supposing that these reports demonstrated, as the Constitutional Court had held, that the two applicants had downloaded the emails of the Minister concerned and that Mr Kanaat also had in his possession the investigation reports on the so-called "17-25 December" criminal investigation, in the Court's view, this could not satisfy an objective observer that the applicants had committed an offence as serious as membership of a terrorist organisation, for which they had been placed in pre-trial detention, unless other grounds and evidence justifying their detention were put forward.

The applicants had been placed in pre-trial detention because they had downloaded pirated emails from the then Turkish Energy Minister, in order to prepare an article on them. In the Court's opinion, the fact of downloading such emails and of publishing an article about them were indisputably protected by the applicants' freedom of the press and could not satisfy an objective observer that the applicants might have committed the offence of membership of a terrorist organisation.

In addition, it was alleged that Mr Kanaat had in his possession the originals of investigative reports about a criminal investigation into allegations of corruption in government circles ("17-25 December"), described by the Government as a conspiracy and an attempted judicial coup. Mr Kanaat argued that he had downloaded this document from Internet, from a public source, and that it was not the original copy. For this reason, he disputed the authenticity of the investigation reports in question. However, the domestic courts did not appear to have sought to verify the authenticity of the investigation reports, and the Government had been unable to provide any evidence to refute Mr Kanaat's contention in that respect. In view of the doubts surrounding the authenticity of these documents, the Court considered that they could not provide the basis on which an objective observer could conclude that there was a reasonable suspicion in support of the accusations against Mr Kanaat.

In consequence, the Court considered that the two applicants' alleged acts were linked to the exercise of their rights under the Convention, in particular Article 10 (freedom of expression). No specific facts or information giving rise to a suspicion justifying the applicants' detention were mentioned or produced during the initial proceedings, which nevertheless concluded with the adoption of a measure depriving them of their liberty. Thus, at the time of their initial pre-trial detention, there were no facts or information that could satisfy an objective observer that the applicants had committed the alleged offences. In those circumstances, the interpretation and

application of the legal provisions relied on by the domestic authorities had been so unreasonable as to render the applicants' detention unlawful and arbitrary.

As to Article 15 of the Convention, the Court noted that no derogatory measure had been applicable in this case.

It followed that there had been a violation of Article 5 § 1 of the Convention, given the absence of reasonable grounds for suspecting the applicants of having committed a criminal offence.

Having regard to this conclusion, the Court considered that it was not necessary to examine separately whether the reasons given by the domestic courts to justify the applicants' detention had been based on relevant and sufficient grounds, as required by Article 5 §§ 1 (c) and 3 of the Convention.

[Article 5 § 4 \(right to a speedy decision on the lawfulness of detention: complaint concerning the lack of access to the investigation file\)](#)

On 24 December 2016 the Istanbul Magistrate's Court had decided to restrict access to the investigation file for the applicants and their lawyers. In consequence, the applicants and their lawyers had been unable to examine the prosecution evidence, particularly the reports on the content of the IT equipment, which had been used as justification for the applicants' placement in pre-trial detention until 23 June 2017, when the indictment was filed. However, there was essential evidence, such as these reports, which could have enabled the applicants to challenge the lawfulness of their pre-trial detention. Therefore, the Court considered that neither the applicants nor their lawyers, deprived of access to the file without valid reason, had had the opportunity to properly contest the reasons given to justify the applicants' pre-trial detention.

With regard to Article 15 of the Convention and the derogation by Turkey, the Court pointed out that the decision to restrict access to the file had been based on Article 153 of the Code of Criminal Procedure and had been issued during the state of emergency. In consequence, the Court doubted that it had been a measure imposed to derogate from the Convention. In addition, the restriction in question had been lifted on 23 June 2017 when the indictment was filed, although the state of emergency had still been in force. The Court considered that, even in the framework of a state of emergency, the fundamental principle of the rule of law had to prevail. It therefore considered that this restriction was in no way justified by the special circumstances of the state of emergency and that such an interpretation would negate the safeguards provided by Article 5 of the Convention.

In conclusion, the fact that the applicants had not had access to the investigation file could not be regarded as compatible with the requirements of Article 5 § 4 of the Convention. It followed that there had been a violation of this provision.

[Article 10 \(freedom of expression\)](#)

The Court noted that the applicants had been the subject of criminal proceedings because they were suspected of belonging to terrorist organisations, principally on account of their journalistic activities. As part of the criminal proceedings, they had been detained from 25 December 2016, when they were placed in police custody, until 6 December 2017.

The Court considered that this deprivation of liberty had constituted a real and effective constraint and amounted to "interference" with the applicants' right to freedom of expression. It also noted that, in accordance with Article 100 of the Code of Criminal Procedure, an individual could only be placed in pre-trial detention where there was factual evidence giving rise to strong suspicion that the person had committed an offence.

In this context, the Court reiterated its finding that the applicants' pre-trial detention had not been based on a reasonable suspicion that they had committed an offence and that, accordingly, there had been a breach of their right to liberty and security. It had also held that the interpretation and

application of the legal provisions relied on by the domestic authorities had been so arbitrary or manifestly unreasonable as to render the applicants' detention unlawful and arbitrary. The Court also reiterated that Article 5 § 1 of the Convention contained an exhaustive list of permissible grounds for deprivation of liberty. No deprivation of liberty would be lawful unless it fell within one of those grounds.

In addition, regarding the foreseeability of the offence of membership of a terrorist organisation, punishable under Article 314 § 2 of the Criminal Code, the Court noted that it had recently held in the *Selahattin Demirtaş (no. 2)*² case that such a broad interpretation of a provision of criminal law could not be justified where it entailed equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link. In the Court's view, this consideration was also valid with regard to the pre-trial detention of Mr Öğreten and Mr Kanaat, who had been detained on account of their journalistic activities. It followed that the interference with the applicants' rights and freedoms had not been prescribed by law.

The Court further noted that the pre-trial detention of anyone expressing critical views produced a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, would inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices.

It also considered that its conclusions concerning the application of Article 15 of the Convention were also valid in the context of its examination under Article 10.

It followed that there had been a violation of Article 10 of the Convention.

Other articles

The Court dismissed the complaint concerning the length of the proceedings before the Constitutional Court (Article 5 § 4), referring to its case-law in *Mehmet Hasan Altan, Şahin Alpay*³ and *Selahattin Demirtaş (no. 2)*.

The Court also dismissed the complaint under Article 18 of the Convention for failure to exhaust domestic remedies, as this point had not been raised before the Constitutional Court.

Just satisfaction (Article 41)

The Court held that Turkey was to pay Mr Öğreten 5,750 euros (EUR) in respect of pecuniary damage, EUR 14,000 to each applicant in respect of non-pecuniary damage and EUR 2,250 to each applicant in respect of costs and expenses.

Separate opinion

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

The judgment is available only in French.

This press release is a document produced by the Registry. It does not bind the Court. Decisions, judgments and further information about the Court can be found on www.echr.coe.int. To receive the Court's press releases, please subscribe here: www.echr.coe.int/RSS/en or follow us on Twitter [@ECHR_CEDH](https://twitter.com/ECHR_CEDH).

² *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

³ *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, and *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018.

Press contacts

During the current public health-crisis, journalists can continue to contact the press unit via echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

Inci Ertekin

Tracey Turner-Tretz

Denis Lambert

Neil Connolly

Jane Swift

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.