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Communication from Turkey concerning the case of BALTA AND DEMIR v. Turkey (Application No. 48628/12)

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Communication de la Turquie concernant l'affaire BALTA ET DEMIR c. Turquie (requête n° 48628/12)
(anglais uniquement)

Ankara, March 2018



REVISED ACTION REPORT

Balta and Demir v. Turkey (no. 48628/12)

Judgment of 23 June 2015, final on 23 September 2015

I. CASE DESCRIPTION

1. This case concerns a violation of the applicants' right to a fair trial on account of their conviction on the basis of an anonymous witness statement, whom neither the applicants nor the trial court questioned at any stage of the proceedings (violation of Article 6 § 1 in conjunction with Article 6 § 3 (d))
2. The European Court held that the domestic courts did not implement the existing procedural safeguards provided in Article 58 (3) of the Turkish Criminal Procedure Code whilst hearing the anonymous witness and they failed to provide a justification (§§ 58, 59). The European Court therefore considered that the Turkish authorities failed to counterbalance the obstacles arising to the defence from the lack of a direct confrontation with the witness (§ 61).

II. INDIVIDUAL MEASURES

3. The Government has 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 Proceedings

4. The Turkish authorities would like to highlight that pursuant to the domestic legislation it was open to the applicants to request reopening of the impugned proceedings following the European Court's judgment finding a violation.

5. The applicants' request for reopening of the proceedings was accepted and the impugned criminal proceedings were reopened. The Turkish authorities would like to note that during the course of the trials the identity of the anonymous witness, whose statements were taken into account in the applicant's sentence, was revealed. As a result, the court decided that the reopened proceedings should be suspended in accordance with the Law no. 6352.
6. In this respect, a brief information on the Law no. 6352 would be helpful. In 2012 an exceptional legislation was adopted in respect of crimes concerning freedom of expression and offences calling for a prison sentence of maximum 5 years. This legislation provided that prosecution and proceedings in relation to such crimes shall be suspended for 3 years. On this basis, the domestic court decided to suspend the impugned criminal procedures reopened.
7. During the reopening proceedings, the statement of the anonymous witness which had been taken as basis for the previous decision of the Assize Court wasn't taken as basis in the new decision since the anonymous witness stated in his statement which revealed his identity that he had previously witnessed under pressure. Thus his identity was learned by the defendants and their lawyers. On the other hand, no more anonymous witnesses were included in the case.
8. After the trial, the Assize Court concluded that the actions of the defendants constituted the offense of propaganda for the terrorist organization in spite of the fact that criminal proceedings were initiated against the defendants for the membership of the terrorist organisation. Thus, the Court decided to delay the prosecution of the defendants in accordance with provisional 1/1-b of Law No. 6352 on account of date of the offense charged to the defendants, the method of committing an offense and the basic form of the offense. The decision was subject to objection before another Assize Court in accordance with Article 223/8-2 of the Code of Criminal Procedure. At last, the decision became final when the objection was rejected on 23 May 2017.

II.b. Just Satisfaction

9. The European Court awarded just satisfaction in respect of the non-pecuniary damage sustained by the applicants, and it has been paid within the deadline set by the Court.
10. The authorities consider that the individual measures taken have ended the negative consequences of the violation and have provided full redress to the applicants.

III. GENERAL MEASURES

11. The Turkish authorities have taken a number of measures aimed at preventing similar violations. These measures included, in particular, measures taken in respect of questioning an anonymous witness, the Audio/Visual Information System (SEGBIS), individual application right before the Constitutional Court, development in the case-law of the Court of Cassation, Action Plan on prevention of the ECHR violations, training and awareness-raising activities as well as publication and dissemination of the judgment.

III.a. Measures taken in respect of questioning an anonymous witness

12. As the Court underlined in its judgment, the legislative provisions of the Turkish legal system concerning anonymous witness did not pose a problem. However, defendants could not enjoy the rights set out in the Code of Criminal Procedure and the Code of Witness Protection in criminal proceedings, because of non-application these safeguards by the domestic court (see § 58 of the judgment) (In other words, the reason of the violation stems from domestic court's practice).
13. In practice, it is asked from Witness Protection Bureaus whether there is a clear danger or any intelligence in this regard, related to the anonymous witnesses or their close neighbourhood when the anonymous witnesses reveal their identities during the trials. In case of being informed about the necessity for the protection of the confidentiality of the anonymous witnesses' identities, their statements are taken in the hearing room where defendants and their lawyers are present on the hearing day determined by the court, via SEGBIS (The Audio/Visual Information System) by changing their voice and images in the court where they are present in pursuant of the Articles 5 and 6 of the Witness Protection Act. The defendants and their lawyers are entitled to ask questions to the anonymous witnesses in this regard.

III.b. The Audio/Visual Information System (SEGBIS)

14. Taking the statement of any parties as well as witnesses by a public prosecutor, judge or court during due process, SEGBIS introduced the National Judicial Network Project (UYAP) has been entirely using among Courthouses. The "Regulation on the Usage of the Audio/Visual Information System in Criminal Procedure" aiming at establishing the conditions of recording and storing the statements taken came into force on the date of 20 September 2011.

15. The SEGBIS provides the opportunity to have hearing statements, interrogating witnesses and recording them of whom are outside the local/regional jurisdiction of the court or the public prosecutor's office.
16. Hearing of the anonymous witness through the SEGBIS instead of rogatory procedure as in the instant case will ensure to ask questions to the parties. The aim of which is to prevent violations occurred as in the instant case, through activating the SEGBIS system in all courts and penitentiary institutions. At the present time, this system is effectively used in the courts for taking statements, including those of anonymous witnesses.
In order to effectively use the SEGBIS, 2870 SEGBIS devices at courts and a total of 520 SEGBIS devices at 220 penitentiary institutions have currently been installed.

III.c. Individual Application Right before the Constitutional Court

17. 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 applicants' 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 applicants' 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.
18. In this regard, it is apparent that in the case of *Balta and Demir*, the applicants' conviction for membership of an illegal organisation is based on the statements by an anonymous witness whom the applicants were unable to question at any stage of the proceedings.
19. Similarly, in one of the individual applications before the Constitutional Court (*Baran Karadağ*, app. no. 2014/12906, 7 May 2015), the only evidence regarding the offense with which the applicant was charged was the statement of anonymous witness and that the applicant was unable to ask questions to this anonymous witness; given the fact that no ground for why the witness's identity was hidden was showed, that the statement of

the anonymous witness played a determining role in the judgment and that there were guarantees in favour of the accused (applicant), the Constitutional Court held that the applicant's right to a fair trial had been violated for the applicant's not having been able to ask questions to the witness against him, as a fair balance was not struck between the interests of the witness and the accused person's right to a fair trial.

20. Additionally, the Constitutional Court underlined in another decision that the domestic court, which rendered decision by taking into account the statements of anonymous witness, had not taken measures to compensate for the disadvantage of the applicant and to allow the applicant to use his rights to "defense" and to "question the witness" "truly and efficiently" and held that the applicant's right to a fair trial had been violated (*Sebahat Tuncel (2)*, app.no. 2014/1440, 26 December 2015). Besides the acts which had not been in the indictment but had emerged subsequently, and had been constantly changing, the related objections of the applicant should have been investigated in order to show that the measures regarding real and effective defense were taken in this regard.
21. As is seen from those judgments, the Constitutional Court's case-law is compatible with the ECtHR's judgments and the Convention regarding how to take into account the anonymous witnesses' statements and the necessity of truly and efficiently questioning them especially when the said acts are not in the indictment but given subsequently in the statement of the anonymous witnesses.

III.d. Case-Law of the Court of Cassation

22. The Court of Cassation also rendered decisions compatible with the ECtHR's judgments and the Convention as seen below:
23. In this regard, the 10th Criminal Chamber of the Court of Cassation underlined in its decision that the statements of informants, heard as " anonymous witness" at the phase of investigation by the law-enforcement officers, cannot be accepted as basis for the judgment, in cases where they were not heard duly at the prosecution stage (The decision with docket no. 2007/25667 and decision no. 2008/4879, date of decision: 27 March 2008). Thus, it was decided that the legal status of the accused has to be determined according to the other evidence available in the case-file.
24. The 1st Criminal Chamber of the Court of Cassation quashed the conviction decision on account of the fact that not mentioning the sworn statements of the witnesses heard before the Court in the reasoned decision and leaving arguable whether the statements of these witnesses have been considered or not, are unlawful, as well as, taking the

statements of the witnesses for whom protection measure decision was taken, as the only basis for the judgment is unlawful (The decision with docket no. 2009/4015 and decision no. 2010/1277, date of decision: 3 March 2010).

III.e. Action Plan on Prevention of the ECHR Violations

25. The Action Plan which was set out after very long and comprehensive studies was prepared and submitted to the Board of Ministers for its adoption as an Action Plan and a reference document for all the public institutions with a view to prevent human rights violations. The Action Plan consists of 14 main aims, and 46 goals have been set in order to materialize the aims in question. Short, medium and long terms have been envisaged for the activities that shall be carried out with a view to reaching these goals. In this context, the Action Plan also includes goals and activities under the aim of preventing errors in the practice as in this judgment.

III.f. Training and awareness-raising activities

26. Project on Improving the Efficiency of the Turkish Criminal Justice System for which the Ministry of Justice was the responsible authority was carried out in 2012-2014. The aim of the Project was to improve the efficiency of the Turkish Criminal Justice System in terms of European standards and to enhance the application of human rights standards in the Turkish Criminal System. In the course of the Project, training modules were created, and a pool of trainers was formed by virtue of the training-of-trainers seminars that were conducted. Within the scope of the Project, 492 judge and public prosecutor candidates and 100 judges and public prosecutors were provided with vocational training seminars. On 25-26 November 2014 an international symposium was held within the scope of the Project.

III.g. Publication and dissemination measures

27. The Turkish authorities ensured that the European Court's judgment was translated in Turkish and published on its official website which has been made available to the public and legal professionals alike (<http://hudoc.echr.coe.int/tur?i=001-157637>).
28. Furthermore 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 this case as well as to other relevant courts such as the Constitutional Court and the Court of Cassation.

29. The Government therefore considers that the above-mentioned measures are capable of preventing similar violations and no other measures are required.

IV. CONCLUSION

30. In light of what the Government has submitted in the individual and general measures about how the 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 all these elements into account, the Committee of Ministers is respectfully invited to close their examination thereof.