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Meeting: 1318<sup>th</sup> meeting (June 2018) (DH)

Item reference: Revised action report (12/04/2018)

Communication from Turkey concerning the case of BURAK HUN v. Turkey (Application No. 17570/04)  
(Appendices in Turkish are available at the Secretariat)

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Communication de la Turquie concernant l'affaire BURAK HUN c. Turquie (requête n° 17570/04) (des annexes en turc sont disponibles auprès du Secrétariat) (**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 two cases concern the violation of the applicants' right to a fair trial on account of their conviction for a crime committed upon active incitement by undercover state agents in 2001 and 2005 (violation of Article 6§1).

2. In Burak Hun the European Court found that the actions of the state agent had gone beyond the mere passive investigation of crime, and that there was no evidence that the applicant was engaged in criminal activity before the intervention of the agent provocateur. The European Court observed that the agent's actions had had the effect of inciting the applicant to commit the offence concerned and that there was no indication that the applicant would have committed it without his intervention (§43-47 of the judgment).

3. Also, in Sepil the Court noted that, in 2005, the police officers performed the operation leading to the applicant's arrest, although there was no decision by a judge or public prosecutor, contrary to Article 139 of the Code of Criminal Procedure (CCP), which regulates the appointment of undercover agents, and without any judicial supervision (§35).

### **II. INDIVIDUAL MEASURES**

4. 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***

5. According to Article 311 § 1(f) of the new Code of Criminal Procedure, the authorities ensured the reopening of the proceedings on the basis of the Court judgment finding a violation within one year from the date on which the Court's judgment becomes final.

6. 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***

7. 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 (including as a result of a retrial conducted, i.e., upon the ECtHR judgment finding a violation), criminal records and archive records concerning the previous conviction shall be completely deleted. The government's obligation with regard to the Court's judgment finding a violation 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 and render a decision on acquittal or conviction.

8. According to Articles 9 and 12/1.c of Law No. 5352, archive records are automatically deleted five years after the date on which the sentence is fully served in respect of petty crimes and except for those which stipulated in Article 76 of the Constitution. But, as far as aggravated sentences, to which Article 53 of the Criminal Code is applied, are concerned, this rule applies differently and for different time limit. Article 53 of the Criminal Code concerns the sanctions imposed on the convicts for the aggravated crimes and consists of bans because of which the convicts cannot enjoy some of their rights, i.e., paternity rights, voting rights etc.

9. Turning to the case at hand, the applicants were sentenced to one year and eight months imprisonment as well as monetary fine and six years and three months' imprisonment along with the said sanctions in 2003 and 2006 respectively. In this event, the applicants, at first, have to file a petition with the competent courts in order to lift their bans in question. After having obtained such decision, the time set out in the Law No. 5352 on Criminal Records with regard to deletion of the archive records will start to count. However, the applicants did not make such a request to trigger the countdown so as to clean their archive records in that regard so far. Even if they do so right now, it would, though, take years the archive records to be automatically deleted. The applicants themselves are responsible for making such a request.

10. The first opportunity for the applicants was to apply for the reopening through which they could have obtained acquittal and deleted all the records accordingly. But, they did not avail themselves of this opportunity as well.

11. The applicants' actual criminal records were removed from the foreground and transferred to the archive. That is to say, under the domestic legislation mentioned above, the applicants have clean criminal records in respect of the impugned judgments. In other words, if they applied for any job or obtaining driving license etc., the impugned judgments would not appear on the document in that the archive records are not indicated on the document and not open to public except for the courts/prosecutorial offices etc.

12. Consequently, the Government has no liability for the failure to request for reopening of the proceedings or lifting the bans and cannot speculate the probable outcome of a re-trial which might have been done.

### **III. GENERAL MEASURES**

13. 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***

14. The new Turkish Code of Criminal Procedure (Law 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 worth mentioning.

15. According to the Turkish Code of Criminal Procedure 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 to investigation has been committed and there is no other means of obtaining evidence.

16. 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.

17. 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.

18. 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.

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

20. The Turkish Code of Criminal Procedure has specified the crimes which an undercover agent might be used as investigator to obtain evidence such as producing 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).

21. 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.

22. 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.

23. 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***

24. 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.

25. 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.

26. 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 rule 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 imaginary export 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. 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.

27. 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).

28. 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 rule 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.

29. 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).

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

31. 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.

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

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

33. 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.

34. The relevant part of it is as follows:

35. “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.”*

36. 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.

37. 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.

38. 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.

39. 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***

40. 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***

41. 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>).

42. 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.

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

#### ***IV. JUST SATISFACTION***

44. 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 EUR 1500 for costs and expenses to the applicant. The Government ensured that the just satisfaction amount awarded was disbursed within the deadline set by the Court.

45. Regarding *Sepil* case, the Court awarded EUR 4000 in respect of non-pecuniary damage as well as EUR 1000 in respect of costs and expenses. The Government ensured that the just satisfaction amounts awarded was disbursed within the deadline set by the Court

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

#### **V. CONCLUSION**

42. 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.

#### **ANNEXES**

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