



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND AND WALES

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REPORT ON BAR HUMAN RIGHTS COMMITTEE HEARING OBSERVATION:

TURKEY

**A report on a pre-trial hearing in the case of 46 Turkish lawyers, Istanbul Heavy Penal Court,
Koaeli prison, Silivri**

3rd January 2013

Acknowledgments

The hearing observation was undertaken by Melanie Gingell, Took's Chambers, on behalf of the Bar Human Rights Committee of England and Wales (BHRC). The report was written by Melanie Gingell and edited by Jodie Blackstock, Barrister at JUSTICE, Professor Bill Bowring, Barrister, Birkbeck College (University of London), of the executive committee of the BHRC and Illari Aragón, project coordinator. Responsibility for the content of this report, and the views expressed within, lies solely with the Bar Human Rights Committee.

Melanie Gingell was assisted in her visit by the members of the Istanbul Bar Association, who facilitated her introduction to a variety of people including the presiding judge and to defendants in the case, provided her with background information as to the outcome of the previous hearing, and ensured her access to the court to observe the hearing on 3rd January, as well as translation of the main points of that hearing. The hearing was conducted in Turkish.

This report follows Ms Gingell's report of the previous hearing on 6th November 2012, conducted at the invitation of the Kurdish solidarity campaign, Peace in Kurdistan.¹

¹ Available on the website of Peace in Kurdistan,
<http://peaceinkurdistancampaign.wordpress.com/2012/11/12/kck-lawyers-trial-report-by-melanie-gingell/>

About the Bar Human Rights Committee of England and Wales

The Bar Human Rights Committee of England and Wales is the international human rights arm of the Bar of England and Wales. It is an independent body concerned with protecting the rights of advocates, judges and human rights defenders around the world. The Committee is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial.

The remit of BHRC extends to all countries of the world, apart from its own jurisdiction of England & Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer, critic and advisor, with internationally accepted rule of law principles at the heart of its agenda.

Summary

This hearing observation concerned the prosecution of 46 Turkish and Kurdish lawyers. There have been three one-day hearings to date: July 2012, 6th November 2012 and most recently on 3rd January 2013. The hearing lasted for one day and consisted predominantly of detailed submissions by the defense representatives in relation to the exclusion of parts of the prosecution evidence and to bail. The period of pre-trial detention for those remanded in custody now amounts to 14 months.

The outcome was that one further defendant was released on bail leaving thirty-seven remaining in custody. No other applications were acceded to. The trial was adjourned to 28th March 2013.

Historical and Political Context

Approximately 18% of the population of Turkey of nearly 80 million people are ethnic Kurds.² The Kurdish minority is a linguistically distinct group, which is native to an area crossing state borders encompassing parts of Iran, Iraq, Syria and Turkey.

The Turkish state followed a policy of forced assimilation of the Kurds during the 1920s and 1930s, the first decades of the republic, which was met with Kurdish resistance. Historically this resistance has included both peaceful political activity and an armed secessionist movement.

In the 1980s and 1990s the Turkish government engaged in a military conflict with the PKK³, which is a terrorist organisation with the stated aim of establishing an independent Kurdish state. This conflict resulted in 40,000 deaths many of them of Turkish and Kurdish civilians. From 1984 until 1999, the Turkish government pursued a policy of forced evacuation of Kurdish villages in the south east of Turkey resulting in depopulation and impoverishment of the region. A large number of Kurdish applicants complained of gross violations of human rights to the European Court of Human Rights. Many judgments were made against Turkey with substantial damages being awarded to victims of torture, arbitrary killing, unlawful detention and destruction of property.⁴

In 1999, Abdullah Öcalan, the leader of the PKK was captured. He was tried and sentenced to death, which was subsequently reduced to life imprisonment when Turkey abolished the death penalty in peacetime.⁵ He remains in custody in isolation within a detention centre on İmralı Island. Since then, both the Turkish Government and PKK and affiliated organisations have withdrawn from armed conflict and have sought to move towards a political solution.

The main Kurdish political party in Turkey is the BDP (the Peace and Democracy Party) which seeks change through legal political activity. It won 36 seats in parliament in the last elections in June 2011.

In 2009 a new policy known as the 'democratic opening' resulted in peace talks in Oslo between the

² CIA World Factbook at <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>

³ Parti Karkerani Kurdistan (Kurdish Workers Party)

⁴ See for example, *Dogan and others v Turkey* [2004] ECHR 296 and *Içyer v Turkey*, app. no. 18888/02, decision 12th January 2006 (inadmissible due to establishment of compensation commission)

⁵ The European Court of Human Rights found the trial had taken place in breach of the right to a fair trial under article 6 ECHR, amongst other violations, see *Ocalan v Turkey* (GC) (2005) 41 EHRR 45

government and the PKK. It was after these talks broke down that there was an upturn in the military conflict and the present wide scale pattern of arrests of Kurdish activists began.

These arrests are directed against Kurdish activists whom the government claims are members of the KCK⁶, an organisation set up by Mr Öcalan to further his aspirations of democratic confederalism for Kurdistan, which has been designated as illegal by the Turkish Government. The defendants deny membership of this organisation and many are members of the mainstream BDP. The arrests have been targeted at Kurdish politicians, locally elected mayors and members of municipal councils, journalists, human rights defenders, trade unionists and academics as well as the lawyers involved in the present case. For example the Member of Parliament (MP) for Van, Aysel Tugluk, has been sentenced to 14 and a half years in prison on charges of 'spreading propaganda for a terrorist organisation' and 'committing crime on behalf of an illegal organisation despite not being a member of it' following speeches she made.⁷ The elected MP for Istanbul, Sebahat Tuncel, has also been sentenced to a term of imprisonment. These MPs have parliamentary immunity until such time as they are no longer MPs, at which point their sentences will be activated. Ms Tuncel MP has been observing the hearings in the present trial.

According to Human Rights Watch (HRW) hundreds of defendants remain in pre-trial detention and thousands are on trial for terrorism related charges. HRW concludes:

*'While the last decade has demonstrated momentum in Turkey for increasingly open debate on even controversial issues, Turkey's laws, prosecutors, judges, and politicians still lag behind. Turkey's overbroad definition of terrorism still allows for arbitrary imposition of the harshest terrorism charges against individuals about whom there is little evidence of logistical or material support for terrorism or of involvement in plotting violent activities.'*⁸

The bid to become a member of the European Union (EU) has been a useful mechanism for exerting pressure upon Turkey for improvements in human rights standards and negotiations toward EU accession continue⁹. However, Turkey suspended its talks with the EU Presidency in the second half of 2012 whilst this was held by Cyprus¹⁰ and it now appears that Turkey is turning its face more towards its Arab neighbours.¹¹ The EU continues to monitor progress on an annual basis. In relation to the criminal justice system, the EU's Turkey Progress Report refers to several areas of concern which are relevant to the present trial:

*'In practice, concerns have been expressed as regards the criminal justice system and, in particular, the Serious Crimes Courts. These focused on the defence's limited access to the prosecution file, on decisions to arrest or continue to detain suspects, and on the length of pre-trial detention. Alternatives to pre-trial detention are not sufficiently applied. Turkey lacks an effective domestic remedy to ensure that applicants are heard and to offer them the opportunity to challenge the lawfulness of their pre-trial detention with reasonable prospects of success. There have been concerns over the quality of the indictments and of the indictment process. Leaks of information, evidence and statements continued to give rise to concerns. In some cases there have been concerns that cross-examination in criminal trials is not carried out properly. Judges and prosecutors have been given no training in cross-examination.'*¹²

Overall, there is a perception that Turkey's approach to minorities is restrictive and does not reach internationally accepted standards. The state has maintained its reservations to the UN Covenant on Civil and Political Rights (ICCPR) in relation to minorities and the UN International Covenant on

⁶ Koma Civaken Kurdistan (Union of Communities in Kurdistan)

⁷ See European Commission, *Turkey 2012 Progress Report*, SWD(2012) 336 final (Brussels, 10th October 2012) p. 34. Available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf

⁸ Human Rights Watch, *World Report Chapter: Turkey*. Available at <http://www.hrw.org/world-report-2012/world-report-2012-turkey>

⁹ See note 6 above.

¹⁰ *Ibid*, p 5

¹¹ P. Inman, *Spurned Turkey looks east after EU courtship falters*, available at

<http://www.guardian.co.uk/business/economics-blog/2012/dec/16/spurned-turkey-european-union-courtship>

¹² Note 6 above, page 71.

Economic, Social and Cultural Rights (ICESCR) regarding the right to education.¹³ Turkey has not signed or ratified the Council of Europe Framework Convention for the Protection of National Minorities¹⁴ or its Charter for Regional and Minority Languages.¹⁵

The Hearing

Charges

The lawyers are charged with terrorist offences arising out of their work as legal representatives of Abdullah Öcalan, the leader of the PKK. The lawyers are charged with offences under sections 314/1 and 314/2 of the Turkish Penal Code:

'314 (1) Persons who found or run a military (armed) organisation in order to commit the offences in parts 4 and 5 of this chapter shall receive sentences of 10 to 15 years in prison.

(2) Persons who are members of the organisations described in subsection 1 shall receive sentences of 5 to 10 years in prison.'

Offences under parts 4 and 5 are offences against national security, which include becoming members of terrorist groups.

The indictment contains not only the charges but also the evidence upon which the prosecution relies. It shows that the case against each defendant is essentially the same. They are accused of communicating 'information and direction' from Mr Öcalan to members of illegal organisations. The information the defendants had gathered from Mr Öcalan during legal conferences with him is said to have enabled them to progress the 'strategy and management' of such organisations.

The evidence consists of information gathered through telephone intercepts, searches of office and personal accommodation, and analysis of media interviews and publications by the defendants. Their computer hard drives, amongst other items, were confiscated and examined as were their physical case files.

Arrest

The lawyers were arrested in November 2011 and we hold serious concerns, fuelled by the circumstances of their arrests, as to whether they will receive a fair trial. The arrests were part of a far broader operation against alleged members of the KCK. The defendants deny being members of this group.

The main concerns are of prolonged pre-trial detention, lack of equality of arms, lack of access in the early stages to the prosecution evidence, the legality of the methods of obtaining prosecution evidence and the insufficient independence and impartiality of the tribunal.

3rd January hearing

The hearing took place in the Istanbul Heavy Penal Court, a court specially constituted to hear cases under terrorist legislation. The court was sitting in a room within Koaeli prison at Silivri approximately an hour and a half's drive from the centre of Istanbul. A large courtroom had been allocated enabling all the defendants, legal teams, relatives and international observers¹⁶ to be accommodated. There were again high levels of security with riot police in attendance. The entries to and from the courthouse were filmed from the roof of another prison building. The hearing was presided over by

¹³ See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en

¹⁴ See: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=157&CL=ENG>

¹⁵ See: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=148&CM=8&DF=&CL=ENG>

¹⁶ These included representatives from France, Germany and Greece, as well as the Human Rights Committee of the Law Society of England and Wales.

three judges, a president and two others, who had sat in the previous hearing. The prosecutor also sat on the bench with the judges.

Approximately one hundred defence lawyers were instructed to jointly represent the defendants. The first application they made was for an adjournment to allow time for new legislation allowing Kurdish to be spoken in court to come into effect. That, we were told, was due to happen in the next few weeks. This application was rejected.

The defendants were given the opportunity to address the judge and then required to answer to the sections of the indictment and to answer questions. All except one defendant requested the services of an interpreter to allow them to conduct proceedings in Kurdish. These requests, as at the previous hearing, were rejected. We were informed that there is inconsistency among judges as to whether to allow Kurdish to be spoken in court. This tribunal has consistently denied its use. Whilst the defendants speak Turkish, their request to speak in Kurdish was to enable the recognition and communication of their native language.

Submissions

One of the first defendants said that he had never seen Mr Öcalan personally. The accusation against him was that he had received orders through one of his clients who had talked to Mr Öcalan. The evidence against him had been obtained from the legally privileged notes of a client conference. This defendant was on bail.

There followed a lengthy submission from a defence lawyer concerning the detention conditions of Mr Öcalan, and the requirements for attending conferences with him for legal purposes. The lawyer submitted that the procedure to see Mr Öcalan is highly regulated; All requests to see him are processed through one law office, the Asrin office. Impediments are often placed in the way of those seeking to see him. The two-hour boat trip, for example, is often impossible due to mechanical problems. It was interesting that this submission was made in the context of the prosecution of these lawyers; it demonstrates that the prosecutions are taking place in a politically charged environment and with recognition that international observers were present who may highlight the continuing isolation in which Mr Öcalan is being incarcerated.

There was a substantial submission, which had been prepared with the help of up to 40 lawyers, addressing the evidence in detail and requesting that specific areas be excluded. This submission addressed evidence contained in 144 files of 700 pages each. The applications to exclude evidence made reference to specific page numbers in the files. The main points of the submission were as follows:

- It was accepted that the relevant authority had been obtained for certain instances of intercepts but that the authorised areas had been wildly exceeded.
- Some highly personal information had been disclosed.
- The necessary reasons for intercepts had not been provided.
- Some evidence had not been seen by the defence.
- The whereabouts of defendants had been ascertained by the use of mobile phone tracking. This had been done without the necessary authority.
- Any interference with Article 8 of the European Convention of Human Rights should have been authorized by a judicial decision taking into account principles of proportionality. This had not been done or the authority had been exceeded.

There were twenty-five further submissions throughout the afternoon including one by the President of the Diyarbakir Bar Association, Mr Tahir Elci, who made submissions emphasizing the human rights and constitutional aspects of the case. He talked about the rights of lawyers to carry out their professional functions and to not be identified with their clients' causes as a result of doing their job. He submitted that the prosecution was an attack on the right to have a legal defence. He asserted that the defence lawyers in the courtroom did not have equal status to the prosecutor.

Mr Elci and at least one other lawyer in the case had themselves been the subjects of a case against Turkey in the European Court of Human Rights in 2004. It was found that Mr Elci had been tortured,

contrary to article 3 ECHR, and Ms Sahin, another lawyer, had suffered other violations of the Convention, because of their work as lawyers representing clients who were allegedly members of the PKK.¹⁷

The President of the Izmir Bar Association made similar submissions. He made reference to clear breaches of the UN Basic Principles on the Role of Lawyers.¹⁸

Decision

Following the defence submissions the presiding judge asked the prosecutor for his views. He responded very briefly that the submissions should be rejected. After a short adjournment the judges returned and rejected all the evidence based submissions. One further defendant was granted bail but no reasons were given for this decision. It is noteworthy, however, that this defendant was the only one to address the judge in Turkish as opposed to Kurdish.

Conclusions

The highly political nature of the case was apparent in the hearing we observed. The large number of arrests in the political context set out above, the broad indictment encompassing all defendants in a blanket charge rather than charges against them individually, and the failure to give reasoned decisions lead us to have serious concerns that the prosecutions are an attempt to thwart the Kurdish political campaign for recognition of their minority rights rather than being motivated by genuine suspicion that the lawyers are engaged in terrorist activities.

This case is taking place in a special authority court for terrorist offences. Human rights monitoring bodies including the UN Committee Against Torture have highlighted concerns about the lack of sufficient procedural safeguards in these courts.¹⁹ The broad definitions of terrorism related conduct and the wide application of anti-terrorist legislation in this case and many others is of particular concern.

A Judicial Reform Strategy 2009-2013 and Plan of Action, with subsequent constitutional amendments in 2010 were aimed at improving the efficiency, independence and impartiality of the judicial system in Turkey. It appears, however, that from the cursory attention given to serious applications for bail and exclusion of illegally obtained evidence in this hearing that many problems in this respect remain in relation to the special court at least.

The UN Special Rapporteur on the Independence of the Judiciary and Lawyers notes in her report on Turkey of October 2011 that the Minister of Justice still exerts significant influence on judicial activities. She received information that judges and prosecutors who were working on terrorist cases who 'expressed concern regarding the respect of fair trial rights and procedural guarantees were transferred and replaced with those alleged to be more complacent about the special powers exercised by these courts.²⁰ Despite this, we understood from a lawyer with the Istanbul Law Association that permission to prosecute lawyers is required from the Minister of Justice pursuant to the Turkish Lawyers Act, but this had not been granted in these cases.

It was clear from the set up of the courtroom and from the interaction between the prosecutor and the judges that there is not equality of arms between the defence and the prosecution. The prosecutor entered and left court through the same door as the judges and sat at their level. Since the defence made lengthy submissions that were answered by the prosecutor extremely perfunctorily it appeared that the prosecutor already knew how the court would decide. This leads us to doubt the independence and impartiality of the tribunal.

¹⁷ *Elci and others v Turkey*, app. no. 23143/93, judgment 13th November 2003 (unreported), judgment available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61442>

¹⁸ Adopted at the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, (1990), available at <http://www2.ohchr.org/english/law/lawyers.htm>

¹⁹ Concluding observations of the Committee against Torture on the third periodic report of Turkey (CAT/C/TUR/CO/3), para. 11

²⁰ Gabriela Knaul, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mission to Turkey*, 10th -14th October 2011, para. 52, United Nations, Human Rights Council Twentieth Session.

Many aspects of this hearing and previous hearings indicate that there have been violations of international standards and will continue to be violations if the trial goes ahead under the same conditions. In particular we are concerned that:

- The right to trial within a reasonable time pursuant to article 6 ECHR or to release pending trial pursuant to article 5 ECHR will be breached if further delay occurs and the failure to properly consider bail applications may have violated the right to release pending trial;
- The right to an independent and impartial tribunal pursuant to Article 6 ECHR, may be violated at trial;
- The use of legally privileged material, and evidence obtained through surveillance, without a properly reasoned decision that it is necessary and proportionate will be in breach of Article 8 ECHR, the right to respect for private and family life, home and correspondence.

The prosecution appears to be in breach of the UN Basic Principles on the Role of Lawyers. In particular the following principles provide:

16. Governments shall ensure that lawyers:

- (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;*
- (b) are able to travel and to consult with their clients freely both within their own country and abroad; and*
- (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.*

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

It also appears that there are significant violations of domestic law as to:

- The charging of lawyers without proper authority pursuant to the Turkish Lawyers Act 1928.
- The failure to obtain authority for all interferences with private communications and the exceeding of authority in relation to those orders that were obtained, as required by section 135 of the Law on Criminal Trials, concerning the right to freedom of communication, and also enshrined in Article 22 of the Turkish Constitution.
- The failure to give reasoned judgments in relation to the decisions not to grant bail contrary to Article 101(2) of the Turkish Criminal Procedure Code.

In conclusion, the BHRC voices its concern as to the significant irregularities demonstrated at this hearing and the likelihood that the trial will be conducted under unfair conditions. Our observation of this hearing reflects the finding of the UN Special Rapporteur on the Independence of the Judiciary that Turkey has not created an independent and impartial judiciary.

Furthermore, the BHRC considers it essential to the fairness of proceedings that lawyers should be able to exercise their professional duties without intimidation, harassment and improper interference. The continuing and widespread arrest of lawyers in Turkey is having a detrimental effect upon the right to the legal defence of those charged with offences related to the political struggle on the Kurdish

issue.²¹

The BHRC shares the views expressed by international human rights organisations that further reform of the judiciary and the criminal justice system is required in Turkey in order that the rule of law is respected, and that international fair trial standards are protected for all groups in society.²² The BHRC calls for the application of procedural safeguards, equality of arms and independent decision making in the trial of these lawyers.

A further hearing concerning the prosecution of these 46 lawyers will continue on 28th March 2013. It is unclear when the actual trial will be held.

²¹ A further fifteen lawyers were arrested on 16th January, see BHRC press release available at http://www.barhumanrights.org.uk/sites/default/files/documents/news/bhrc_statement_on_the_arrest_of_turkish_lawyers_0.pdf

²² See notes 5, 17 and 18 above. See also Cape et al, *Effective Criminal Defence in Europe* (Intersentia, 2010). The executive summary and recommendations are available here http://www.justice.org.uk/data/files/resources/174/Effective_Criminal_Defence_in_Europe_exec_summary_and_recommendations.pdf, see page 12.