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Contact: Clare OVEY  
Tel: 03 88 41 36 45

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

Item reference: Action report (19/02/2018)

Communication from Turkey concerning the case of BURAK HUN v. Turkey (Application No. 17570/04)

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Communication de la Turquie concernant l'affaire BURAK HUN c. Turquie (requête n° 17570/04)  
**(anglais uniquement)**

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## **REVISED ACTION REPORT**

**Leading case of Burak Hun v. Turkey (no: 17570/04)**

**Judgment of 15 December 2009, final on 15 March 2010**

**Repetitive case of Sepil v. Turkey (no: 17711/07)**

**Judgment of 12 November 2013, final on 12 February 2014**

### **I. CASE DESCRIPTION**

1. These cases concern the violation of right to a fair trial on account of conviction imposed on account of buying drugs from and selling them to an agent provocateur in a police operation (violation of Article 6 § 1).

2. The European Court of Human Rights (“the ECtHR” or “the Court”) held in these cases that the use of “agent provocateur” prejudiced the fairness of the criminal proceedings against the applicants and decided that there has been a violation of Article 6 of the Convention.

### **II. INDIVIDUAL MEASURES**

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

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

4. According to Article 311 § 1(f) of the new Code of Criminal Procedure, the Government ensured the reopening of the proceedings on the basis of the Court judgment finding a violation within a year as of the date the judgment becomes final.

5. However, reference to the letter of the Ankara Assize Court and Bakırköy Assize Court, the applicants did not avail themselves of this opportunity.

#### ***II.b Deletion of the Applicant's Criminal Records***

6. According to Article 12 § 3 of the Law no. 5352 on Criminal Records, in cases where a decision on acquittal or a decision on no need for imposing a penalty has become final as a result of reversal in favour of the administration of justice or a retrial conducted (for instance, upon the ECtHR judgment finding a violation), criminal records and archive records concerning the

previous conviction shall be completely deleted. The obligation with regard to a violation judgment in respect of the Government is to introduce an available remedy to be used by the aggrieved party. The procedure of reopening of proceedings does not guarantee a change in the outcome of the case. Depending on the violation found, use of an agent provocateur in present case, the competent court hearing the case will freely assess the evidence in the case file and render a decision on acquittal or conviction.

7. Turning to the case at hand, the applicants failed to request for reopening of the proceedings in due time. The applicants themselves are responsible for making a request.

8. The Turkish legislation concerning deletion of criminal record requires a court decision or in very exigent circumstances a decriminalization statute. No executive discretion has been granted to the administration save for decriminalization.

9. Consequently, the Government has no liability for the failure to request for reopening of the proceedings and therefore, for non-deletion of the criminal record. Moreover, the Government cannot speculate the probable outcome of a re-trial which might have been done.

10. However, applicants' criminal records have been transferred to the archive in compliance with Article 10 of the Law no 5352.

### ***II.c Just Satisfaction***

11. The Government would like to recall that the European Court held that in *Burak Hun* case, the finding of a violation provides in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. On the other hand, the European Court awarded the reimbursement of costs and expenses to the applicant. The Government ensured that the just satisfaction amount awarded was disbursed within the deadline set by the Court (AVKONS DT tarafından teyit edilecektir)

12. Regarding *Sepil* case, the Court awarded just satisfaction in respect of non-pecuniary damage together with costs and expenses. The Government ensured that the just satisfaction amount awarded was disbursed within the deadline set by the Court

13. The Government considers that all individual measures the Government is obliged to have been taken and no further individual measures are required.

### **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, case-law of the Court of Cassation, introduction of an effective individual application before the Constitutional Court, awareness raising activities and measures on the publication and dissemination of the European Court's judgment.

#### ***III.a Legislative Amendments***

15. The new Turkish Criminal Procedure Code no. 5271 entered into force on 1 June 2005. It introduced the use of undercover investigator ("*gizli soruşturmacı*") in Article 139 for the purpose of revealing crimes. So that undercover investigator can also take part in the investigation of crimes involving production and trade of narcotics and psychotropic substances regardless of whether or not they are committed in an organised way. Those kinds of investigators are supposed to replace the policemen used for revealing crimes. Therefore, the amendments on this subject are worth to mention.

16. According to the Turkish Criminal Procedure Code which has been in force since 2005, the public officials may be appointed as undercover investigators by Judge's decision if it is found that there is strong suspicion on the basis of concrete evidence that the crime which was subject of investigation has been committed and there is no other means of obtaining evidence.

17. The identity of undercover investigator may be changed. The legal actions can be performed by this identity. Where it is compulsory for forming or maintaining the identity, the necessary documents may be prepared, changed or used.

18. The decision and other documents regarding the appointment of undercover investigator are preserved in the Chief Public Prosecutor's Office. Following the termination of the duty, the identity of undercover investigator is kept confidential. Where it is obligatory that the investigator must be heard in the prosecution phase as a witness, he/she is heard in the absence of those who have the right to be present in the hearing or in a private environment by disguising his/her look or modulating his/her voice.

19. The undercover investigator is obliged to be present in all kinds of inquiries regarding the activities of the organization that he/she was assigned for monitoring and to gather evidence relating to crimes committed within the framework of the activities of this organization.

20. The undercover investigator does not commit crimes while performing his/her duty and cannot be held responsible for the crimes that were committed by the organization for which he/she was appointed.

21. The personal information that was obtained by the appointment of the undercover investigator cannot be used out of criminal investigation and prosecution.

22. The appointment of an undercover investigator may be used for the offences such as: production and trade of narcotics and psychotropic substances regardless of whether or not they are not committed in an organised way (Article 188), establishing organization for the purpose of committing crime (Article 220, excluding paragraphs 2, 7 and 8), armed organization (Article 314) or supplying such organizations with arms (Article 315).

23. In sum, the law has established limited crimes an undercover agent may be used as investigator.

24. Pursuant to Article 139 § 5 of the Code of Criminal Procedure no. 5271, an undercover agent cannot commit a crime and may not be held responsible for the crimes committed by the organization for which he/she was assigned. As is clearly seen from this article, it is forbidden to incite to commission of a crime, especially by buying or selling drugs.

25. In the situation an undercover investigator used the law envisages that the agent cannot commit a crime and Article 230 of Law no 5271 requires to be shown the unlawful evidence in the judgement of the domestic court.

26. Article 289 of Law no 5271 requires that the decision rendered on the basis of the evidence obtained unlawfully be quashed. Those rules are to apply *mutatis mutandis* to the agent provocateur.

### ***III.b Case-Law of the Court of Cassation and Judicial Practices***

27. The Court of Cassation developed its case-law in line with the ECtHR's judgment and interpreted the practices of agent provocateur which instigate or incite to committing offences as a violation of right to a fair trial.

28. In its judgment (docket no. 2014/848, dec. no. 2015/136), the General Assembly of Criminal Chambers of the Court of Cassation examined the practices of undercover agents, undercover investigators and agent provocateurs.

29. The incidents giving rise to the said judgment of the General Assembly of Criminal Chambers of the Court of Cassation are as follows: The Bursa Assize Court convicted the accuseds for the offence of trade of narcotics and the 10<sup>th</sup> Criminal Chamber of the Court of Cassation upheld the decision in question. The Chief Public Prosecutor's Office of the Court of Cassation filed an opposition against this decision. The General Assembly of Criminal Chambers of the Court of Cassation ("*the General Assembly*") made reference to the Court's judgments for the cases of *Burak Hun* and *Sepil*. In accordance with the Court's related case-law, the General Assembly noted that the security forces must take necessary measures to prevent committing a crime at the outset. In addition, the General Assembly emphasized that following a crime was committed, this crime must be determined, the pieces of evidence must be collected and the person who committed the crime must be arrested and be brought to justice before he/she is incited to commit another crime. On the other hand, the General Assembly also stressed that "the principle of state of law" set out in Article 2 of the Constitution of the Republic of Turkey and "the right to fair trial" set out in Article 6 of the European Convention on Human Rights will be breached if the suspects perform acts that may increase their penal responsibilities. Accordingly, the fictitious trades performed and conclusions reached by the police officers in order to incite the person to commit offences amount to violation of "right to a fair trial" envisaged under Article 6 of the European Convention on Human Rights and cannot constitute the basis for the Convention. The General Assembly of Criminal Chambers of the Court of Cassation lifted the upholding judgment of the 10th Chamber of the Court of Cassation and quashed the domestic court decision (see Annex 1). Similarly, the judgment of the General Assembly of Criminal Chambers of the Court of Cassation docket no. 2014//462 and decision no. 2015/135 is as such.

30. The General Assembly of Criminal Chambers of the Court of Cassation is the supreme decision making body of the Court of Cassation in the field of criminal justice. Accordingly, its judgments are binding for the other Criminal Chambers of the Court of Cassation, Regional Courts of Justice and the first instance courts. Therefore, the judicial procedure in respect of the undercover investigator was evolved in this direction. Indeed, there are various judgments rendered by the Court of Cassation for the similar cases. In some of these judgments, the Constitution, the Convention, the Court's case-law and the said judgment of the General Assembly were referred (see Annex 2).

31. Within this scope, the recent judgments of the Court of Cassation are as follows: In one of the latest judgments of the 10<sup>th</sup> Criminal Chamber of the Court of Cassation docket no. 2017/6298, it was established that it cannot be accepted that the security forces incites the suspects to commit a crime to ensure that they are sentenced more heavily, otherwise "the principle of state of law" set out in Article 2 of the Constitution of the Republic of Turkey and "the right to fair trial" set out in Article 6 of the European Convention on Human Rights will be breached and consequently the decision was quashed.

32. In another judgment of the 10<sup>th</sup> Criminal Chamber of the Court of Cassation docket no. 2017/178, it paid regard to the fact that the public officials appointed as undercover investigator bought pot in exchange for money from the accused however the accused did not arrested. The 10<sup>th</sup> Criminal Chamber of the Court of Cassation quashed the decision by referring to the Court's case-law and the judgments of the General Assembly of Criminal Chambers of the Court of Cassation (see Annex 2).

33. Accordingly, both the case-law of the Court of Cassation and the judicial practice are in accordance with the Court's case-law.

34. 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.

35. As it is observed, the practice of agent provocator mentioned in the Court's judgment in question was rendered fruitless by the Court's judgments and prevented.

### ***III.c Awareness Raising Activities***

36. The legal issue mentioned in the Hun judgment did also take into consideration the preparation of Action Plan on Prevention of ECHR Violations which entered into force on 1 March 2014.

37. The relevant part of it is as follows:

38. "Ensuring the Disregard of Illegal Evidence in the Criminal Proceedings" *Carrying out awareness raising activities addressing the judges and prosecutors concerning the ECtHR's improving case-law concerning the assessment of the evidences including the use of undercover investigator and the informer.*"

39. In this context, the *training module on the measures on surveillance through technical devices and undercover investigators* was prepared within the scope of the "Project on

*Improving the Efficiency of the Turkish Criminal Justice System*”, and it was stressed in this module that the evidence obtained unlawfully should not be taken into account in the proceedings. In the training of judge-prosecutor candidates which receive training in the Turkish Justice Academy, the module in question is used, and this module is distributed to judges and prosecutors which receive training. The modules in question have been published on the web site of the project.

40. Within the prevocational training curriculum of the Turkish Justice Academy, there exist lectures such as *prosecutor’s office practices during investigation and prosecution* for 12 hours, *private investigation procedures* for 12 hours, *supervision of communication through telecommunication- assignment of undercover investigator and practices of monitoring through technical devices* for 8 hours.

41. On 28-30 April 2014, a vocational training seminar on *Protection of Private Life and Protective Measures within the Scope of the ECtHR and ECHR Practices* was held for the judges and prosecutors taking office, and the presentations on undercover investigators and follow-up through technical devices were made in the program and the participants were provided with explanations as regards the ECtHR’s attitude on the matter. Between 1 and 3 December 2014, a vocational training seminar on *Effective Investigation* was held with the participation of 80 judges taking office at the criminal courts and public prosecutors. On 17-19 April 2015, a seminar on *Effective Investigation* was held with the participation of 100 judges and public prosecutors, with a view to analysing the problems resulting from practices concerning the violation of presumption of innocence in the light of the developing case-law of the ECtHR on assessment of evidence including the use of undercover investigators and whistleblowers and raising the awareness of judges and prosecutors in line with the standards set out by the ECtHR on these matters.

42. The Turkish Justice Academy published the book *Undercover Investigator and Agent Provocator in the Criminal Procedure*.

### ***III.d Introduction of an effective individual complaint before the Constitutional Court***

43. Although it is not a *major* response to the European Court’s judgment in this case, the authorities would furthermore like to highlight that a person in the applicant’s situation has at his or her disposal today an effective remedy to bring the violation to an end and obtain redress



before the domestic authorities. In particular, following the European Court's judgment in 2012, the legislative measures were taken to introduce an individual application before the Constitutional Court in respect of human rights violations. An individual in the applicant's situation could therefore pursue today the avenue of lodging an individual application to uphold his or her Convention rights, including in the present case. The Constitutional Court is also able to award just satisfaction in case of finding a violation of human rights. In this respect, the Turkish authorities would like to recall that the European Court indicated in the *Hasan Uzun* case (application no. 10755/13) that the individual application to the Constitutional Court should be considered an effective remedy as of 23 September 2012.

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

44. The Turkish authorities ensured that the European Court's judgments were translated in Turkish and published on its official website which have been made available to the public and legal professionals alike (<http://hudoc.echr.coe.int>).

45. The Turkish authorities also ensured that the European Court's findings have been disseminated among the *competent* bodies to ensure that similar violations are prevented. To this end, the European Court's judgment has been transmitted together with an explanatory note on the European Court's findings to the domestic courts involved in these cases, as well as, to other relevant courts such as the Constitutional Court and the Court of Cassation.

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

## **IV. CONCLUSION**

47. In light of what the Government has submitted in terms of the individual and general measures about how applicants were 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.

Ankara, February 2018

## **ANNEXES**

- 1-** The judgment of the Court of Cassation dated 28 April 2015
- 2-** Judicial Decisions