Thematic factsheet[1]
Updated: July 2017

DETENTION AND IMPRISONMENT OF JOURNALISTS

I. Relevant case-law of the European Court of Human Rights

Article 5 of the European Convention on Human Rights (Right to liberty and security)

The right to liberty and security enshrined in Article 5 lays down a positive obligation on the State not only to refrain from active infringement of the rights in question, but also to take measures providing effective protection, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.

The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty. The domestic law must be in conformity with the general principles expressed or implied in the Convention, namely the principle of the rule of law, of legal certainty, of proportionality and the principle of protection against arbitrariness. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Everyone who is arrested (a) shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him; (b) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial, and (c) shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Pre-trial detention for over a year of investigative journalists accused of aiding and abetting a criminal organization. Length and reasonableness of pre-trial detention

Sık v. Turkey - 53413/11 and Nedim Şener v. Turkey -38270/11
Judgments 8.7.2014

The applicants are two investigative journalists. In March 2011 the police searched their homes and took them both into police custody. They were accused, in particular, of having been involved in the production of publications criticising the government and serving as propaganda for the criminal organization

[1] This document presents a non-exhaustive selection of the CoE instruments and of the ECtHR relevant case law. This information is not a legal assessment of the alerts and should not be treated or used as such.

Ergenekon, whose members were convicted of fomenting a coup d'état. The applicants were not released until March 2012.

In accusing the applicants from the outset of the investigation of "serious terrorist offences" and in presuming a need to keep them in pre-trial detention, the authorities had based that detention on reasons that were neither "relevant" nor "sufficient" to justify its length. In the Court's view, it was doubtful whether it was necessary to remand the accused in custody for over a year in the context of a preliminary investigation. The reasons given for refusing the applicants' requests for release on bail during the first year of the criminal investigation had not been substantiated and lack of detailed reasons meant that there had been no specific evidence demonstrating the need to keep the applicants in pre-trial detention. A stereotyped list of general reasons was not sufficient to compensate for this deficiency.

The Court further noted that Mr Şener and Mr Şık had been accused of using "black propaganda" methods to insidiously undermine public confidence in the judiciary. The Court observed that this act as such was not punishable under the Turkish Criminal Code. Even if the books in question had contained assertions that were untrue, the Court pointed out that the offences of defamation or bringing pressure to bear on the judiciary were less serious in nature than the crimes of belonging to or assisting a terrorist organisation, and did not warrant such a long period of pre-trial detention.

Conclusion: violation of Article 5 § 3 of the Convention

Proceedings concerning an appeal against detention had to be adversarial and to guarantee equality of arms between the parties, that is, between the prosecution and the person in detention. The method chosen by the domestic legislation had to guarantee that each party was made aware of any observations submitted and had a genuine opportunity of commenting on them. The Court noted that the prosecuting authorities' accusations against Mr Şener and Mr Şık had been based mainly on documents and computer files seized on the premises of third parties rather than those of the applicants. Invoking the need for confidentiality, the public prosecutor's office had refused the applicants permission to examine these key items of evidence. The Court thus considered that neither the applicants nor their lawyer had had sufficient knowledge of the content of the documents, which were of crucial importance for the purpose of challenging the lawfulness of their detention.

Conclusion: violation of Article 5 § 4 of the Convention

Detention of a journalist with a view to compelling him to disclose his source of information
Failure to notify a detention order within the time-limit prescribed by law

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Voskuil v. the Netherlands - 64752/01
Judgment 22.11.2007

In 2000 the applicant, a journalist, published an article which contained quotations of an unnamed policeman compromising the methods used in a criminal investigation against certain persons. The court of appeal ordered the applicant to reveal the identity of his source in the interests of the accused and the integrity of the police and judicial authorities. When the applicant failed to comply, the court ordered his immediate detention. More than two weeks later, in the light of the results of an internal police investigation, the domestic court considered the applicant's statements implausible and lifted the order for his detention. The criminal proceedings against the accused were brought to a conclusion.

The Court recalled that the protection of a journalist's sources was one of the basic conditions for freedom of the press. Without such protection, sources might be deterred from assisting the press in informing the public on matters of public interest and, as a result, the vital public-watchdog role of the press might be undermined. It took the view that, in a democratic state governed by the rule of law, the use of improper methods by a public authority was precisely the kind of issue about which the public had the right to be informed. The Court was struck by the lengths to which the authorities had been prepared to go to learn the identity of the source. Such far-reaching measures could but discourage those who had true and accurate information relating to wrongdoing from coming forward in the future and sharing their knowledge with the press. In conclusion, the Government's interest in knowing the identity of the applicant's source had not been sufficient to override the applicant's interest in concealing it.

Furthermore, the domestic law provided for notification in writing of the detention order within twenty-four hours. However, the applicant was not notified of the order until some three days later. Therefore, his detention had not complied with “a procedure prescribed by law”.

Conclusion: violation of Article 5 § 1 of the Convention

Police power to stop and search individuals - including journalists- without reasonable suspicion of wrongdoing

Gillan and Quinton v. the United Kingdom - 4158/05
Judgment 12.1.2010

The applicants were stopped and searched by the police in separate incidents while on their way to a demonstration. Mr Gillan was riding a bicycle and carrying a rucksack. Ms Quinton, a journalist, was stopped and searched despite showing her press cards.

The Court noted that the stop and search powers under the Terrorism Act were not sufficiently circumscribed or subject to adequate legal safeguards against abuse. It observed that although the length of time during which each applicant was stopped and search did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1.

Pointing out to statistical evidence, the Court was struck by that the extent to which police officers resorted to the stop and search powers. Noting the large number of searches involved and the reports by the independent reviewer indicating that the powers were being used unnecessarily, the Court found that there was a clear risk of arbitrariness in granting such broad discretion to police officers. There was a risk that such a widely framed power could be misused against demonstrators and protestors. Similarly, as had been shown in the applicants’ case, judicial review or an action in damages to challenge the exercise of the stop and search powers by a police officer in an individual case were unlikely to succeed as the absence of any obligation on the part of the officer to show reasonable suspicion made it almost impossible to prove that the powers had been improperly exercised.

Conclusion: violation of Article 8 of the Convention

Placing in detention journalists (columnists, journalists and editors) from the daily newspaper *Cumhuriyet* as an alleged form of politically-motivated judicial harassment

Sabuncu and Others v. Turkey 23199/17
Pending

Ten journalists from the daily newspaper *Cumhuriyet* ("the Republic") were placed in police custody and subsequently in pre-trial detention in October and November 2016 on suspicion of having committed offences on behalf of terrorist organisations and disseminating propaganda for them. The applicants challenged the relevant detention ordersbefore judges of the peace and applied, unsuccessfully, for release. They also lodged individual petitions before the Constitutional Court; those proceedings are currently pending.

Relying in particular on Article 5 §§ 1, 3 and 4 (right to liberty and security / right to speedy review of the lawfulness of detention), Article 10 (freedom of expression) and Article 18 (limitation on use of restrictions on rights), the ten journalists complained before the ECtHR about their pre-trial detention and its duration, and also submit that there has been a breach of their freedom of expression. They further allege that their detention is a sanction against them for criticising the government and amounts to politically-motivated judicial harassment.

See, for other examples of pending applications concerning detained Turkish journalists,

- Atilla Taş (72/17) and Murat Aksoy v. Turkey (80/17) : communicated
- Ayşe Nazlı Ilıcak v. Turkey (1210/17) : communicated
- Mehmet Hasan Altan (n° 13237/17) and Ahmet Hüsrev Altan v. Turkey (13252/17) : communicated
- Şahin Alpay v. Turkey (16538/17) : communicated
- Ali Bulaç v. Turkey (25939/17) : communicated

Article 6 of the European Convention on Human Rights (right to a fair trial)

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society.

Everyone charged with a criminal offence: (a) shall be presumed innocent until proved guilty according to law, and (b) has the following minimum rights: (i) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (ii) to have adequate time and the facilities for the preparation of his defence; (iii) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (iv) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (v) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Arbitrary imprisonment of a journalist following domestic courts' failure to address legitimate concerns about possible "planting" of evidence on him

Sakit Zahidov v. Azerbaijan - 51164/07
Judgment 12.11.2015

The applicant (an independent Azeri journalist, satirist and poet, working for the newspaper *Azadliq*as) was arrested and taken to local police premises where a search was conducted and drugs were found in one of his pockets. He was later convicted of illegal possession of drugs. Before the domestic courts, the applicant claimed that the drugs had been planted on him by the police officers.

The Court noted a number of concerns regarding the circumstances in which the physical evidence had been obtained. Firstly, the search of the applicant had not been carried out immediately following the arrest, but twenty minutes later, nowhere near the place of arrest. The time lapse between the arrest and search raised legitimate concerns about possible "planting" of the evidence, because the applicant was completely under the police's control during that time. Secondly, the domestic courts had declined to examine a copy of the video-recording of the search. Thirdly, the applicant's arrest was not immediately documented by the police and the applicant was not represented by a lawyer during his arrest or the search. Overall, the quality of the physical evidence on which the domestic courts' guilty verdict was based was questionable because the manner in which it had been obtained cast doubt on its reliability.

Conclusion: violation of Article 6 of the Convention

Arbitrary application of anti-terror law to convict a newspaper editor to an imprisonment sentence. Grossly disproportionate restrictions on freedom of expression

Fatullayev v. Azerbaijan - 40984/07
Judgment 22.4.2010

The applicant, a newspaper editor, was prosecuted in connection with two articles he had published and subsequently sentenced to a total of eight and a half years' imprisonment for having criticised his Government's foreign and domestic political moves.

The Court held that there had been no justification for the imposition of a prison sentence in the applicant's case. The journalist had criticised the Government and, in common with a number of other media sources at the time, had suggested that, in the event of a war, Azerbaijan was likely to be involved; he had also speculated about possible targets for Iranian attacks. He had not, however, revealed any State secrets or increased or decreased the chances of an attack, but had sought to convey a dramatic picture of the specific consequences of Azerbaijan's involvement in a possible future war. The opinions he had expressed were about hypothetical scenarios and, as such, were not susceptible of proof.

As regards the conviction for threat of terrorism, the applicant, as a journalist and private individual, had clearly not been in a position to influence or exercise any degree of control over any of the hypothetical events discussed in the article. Nor had he voiced any approval or argued in favour of any such attack. It had been his task, as a journalist, to impart information and ideas on the relevant political issues and to express opinions about the possible future consequences of specific decisions taken by the Government. The domestic courts' finding that the applicant had threatened the State with terrorist acts had thus been arbitrary.

As to his conviction for inciting ethnic hostility, the issues raised in the applicant's article could be considered a matter of legitimate public concern which he had been entitled to bring to the public's attention. The mere fact that he had discussed the social and economic situation in regions populated by an ethnic minority and voiced an opinion about possible political tension in those regions could not be regarded as incitement to ethnic hostility. Although the relevant passages may have contained certain categorical and acerbic opinions and a certain degree of exaggeration in criticising the central authorities' alleged treatment of the minority group concerned, they contained no hate speech and could not be said to encourage inter-ethnic violence.

The domestic courts had thus failed to provide any relevant reasons for the applicant's conviction on charges of threat of terrorism and incitement to ethnic hostility. The gravity of the interference had, furthermore, been exacerbated by the particularly severe penalty that had been imposed: a heavy prison sentence when none had been justified. There had thus been a grossly disproportionate restriction on the applicant's freedom of expression.

Conclusion: violation of articles 10 (freedom of expression)

The presumption of innocence is violated if a statement by a public official concerning a person charged with a criminal offence reflected an opinion that he was guilty before he had been proved guilty according to law. While the applicant's position as a well-known journalist meant that it had been necessary to keep the public informed of the alleged offence and ensuing proceedings, the Prosecutor General should have exercised particular caution in his choice of words. However, he had unequivocally declared at the start of the investigation that the applicant's article contained a threat of terrorism. Those specific remarks, made without any qualification or reservation, had amounted to a declaration that the applicant had committed the criminal offence of threat of terrorism and had thus prejudged the assessment of the facts by the courts.

Conclusion: violation of article 6 § 2 (presumption of innocence). Journalist to be released immediately

Article 10 of the European Convention on Human Rights (freedom of expression)

The sanctions imposed by the national authorities should not dissuade the press from taking part in the discussion of matters of legitimate public concern.

Although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.

Although the Contracting States are permitted, even obliged, to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power. Investigative journalists are liable to be inhibited from reporting on matters of general public interest if they run the risk of being sentenced to imprisonment or to a prohibition on the exercise of their profession. The fear of such sanctions has a chilling effect on the exercise of journalistic freedom of expression, which works to the detriment of society as a whole.

Chilling effect of an imprisonment sentence imposed to journalists. Lack of justification for such a sentence in a classic defamation case

Cumpănă and Mazăre v. Romania - 33348/96
Judgment 17.12.2004

Relying on Article 10, the applicants (Romanian journalists) complained that their freedom of expression had been infringed on account of their criminal conviction to an imprisonment sentence following the publication of an article about presumed misappropriation on the part of local elected representatives and public officials.

The Court observed that the sanctions imposed on the applicants had been very severe. It recalled that he imposition of a prison sentence for a press offence was compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights had been seriously impaired, as, for example, in the case of hate speech or incitement to violence. In a classic case of defamation, such as the present case, imposing a prison sentence inevitably had a chilling effect.

The Court accordingly considered that, although the interference with the applicants' right to freedom of expression might have been justified, the criminal sanction and the accompanying prohibitions imposed on them by the Romanian courts had been manifestly disproportionate in their nature and severity to the legitimate aim pursued by the applicants' conviction for insult and defamation.

Conclusion: violation of Article 10 of the Convention

Photographer's apprehension and subsequent detention for disobeying the police while covering a demonstration

Pentikäinen v. Finland [GC] - 11882/10
20 October 2015

The case concerned the apprehension of a media photographer during a demonstration and his subsequent detention and conviction for disobeying the police. The Court found that Mr Pentikäinen's apprehension had taken place in the cordoned-off area where he had remained together with a core group of demonstrators. From the video recordings of the event in the case file, it appeared that he had not been wearing any distinct signs which would have identified him as a journalist, nor had his press badge been visible. While the police had to have learned about his status as a journalist at the latest at the police station when one police officer had taken his press card, Mr Pentikäinen had failed to make it sufficiently clear earlier during the events that he was a journalist.

By not obeying the orders given by the police, Mr Pentikäinen had knowingly taken the risk of being apprehended. The Helsinki District Court had found it established that he had been aware of the police orders to leave the scene but that he had decided to ignore them. Nothing suggested that he could not have continued to exercise his professional assignment in the vicinity of the cordoned-off area, had he obeyed the order.

As regards his detention, the Court noted that the journalist had been one of the first of the people apprehended to be interrogated by the police and shortly after he had been released. While his camera equipment had been taken away for the duration of his detention, the camera and the photographic material had been returned to him entirely and unaltered.

Concerning his conviction, the Court noted that the journalist had been found guilty of disobeying the police but that no penalty had been imposed. His conviction had had no adverse consequences for him: as no sanction had been imposed, the conviction had not, in accordance with national law, been entered in his criminal record.

Conclusion: no violation of Article 10 of the Convention

II. Other relevant Council of Europe instruments

- Recommendation of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies

- Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies

- Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, adopted on 26 September 2007
- Declaration by the Committee of Ministers on the protection and promotion of investigative journalism, adopted on 26 September 2007
- Resolution 2035 (2015) and Recommendation 2062 (2015) of the Parliamentary Assembly Protection of the safety of journalists and of media freedom in Europe and Doc. 13664 Report 2015 (G. S. FLEGO) Protection of media freedom
- Resolution 1577 (2007) and Recommendation 1814 (2007) of the Parliamentary Assembly "Towards decriminalisation of defamation". See also Doc. 11305 of the Committee on Culture, Science, Education and Media Towards decriminalisation of defamation

- Declaration on freedom of expression and information in the media in the context of the fight against terrorism, adopted by the Committee of Ministers on 2 March 2005
- Recommendation 1706 (2005) of the Parliamentary Assembly “Media and terrorism”
- Resolution 2077 (2015) of the Parliamentary Assembly and Report Doc 13863 (2015) 'Abuse of pre-trial detention in States Parties to the European Convention on Human Rights'