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DH-DD(2021)1257

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

Communication from an NGO (İFADE ÖZGÜRLÜĞÜ D İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)) (15/11/2021) in the case of Kavala v. Turkey (Application No. 28749/18) and reply from the authorities (22/11/2021)

Information made available under Rules 9.2 and 9.6 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 : 1419e réunion (décembre 2021) (DH)

Communication d'une ONG (İFADE ÖZGÜRLÜĞÜ D İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)) (15/11/2021) relative à l'affaire Kavala c. Turquie (requête n° 28749/18) et réponse des autorités (22/11/2021) ***[anglais uniquement].***

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

RULE 9.2 COMMUNICATION

in the Case of Kavala v. Turkey (Application No. 28749/18)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

15 November 2021

An independent non-governmental organization specialized in defending and promoting freedom of expression

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

DGI Directorate General of Human Rights and Rule of Law

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15.11.2021

Rule 9.2 Communication from Freedom of Expression Association (İFÖD) in the Case of Kavala v. Turkey (No. 28749/18)

1. The submission is prepared by **İfade Özgürlüğü Derneği** (İFÖD – Freedom of Expression Association), a non-profit and non-governmental organization which aims to protect and foster the right to freedom of opinion and expression in Turkey. İFÖD has been monitoring the Gezi trial, since its first hearing held at Istanbul 30th Criminal Assize Court on June 24-25, 2019. İFÖD's legal team has attended and monitored all of the public hearings thus far. İFÖD has also submitted two Rule 9.2 submissions to the Committee of Ministers concerning the non-implementation of the European Court's judgment both with regard to the individual and general measures in June 2020[1] and February 2021.[2]

2. The **aim of this submission** is to update the Committee of Ministers on the most recent court hearing of the Gezi trial on 08.10.2021, in which the first instance court failed to fully and effectively implement individual measures in the case of **Osman Kavala v. Turkey** and the interim resolution set by the Committee of Ministers at its last five meetings (at the 1377bis meeting (DH), 1-3 September 2020; the 1383rd meeting (DH), 29 September-1 October 2020, 1390th meeting, (DH), 1-3 December 2020, 1398th meeting (DH) 9-11 March 2021, 1406th meeting (DH), 7-9 June 2021, 1411th meeting (DH), 14-16 September 2021).

İFÖD's Observations on the latest court hearing

3. İFÖD's legal team attended the latest hearing of the trial on 08.10.2021 at the Istanbul 13th Criminal Assize Court, after the proceedings have been further joined with the case involving other defendants (*Çarşı Taraftar Grubu*, football supporters accused of criminal acts in the context of the Gezi Park events).

4. In this hearing, the attorneys of the defendants of both Gezi and Çarşı cases stated that their statements regarding the joinder of the cases had not been considered in line with the Turkish Criminal Procedure Code. The attorneys of Kavala specifically emphasized the call to his

[1] İfade Özgürlüğü Derneği Rule 9 communication to the CoE Committee of Ministers in relation to the Osman Kavala v. Turkey case (Application No. 28749/18), 29.06.2020, DH-DD(2020)575 at https://rm.coe.int/native/090000168090ededa.

[2] İfade Özgürlüğü Derneği Rule 9 communication to the CoE Committee of Ministers in relation to the Osman Kavala v. Turkey case (Application No. 28749/18), 15.02.2021, DH-DD(2021)187 at http://hudoc.exec.coe.int/eng?i=DH-DD(2021)187E.

urgent release in the European Court's judgment as well as the Committee of Ministers decisions, as there is no evidence to support a reasonable suspicion that he had committed the offenses pursuant to articles 309, 312 and 328 of the Turkish Criminal Code.

5. The attorneys' emphasis on Committee's evaluations were not taken into consideration in the proceedings as the trial prosecutor demanded the continuation of Kavala's detention without providing any legal reasoning to substantiate his demand.

6. The court held by a majority decision, two votes to one, that the applicant's detention should continue and that judicial control measures would be inadequate considering the nature of the charges, stage of the criminal proceedings, existence of concrete evidence indicating strong suspicion for the impugned crime and the upper limit of the prison sentence prescribed by law. İFÖD notes that this reasoning is entirely similar with the previous reasoning provided by the Istanbul 30th Criminal Assize Court and merely repeats the relevant provision of the Turkish Criminal Procedure Code. The dissenting judge considered that the applicant should be released under one or several judicial control measures. The dissenting judge, referring to the length of the applicant's detention and the fact that his statements have been taken and evidence has been collected to a large extent, considered that judicial control measures would be adequate and efficient, whereas the continuation of the detention would not be proportionate at this stage.

7. According to İFÖD, this indicates **persistent refusal to implement the judgment of the European Court by the Turkish authorities** and also raises a strong presumption that the applicant's ongoing detention is a continuation of the violation of Article 18 taken in conjunction with Article 5 found by the Court as the Committee repeatedly stated.[3]

8. It should be reminded that the Committee at its 1411th meeting stated that in the light of their previous decisions, in particular the decisions adopted at the 1406th meeting (June 2021) (DH), that it is necessary, in order to ensure the implementation of the judgment, to make use of proceedings under Article 46 (4) of the Convention and further expressed their resolve to serve formal notice on Turkey of their intention to commence these proceedings in accordance with Article 46 (4) of the Convention at their 1419th meeting (30 November – 2 December 2021) (DH), in the event that the applicant is not released before then.[4] The Criminal Assize Court postponed the hearing to 26.11.2021 just before the 1419th meeting.

9. It should also be noted that, on 18.10.2021 the embassies of Canada, France, Finland, Denmark, Germany, the Netherlands, New Zealand, Norway, Sweden and the United States of America have published a joint statement involving Kavala's continuing pre-trial detention calling for a just and speedy resolution to the case, four years after he was jailed, stating that the case "cast a shadow over respect for democracy".[5] The Ministry of Foreign Affairs of Turkey summoned the ambassadors of these 10 countries over what it said was an

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[3] CM/Notes/1411/H46-37- 1411th meeting, 14-16 September 2021 (DH) at http://hudoc.exec.coe.int/eng?i=CM/Notes/1411/H46-37E.

[4] CM/Del/Dec(2021)1411/H46-37- 1411th meeting, 14-16 September 2021 (DH) at http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1411/H46-37E.

[5] See https://tr.usembassy.gov/statement-on-four-years-of-osman-kavalas-detention/.

"irresponsible" statement on 19.10.2021.[6] Subsequently, on 21.10.2021, President Erdoğan addressed the joint statement suggesting that Turkey should not host these ambassadors. Furthermore, he targeted Kavala stating "*Why do these 10 ambassadors make this statement? Those who defend this leftover of [George] Soros are striving to get him released"*.[7] Later, on 23.10.2021, President Erdoğan stated in his speech he had instructed his foreign minister to "*declare the ambassadors 'persona non grata' as soon as possible*".[8]

10. İFÖD's previous Rule 9.2 submission displayed numerous examples that following the statement of public authorities, especially the President of Turkey declaring a person guilty, that person would be investigated and prosecuted as well as arrested and detained in different criminal proceedings.[9] President Erdoğan's comments on the protests at Boğaziçi University were also provided as an example in that submission, in which he targeted the Kavala case stating that "*the wife of the person who is the representative of Soros in this country called Osman Kavala is also a woman who is among these provocateurs at Boğaziçi University. So now are we going to say take our country and this precious university and cause disruption? We cannot allow this".*

11. The European Court already held in the *Kavala* case that the speeches by the country's highest-ranking official could corroborate the applicant's argument that his initial and continued detention pursued an ulterior purpose, namely **to reduce him to silence as a human-rights defender** (*Kavala v. Turkey*, no. 28749/18, 10.12.2019, § 230). Therefore, the fact that President Erdoğan persistently comments on the Kavala case seems to be strongly leading to the continuation of Kavala's pre-trial detention in line with the finding of the Court of a violation of Article 18 in conjunction with Article 5 of the Convention.

Conclusion and Recommendations

12. İFÖD kindly invites the Committee to continue to supervise closely the implementation of the judgment of the Court in Kavala case, and immediately to make use of proceedings under Article 46 § 4 of the Convention unless Kavala is released before the 1419th meeting.

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6 See https://www.reuters.com/world/middle-east/turkey-summons-10-ambassadors-after-call-philanthropists-release-2021-10-18/.

7 Statement by President Erdoğan, 21 October 2021, available at https://bianet.org/english/politics/252162-erdogan-turkey-shouldn-t-host-ambassadors-who-called-for-kavala-s-release.

8 Statement by President Erdoğan, 23 October 2021, available at https://www.reuters.com/world/middle-east/turkeys-erdogan-orders-10-ambassadors-declared-persona-non-grata-2021-10-23/.

9 İFÖD already provided detailed information in its previous Rule 9.2 submission, 15.02.2021, DH-DD(2021)187, para. 17-28, at http://hudoc.exec.coe.int/eng?i=DH-DD(2021)187E.

Ankara, November 2021

THE GOVERNMENT'S SUBMISSION IN RESPONSE TO THE COMMUNICATION FROM THE APPLICANT'S LAWYER DATED 15 NOVEMBER 2021
AND
THE COMMUNICATION FROM THE FREEDOM OF EXPRESSION ASSOCIATION DATED 15 NOVEMBER 2021

Kavala (28749/18)

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1. The Turkish Authorities would like to make the following explanations in response to the communication of the applicant's lawyer and the communication of the freedom of expression association dated 15 November 2021 in the case of *Kavala* (28749/18).

2. Although the issues expressed in both notifications are similar, the answers of our Government are as follows:

3. The Turkish authorities have summarised and submitted detailed and updated information as to the legal grounds for the applicant's current detention in the Communications to the Committee of Ministers ("CM") dated 29 May 2020, 11 June 2020, 18 June 2020, 7 July 2020, 16 July 2020, 11 August 2020, 11 September 2020, 25 September 2020, 30 October 2020, 10 November 2020, in the action plan dated 19 January 2021 and in the communications dated 18 February 2021, 19 February 2021, 30 March 2021, 12 April 2021, 4 May 202, 17 May 2021, 25 May 2021, 1 June 2021, 15 June 2021 and in the updated action plan dated 16 July 2021 and in the communication dated 13 August 2021, 6 September 2021, 13 September 2021, 21 September 2021, 4 October 2021, 11 October 2021, 18 October 2021, 2 November 2021 and updated action plan dated 17 November 2021. The Turkish authorities reiterate these explanations in this regard.

4. After the decision of the Court of Cassation, on 12 July 2021, the first hearing was held before the 13th Assize Court of Istanbul with the docket number 2021/178. The last hearing was held on 8 October 2021. The Assize Court reviewed the applicant's detention in this hearing and decided by majority vote (2-1) that his detention to be continued. Further, it has been decided that the next hearing will be held on 26 November 2021.

5. On 13 October 2021 the applicant's lawyers filed an appeal with the 14th Assize Court of Istanbul against the 13th Assıze Court's decision on continuation of detention dated 8 October 2021, the 14th Assize Court examined the appeal on the case file and dismissed the objection on 26 October 2021.

6. The applicant's detention has been rewieved on 5 November 2021 and the Assize Court stressed that; *"Having regard to the fact that, in the present case, by taking into consideration the quality and nature of the offence imputed to the accused Mehmet Osman KAVALA, the current stage of the trial, the examination on HTS records and the base station data in the file, the reports drawn up as a result of the examination on digital materials, the existence of the concrete evidence demonstrating strong suspicion for the imputed offences in view of the MASAK report, the upper limit of the sentence prescribed for the imputed offences by the law, it has been understood that the judicial supervision measures will remain insufficient (...)"*

7. The proceedings before the İstanbul 30th Assize Court and İstanbul 13th Assize Court were merged. The purpose of merging the cases is de jure and de facto connection between the cases. Regarding the proceedings before the Istanbul 30th Assize Criminal Court, the Court of Appeal decided on 22 January 2021 that there was a connection between the two cases.

8. Similarly, during the appeal examination of the İstanbul 13th Assize Court's decision, the Court of Cassation decided on 18 March 2021 that there was a connection between the cases. The facts of these two cases are similar, notably the incidents occured during the Gezi events. In this respect, the latter Court, the Court of Cassation, could consider the preceding decision rendered by the Court of Appeal. This does not suggest that there was a network operating inside the judicial system as claimed by the applicant's representatives.

9. Lastly, it should be noted that, merger of the cases does not mean that these cases resulted from different legal qualification of the same facts. The subject matter of the judgment at hand is the applicant's acts in relation with Gezi events. His current detention is ordered under different criminal proceedings, notably the offence of political or military espionage. In this respect, the authorities would like to reiterate that the applicant's detention, which was the subject matter of the judgment at hand, has already ended. Additionally, the last merger of the cases aimed at a comprehensive determination of the legal status of all accuseds within the scope of the Gezi Events.

10. The Turkish authorities would like to point out that, contrary to the claims, the applicant's trial has been ongoing in line with the procedures and law.

11. According to Article 9 of the Constitution, the Republic of Turkey is a State governed by the rule of law, and the judicial power is exercised by independent and impartial courts. Likewise, according to Article 138 of the Constitution, judges are independent in their

duties and render their decisions according to their conscientious convictions in accordance with the Constitution, the legislation and the law.

12. No organ, authority, office or individual may give orders or instructions to courts or judges relating to the implementation of judicial power, send them circulars, or make recommendations or suggestions.

Conclusion

13. The Turkish authorities will maintain submitting further information on the individual and general measures taken or envisaged to be taken in due time. In this respect, the Committee of Ministers will be kept informed on further developments.