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Meeting: 1310<sup>th</sup> meeting (March 2018) (DH)

Item reference: Action report (13/02/2018)

Communication from Turkey concerning the case of ORHAN CACAN v. Turkey (Application No. 26437/04)

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Communication de la Turquie concernant l'affaire ORHAN CACAN c. Turquie (requête n° 26437/04)  
**(anglais uniquement)**

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Ankara, February 2018

## REVISED ACTION REPORT

### Orhan Çağan Group of Cases

1. *Orhan Çağan v. Turkey*, appl. no. 26437/04, judgment of 23 March 2010, final on 4 September 2010
2. *Sarp Kuray v. Turkey*, appl. no. 23280/09, judgment of 24 July 2012, final on 24 September 2012
3. *Gökbulut v. Turkey*, appl. no: 7459/04, judgment of 29 March 2016, final on 29 June 2016

#### I. CASE DESCRIPTION

1. These cases concerns a violation of the applicant's right to a fair trial on account of the fact that they did not have the opportunity to examine witness against them (Article 6§1 and 6 § 3 (d)).

2. In Orhan Çağan case, the European Court of Human Rights (the Court) concluded that Article 6 § 1 and 6 § 3–d of the Convention had been violated, regarding the right to have examined the witnesses against him.

3. In Sarp Kuray case, the Court held that there had been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings and a violation of Article 6 § 1 and 6 § 3-d (right to obtain attendance and examination of witnesses) of the Convention on account of unfair trial.

4. In Gökbulut case, the Court held that there had been e violation of right to benefit from legal assistance (Article 6 § 1 and 6 § 3 (c)) and the violation of right to examine witnesses (Article 6 § 1 and 6 § 3 (d)).

#### II. INDIVIDUAL MEASURES

5. The Turkish authorities have taken measures to ensure that the violation at issue has ceased and that applicants have been redressed for its negative consequences.

### **II.a. Reopening of the Proceedings**

6. The applicant, Orhan Çağan, applied to the 11<sup>th</sup> Chamber of the Istanbul Assize Court (the Assize Court) with the request of retrial on 03 May 2013 in accordance with Article 311/1 (f) of the Code of Criminal Procedure (CCP). Upon the request, the Assize Court has rejected the request to reopen the criminal proceedings pursuant to the Article 318, 319 of CCP with the decision dated 17 May 2013. However, the 12<sup>th</sup> Chamber of the Istanbul Assize Court quashed the said decision on 20 June 2013 after examining the applicant's appeal. Accordingly, the criminal proceedings have been reopened at the 11<sup>th</sup> Chamber of the Istanbul Assize Court. On 10 March 2017 the 11<sup>th</sup> Chamber of the Istanbul Assize Court rendered a decision during the retrial it conducted. The witness, whose statement was taken as basis for the sentence imposed on the applicant, was invited to appear at the retrial hearing. The applicant Orhan Çağan participated in the hearings via SEGBİS (video conference) while his lawyer attended the hearings in person. Both the applicant and his lawyer were provided with the opportunity to direct questions to the witness who was present in the hearings. The 11<sup>th</sup> Chamber of the Istanbul Assize Court reopened the proceedings and as a result of the trial, a new decision was rendered by having regard to the Court's judgment finding a violation and the submissions of the witness who was heard.

7. The applicant, Sarp Kuray, applied to the 9<sup>th</sup> Chamber of the Istanbul Assize Court (the Assize Court) with the request of retrial on 12 November 2012 in accordance with Article 311/1 (f) of the Code of Criminal Procedure. Upon the request, the Assize Court has reopened the criminal proceedings and held the first hearing on 19 November 2012. Within the scope of the retrial it conducted, the Assize Court decided to re-hear S.K., M.B.Ö. and M.A.B., whose statements led to the applicant's conviction, in the presence of the applicant in accordance with the Court's judgment finding a violation. However, among the said persons, only M.B.Ö.'s attendance could be obtained and he was heard during the hearings in which the applicant was present. On the other hand, there are arrest warrants against S.K. and M.A.B. who are abroad and who are also sought with red notice. For this reason, obtaining their attendance in the hearings as witnesses is not possible. Indeed, during the retrial, the applicant stated that he was aware of the

fact that S.K. and M.A.B. has been sought for a long time and that he did not request that these individuals be heard. Therefore, on 5 November 2013 the Assize Court issued a new decision as a result of the retrial by having regard to the submissions of M.B.Ö. who was heard and the Court's judgment finding a violation. The decision in question was upheld by the Court of Cassation and became final.

8. The applicant, Hasan Basri Gökbulut, applied to the 2<sup>nd</sup> Chamber of the Erzurum Assize Court (the Assize Court) with the request of retrial on 25 August 2016 in accordance with Article 311/1 (f) of the Code of Criminal Procedure. Upon the request, the Assize Court has reopened the criminal proceedings and held the first hearing on 4 October 2016. Within the scope of the retrial, having regard to the Court's judgment, the Assize Court decided in the hearing dated 17 November 2016 to hear the statements of A.B., N.K., K.K. and S.B. who were indicated as unheard witnesses. However, among the witnesses, A.B. could not be heard as he passed away. The statement of S.B. was heard via SEGBİS. However, the applicant's lawyer was not present during the hearing in which S.B. was heard. A request for legal assistance was made to the judicial authorities of Germany to ensure that the other witnesses abroad, namely N.K. and K.K. are heard. For this reason, the trial is still ongoing and therefore, it continues in compliance with the execution of the Court's judgment. In this connection, the Turkish Government would like to state that there is no need for waiting the decision to be delivered as a result of the trial.

9. In all cases the request of retrial have been accepted and the criminal proceedings have been reopened and the Government ensure to the applicants examine witnesses in accordance with the case law of the Court.

## **II.b. Just Satisfaction**

10. The Court awarded just satisfaction to the applicant Orhan Çaçan in respect of non-pecuniary damage together with costs and expenses.

11. The Court awarded just satisfaction to the applicant Sarp Kuray in respect of non-pecuniary damage. The Government paid the said amount to the applicant within the deadline set by the Court.

12. In Gökbulut case, the applicant did not file a request for just satisfaction. The Court considered that there was no need to award the applicant any sum for damages.

13. Hereby, the Government considers that no other individual measures are required in respect of the violations at hand.

### **III. GENERAL MEASURES**

14. The Turkish authorities have taken a number of measures aiming at preventing similar violations. These measures include, in particular, legislative amendments, enhancing the case-law of the high court, individual application and measures on the publication and dissemination of the European Court's judgment.

15. The Government would like to indicate that in line with the European Court's findings in the case at hand, it has taken a number of measures aimed at preventing similar violations.

#### **III.a. Length of the Criminal Proceedings**

16. In Sarp Kuray case, the Court held that there had been a violation of Article 6/1 of the Convention on account of the length of the criminal proceedings. The Government would like to recall that the measures aimed at preventing excessive length of domestic proceedings have been taken within the framework of the Ormancı group of cases. The Committee of Ministers decided to close this group of cases in December 2014 (see Resolution CM/ResDH (2014) 298).

17. The Government furthermore notes that the impugned facts in the cases took place before the measures have been taken within the framework of the Ormancı group of cases.

#### **III.b. Right to Examine Witnesses (Article 6 § 1 and 6 § 3 (d))**

##### **III.b.1 Legislative Amendments**

18. The new Turkish Criminal Procedure Code (TCPC) no. 5271 entered into force on 1 June 2005. Pursuant to Article 201/1 of the TCPC, the public prosecutor, defense counsel or the lawyer who participates at the main hearing as a representative may ask direct questions to the accused,

to the intervening party, to the witnesses, to experts, and to other summoned individuals, adhering to the rules of discipline at the main hearing. The accused and the intervening party may also direct questions with the help of the chief justice or judge.

19. Pursuant to Article 210/1 of the TCPC, If the only evidence of the fact is just a witness testimony, this witness shall be definitely heard in the main hearing. Reading of the record or written explanation, which is produced during a previous hearing, shall not substitute a hearing.

20. Pursuant to Article 217/1 of the TCPC, the judge shall only rely upon evidence that is presented at the main hearing and has been discussed in his presence while forming his judgment. This evidence is subject to free discretion of the conscious opinion of the judge.

21. As seen, the domestic law affords the guarantee to have the witnesses heard and to direct questions to the witnesses during the criminal trials.

### **III.b.2 Case Law Court Of Cassation**

22. In the case on which the 13<sup>th</sup> Penal Chamber of the Court of Cassation rendered its judgment dated 23 February 2016, the accused, who had been convicted of the offence of theft on the basis of the witness testimony, appealed the conviction. In its judgment, the Court of Cassation referred to Article 6 § 3 (d) of the Convention. The Court of Cassation quashed the conviction by holding that conviction had been unlawful as it had been imposed without establishing the identity of the witness, whose name had been mentioned in the submissions of the complainant and who was the sole evidence *vis-à-vis* the submissions of the accused who had rejected the accusation at all stages and without paying regard to the necessity to hear the said witness during the hearing (Annex-1).

23. In its judgment dated 10 December 2015, the 10<sup>th</sup> Penal Chamber of the Court of Cassation quashed the conviction which had been imposed by the domestic court by relying on the statements given by the witnesses as regards the accused during the investigation stage and by also dismissing the accused's request to have the witnesses heard. The Court of Cassation held that the said persons had to be heard as witnesses by enabling the accused and his defense counsels to direct questions in the hearing and that subsequently, their testimonies had to be discussed. While rendering this judgment, the Court of Cassation emphasized Article 6 § 3 (d) of the Convention (Annex-2).

24. In many judgments of the Criminal Chambers of the Court of Cassation, the quashing judgments were rendered on similar grounds and the file was transferred to the relevant court.

### **III.b.3 Individual Application Procedure**

25. In addition to the measures above, another measure has been established to cease the violation at domestic level if any occurs.

26. The Turkish authorities would also like to indicate in that scope that, in 2012, legislative amendments were adopted to introduce a possibility of an individual application before the Constitutional Court in respect of violation of human rights. Although this is not a major response to the shortcomings identified by the European Court in this case, the Turkish authorities would like to point out that an individual in the applicant's situation can today seek the remedy of lodging an individual application to uphold his or her Convention rights, as in the present case. In this respect, the Turkish authorities would like to recall that the European Court indicated in the Hasan Uzun case (10755/13) that the individual application to the Constitutional Court should be considered an effective remedy as of 23 September 2012.

27. After 23 September 2013, applications were lodged with the Constitutional Court in respect of the right to a fair trial. The Constitutional Court delivered different judgments in accordance with the case-law of the ECtHR.

28. In this regard, in its judgment in the case of Ali Rıza TELEK dated 30 December 2014 and no. 2013/2630<sup>1</sup>, the Constitutional Court held that there had been a violation of right to a fair trial on the ground that the applicant's conviction based on statements made by the witnesses who were unable to be interrogated or questioned during the investigation or trial by the applicant and no measures were taken to protect applicant's defense rights.

29. Furthermore, the Constitutional Court has delivered many judgments on the right to a fair trial.

### **III.c. Publication and dissemination measures**

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<sup>1</sup> <http://kararlaryeni.anayasa.gov.tr/Uploads/2013-2630.doc>

30. The Turkish authorities ensured that the European Court's judgment was translated into Turkish and published on its official website which has been made available to the public and legal professionals alike (<http://hudoc.echr.coe.int>), which has Turkish interface.

31. The Turkish authorities also ensured that the European Court's judgment was disseminated to the competent bodies to ensure that similar violations are prevented. To this end, the European Court's judgment was transmitted to the court which rendered the impugned decision. In addition, the Government ensured that the translated text was disseminated to other relevant courts such as the Constitutional Court and the Supreme Administrative Court.

32. The Turkish authorities consider that those measures taken are capable of preventing similar violations and no other general measures are required.

#### **IV. CONCLUSION**

33. In light of what the Government has submitted in terms of the individual and general measures about how applicants are redressed for the negative consequences of the violation and how the probable future violations are to be prevented, the Government considers that all necessary general and individual measures which Turkey is obliged to take under Article 46 § 1 of the Convention have been properly taken. Taking those all into account, the Committee of Ministers is respectfully invited to close its examination thereof.

#### **ANNEXES**

- 1) The judgment of the 13<sup>rd</sup> Chamber of the Court Of Cassation dated 23 February 2016
- 2) The judgment of the 10<sup>th</sup> Chamber of the Court Of Cassation dated 10 December 2015