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Meeting: 1419th meeting (December 2021) (DH)

Communication from the applicant (15/11/2021) in the case of Kavala v. Turkey (Application No. 28749/18).

Information made available under Rule 9.1 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419^e réunion (décembre 2021) (DH)

Communication du requérant (15/11/2021) relative à l'affaire Kavala c. Turquie (requête n° 28749/18)
[anglais uniquement]

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

TO THE CHAIR OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE
(Kavala v. Turkey - Application No. 28749/18)

1) The criminal proceedings in which Osman Kavala, the applicant, was being tried for violating Articles 312, 309, and 328 of the TCC have been joined with the Çarşı trial related to Gezi Park events. The first hearing of this consolidated trial was held in the Istanbul 13th Assize Court on 8 October 2021.

2) The joinder of the case file against Kavala and the Çarşı trial case file proceeded as follows:

The chief judge of the Istanbul 30th Assize Court, where Kavala was being tried, submitted a request to the Istanbul 13th Assize Court, where the defendants of Çarşı case were being tried, for the joinder of the cases. In the hearing held on 12 July 2021, which was the first hearing after the acquittal decision issued in the Çarşı trial was overturned by the 16th Criminal Chamber of the Court of Cassation, the Istanbul 13th Assize Court gave time to the defense to make a statement about the joinder. The Court stated that it would issue a decision on 8 October 2021 after having received the statement.

Despite this interim decision, the chief judge of the Istanbul 30th Assize Court, who was appointed as the temporary chief judge of the Istanbul 13th Assize Court during the judicial recess, granted the request submitted by himself for the joinder of the cases without waiting for the statements of the defense. As a result of this decision, the cases against Kavala in the 30th Assize Court were joined with the Çarşı trial during the judicial recess.

The decision of consolidation is unlawful, since it was issued by a single judge, not by the two judges reviewing the Gezi and Çarşı cases separately. The Chief Judge of the Istanbul 30th Assize Court was appointed as the temporary Chief Judge of the Istanbul 13th Assize Court and completed the consolidation. This procedure, where the decision to join the cases was issued by the same judge who had submitted the request for the joinder, clearly demonstrates the unlawfulness of the decision.

After the consolidation of the cases, the total number of defendants in these trials reached 52. It will take months to re-examine the files against these 52 people, collect evidence, and wait for the preparation of defenses. The proceedings and the never-ending detention could continue for an indefinite period.

This development indicates that the violation of Articles 5 and 18 of the European Convention still continues.

3) A practice similar to the issuance of the decision of consolidation by a single judge could be seen in the Prosecution. The Prosecutor of the Istanbul 30th Assize Court was the Prosecutor of the Istanbul 13th Assize Court in the hearing held on 8 October 2021.

4) In this hearing, the defense attorneys in the Çarşı trial argued that it was unlawful that the decision of consolidation was issued before the deadline set for them. The following problems also highlighted by these attorneys are important to reveal the unlawfulness of the proceedings leading to the consolidation of the cases: The Court of Cassation, in its decision to overturn the acquittal verdict in the Çarşı trial, referred to the decision of the Appellate Court that overturned the acquittal verdict in the Gezi trial. The defense attorneys in the Çarşı trial argued that it was

unlawful for the Court of Cassation to refer to the decision of the Appellate Court as it could not actually have known about this decision which was not included in the Çarşı case file. This, they argued, indicates the existence of a network of information sharing on the decisions that have been and will be issued, and that the Panel of Judges of the Istanbul 13th Assize Court was also involved in this network, and they requested the Panel of Judges withdraw from the proceedings.

These observations concerning the developments leading to and following the joinder of the cases indicate that the judiciary process in the trial of our client Osman Kavala has not been conducted in compliance with the “right to fair trial” under the European Convention of Human Rights.

5) In the hearing of 8 October 2021 at the 13th Assize Court, the request for separating the cases was dismissed, and it was ruled that Osman Kavala’s detention shall continue.

The decision to continue the detention was based on the following grounds:

“...the details and nature of the charge; the current stage of the trial; the investigation conducted into the HTS records and cell tower data in the file; the reports prepared after the investigation conducted into the digital materials; the presence of concrete evidence supporting a strong suspicion of crime when the report of the Financial Crimes Investigation Committee (MASAK) is considered; the upper limit of the penalty stipulated in the Criminal Law for the crimes with which the defendant has been charged; and the concern that judicial control measures would be inadequate...”

The decision is not based on concrete evidence or facts. It is completely unlawful and faulty for the following reasons:

a. “The current stage of the trial” cannot be a reason for dismissing the request for the release of a defendant who has been detained for 4 years on the same charges and allegations. During the hearings in the Istanbul 36th Assize Court, 12 witnesses were heard and none of them said anything which could support the allegations against Kavala. After the case file was sent to the Istanbul 30th Assize Court, only one hearing was held in 7 months, and no order was issued regarding the collection of evidence in the trial heard in the Istanbul 36th Assize Court.

b. The HTS records cannot constitute a legal ground for the dismissal of the requests for release. HTS records indicating that the mobile phones of Osman Kavala and Henri Barkey gave signals from nearby base station (within a diameter of 500 meters) do not constitute an element of crime or an evidence indicating a crime under domestic law.

c. The justification based on the report of MASAK is not legally acceptable. The MASAK report which was asked and obtained in the context of the previous Gezi Park indictment does not include any finding regarding the elements of the crime of espionage.

d. The prolongation of the detention on such abstract, unfounded, and faulty grounds without any reasonable cause has once again shown that the detention of our client is based on ulterior motives not stipulated in the Convention and violates Article 18.

6) The current detention of our client is based on the charge of espionage under Article 328 of the TCC. In its judgment, the ECtHR had already referred to the matters cited by the Istanbul

13th Assize Court as the grounds for the decision to continue the detention and ruled that these matters did not constitute evidence. Subsequently, the Committee of Ministers, in its several decisions and resolutions, has stated that the present detention of Kavala constitutes a continuation of the violation of his rights expressed in the ECtHR ruling.)- The Istanbul 13th Assize Court dismissed our request for release as if the judgment of the ECtHR and the decisions of the Committee of Ministers did not exist.

7) On 18 October 2021, the ambassadors of Canada, Denmark, Finland, France, Germany, the Netherlands, New Zealand, Norway, Sweden, and the USA called on the Turkish Government to act in compliance with the judgment of the ECtHR and take the necessary steps to assure the release of Osman Kavala. This statement is in line with the decisions of the Committee of Ministers of the Council of Europe. President Recep Tayyip Erdoğan, Minister of Foreign Affairs Mevlüt Çavuşoğlu and Devlet Bahçeli, the leader of the Nationalist Movement Party (MHP) who supports the government and enables the government to maintain parliamentary majority, reacted to this call with an excessively harsh tone and made defamatory statements about Osman Kavala. These statements violate our client's right of defense. Therefore, our client decided not to present a defense at the future hearings.

On 21 October 2021, the President of the Republic of Turkey made the following remarks upon returning from his trip to Africa:

...You see, the ECtHR issued a judgment. They almost want to convict Turkey for this Soros leftover, called Kavala. Why would 10 ambassadors make such a statement? Those who defend this Soros residue are trying to get him released (...) Is it for you to teach Turkey such a lesson? Who do you think you are? They say, 'Release Kavala (...)' Do you release bandits, murderers, or terrorists in your own country? Has the USA, Germany, or others ever done such a thing? They haven't, and they wouldn't. They would respond to such demands by saying, 'The judiciary is independent.' Is our judiciary dependent while yours is independent? Our judiciary is one of the finest examples of independence.¹

With this statement, the President has continued targeting Kavala during his ongoing trial as someone who has been involved in criminal activities. These words of the President convey a strong message to the judiciary as in his previous allegations about George Soros and Osman Kavala such as the following one made on 21.11.2018.

... He (meaning Kavala) sponsored terrorists during the Gezi Park events. Now, he is in prison. But who is behind him? Soros, the famous Hungarian Jew. This man assigns some people to divide nations and break them into pieces; he has lot of money and spends his money on this mission. His representative in Turkey (...) uses his means to provide all kinds of support for such terrorist attacks that aim to divide this country and break it into pieces.²

Devlet Bahçeli, the leader of the MHP, joined in the accusations against our defendant by stating that:

Kavala is the courier of Soros and the sponsor of the Gezi Park events. In the event that the case of this Soros man is adjudicated and he is convicted, it would be a national necessity to

¹ NTV news web site, 21.10.2021: <https://www.ntv.com.tr/turkiye/cumhurbaskani-erdogandan-10-buyukelciye-osman-kavala-tepkisi,Yk1a5d7DDkqHYqa8I4-5Ag>

² Gazete Duvar, 21.11.2018: <https://www.gazeteduvar.com.tr/politika/2018/11/21/erdogan-aihm-sen-neredesin>

*first ensure that he serves his sentence in Turkey, then to expatriate him and send him to one of the countries of these 10 ambassadors.*³

On 28 October 2021, the Minister of Foreign Affairs Mevlüt Çavuşoğlu made the following remarks on a TV show:

*... Many charges have been brought against Kavala. He is currently in detention on other charges. Actually, the judgment of the ECtHR has been executed. These countries are trying to teach us a lesson, but they do not execute the judgments of the Court themselves. (...) Is there any country where overthrowing an elected President is not a crime? It is a crime in all democratic countries, and the penalties for this crime are much more severe than those in our country. During this process, they have realized that no one can shake one's finger at Turkey or interfere in its internal affairs anymore (...) Osman Kavala is Soros' man and attempted to overthrow the legitimate government through the Gezi Park events. We have found that FETO was also involved in the Gezi Park events. What country can accept that?*⁴

8) Such statements constitute a violation of the principle of presumption of innocence, create a perception that our client has committed a crime, and put pressure on the judiciary. These statements indicate a repeated violation of Article 18 of the ECHR.

9) During the detention review by the Istanbul 13th Assize Court on 05.11.2021, Osman Kavala's attorneys' request for release was dismissed by 2 votes against 1 vote, and the court decided to continue Osman Kavala's detention.

10) In conclusion, Turkey, by prolonging Mr. Kavala's detention, refuses to abide by the judgement of the Court in spite of repeated calls of the Committee of Ministers for his immediate release. We therefore respectfully request your Committee to take urgent action under Article 46(4) of the Convention to end this continuous violation.

Counsel for the Applicant
Dr. Köksal Bayraktar, Attorney at Law

³ Hürriyet newspaper, 26.10.2021: <https://www.hurriyet.com.tr/gundem/son-dakika-10-buyukelcinin-geri-adimi-bahceli-kavala-sorosun-kuryesi-gezinin-kiskirticisidir-41925029>

⁴ Hürriyet newspaper, 5.11.2021: <https://www.hurriyet.com.tr/dunya/cavusoglu-buyukelci-krizinin-perde-arkasini-anlatti-bavullarini-hazirlayanlar-olmus-41927422>