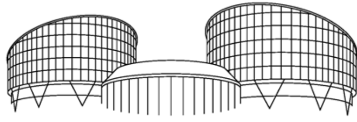

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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ECHR 267 (2023)
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Türkiye must address systemic problem of convictions for terrorism offences based decisively on accused's use of the ByLock messaging application

In today's **Grand Chamber** judgment[1] in the case of Yüksel Yalçınkaya v. Türkiye (application no. 15669/20) the European Court of Human Rights held:

by 11 votes to 6, that there had been **a violation of Article 7 (no punishment without law)** of the European Convention on Human Rights,

by 16 votes to 1, that there had been **a violation of Article 6 § 1 (right to a fair trial)** of the European Convention, and

unanimously, that that there had been **a violation of Article 11 (freedom of assembly and association)** of the Convention.

The case concerned the conviction of a former teacher for membership of an armed terrorist organisation, namely the FETÖ/PDY, formerly known as the "Gülen movement" and considered by the Turkish authorities to be behind the attempted *coup d'état* of 15 July 2016.

Mr Yalçınkaya's conviction had been based decisively on his use of the encrypted messaging application called "ByLock", which the domestic courts held had been designed for the exclusive use of FETÖ/PDY members under the guise of a global application.

Indeed, anyone who had used Bylock could, in principle, be convicted on that basis alone of membership of an armed terrorist organisation. The Court held that such a uniform and global approach by the Turkish judiciary *vis-à-vis* the ByLock evidence departed from the requirements laid down in national law in respect of the offence in question and was contrary to the object and purpose of Article 7 which is to provide effective safeguards against arbitrary prosecution, conviction and punishment.

There had also been procedural shortcomings in the criminal proceedings against Mr Yalçınkaya, notably concerning his access to the ByLock evidence which concerned him specifically and his ability to effectively challenge it, in breach of his right to a fair trial under Article 6.

There are currently approximately 8,500 applications on the Court's docket involving similar complaints under Articles 7 and/or 6 of the Convention and, given that the authorities had identified around 100,000 ByLock users, many more might potentially be lodged. The problems which had led to findings of violations were systemic in nature. The Court held, under **Article 46 (binding force and implementation of judgments)**, that Türkiye had to take general measures as appropriate to address those systemic problems, notably with regard to the Turkish judiciary's approach to Bylock evidence.

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

The applicant, Yüksel Yalçınkaya, is a Turkish national who was born in 1966 and lives in Kayseri (Türkiye).

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In 2016 Mr Yalçınkaya, then a teacher, was arrested on suspicion of being a member of an organisation described by the Turkish authorities as the "Fetullahist Terror Organisation / Parallel State Structure" (*Fetullahçı Terör Örgütü / Paralel Devlet Yapılanması* – "FETÖ/PDY"). Following his placement in pre-trial detention, a bill of indictment was lodged in 2017, which cited, among other things, use of the ByLock telephone application, suspicious banking activity, membership of a trade union and an association that supposedly had terrorist links, and mentioned an anonymous informant.

The case went to trial, with Mr Yalçınkaya being found guilty in 2017 and sentenced to six years and three months' imprisonment. Subsequently, the Ankara Regional Court of Appeal and the Court of Cassation upheld Mr Yalçınkaya's conviction. Ultimately, in 2019, the Constitutional Court rejected as inadmissible an application lodged by him in the case.

The applicant's alleged use of ByLock constituted decisive evidence for his conviction, based on the finding that the encrypted messaging system had been exclusively used by FETÖ/PDY, under the guise of a global application.

Corroborating evidence was his use of an account at Bank Asya, and his membership of the trade union *Aktif Eğitim-Sen* and the Kayseri Voluntary Educators Association, that were considered to be affiliated with the FETÖ/PDY.

The events in question took place against the background of the attempted *coup d'état* of 15 July 2016 (see *Ahmet Hüsrev Altan v. Turkey* (no. 13252/17) and *Akgün v. Turkey* (no. 19699/18) for more details).

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 17 March 2020.

Relying on Article 6 § 1 (right to a fair trial) of the European Convention of Human Rights, the applicant alleged in particular irregularities in the collection and admission as evidence of the ByLock data, as well as difficulties in challenging them and the inadequacy of the reasoning in the courts' decisions concerning that evidence.

Relying on Articles 7 (no punishment without law) and 11 (freedom of assembly and association), the applicant also complained that he had been convicted on the basis of acts that had not constituted a crime, owing to an extensive and arbitrary interpretation of the relevant laws; and that membership of a trade union and an association had been used as evidence for his conviction.

On 19 February 2021 the Turkish Government were given notice[2] of the application, with questions from the Court. A statement of facts submitted to the Government is available only in English on the Court's website.

The organisation International Commission of Jurists was granted leave to intervene in the written proceedings as a third party.

On 3 May 2022 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

A hearing took place on 18 January 2023 in the Human Rights Building, Strasbourg.

[2] In accordance with Rule 54§ 2 b) of the Rules of Court, "the Court may decide to give notice of the application or part of the application to the respondent Contracting Party and invite that Party to submit written observations thereon and, upon receipt thereof, invite the applicant to submit observations in reply". Further information about the procedure after a case is notified to a Government can be found in the Rules of Court.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Georges **Ravarani** (Luxembourg),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pere **Pastor Vilanova** (Andorra),
Arnfinn **Bårdsen** (Norway),
Carlo **Ranzoni** (Liechtenstein),
Georgios A. **Serghides** (Cyprus),
Lado **Chanturia** (Georgia),
Ivana **Jelić** (Montenegro),
Gilberto **Felici** (San Marino),
Saadet **Yüksel** (Türkiye),
Lorraine **Schembri Orland** (Malta),
Mattias **Guyomar** (France),
Frédéric **Krenc** (Belgium),
Diana **Sârcu** (the Republic of Moldova),
Kateřina **Šimáčková** (the Czech Republic),
Davor **Derenčinović** (Croatia),

and also Abel **Campos**, *Deputy Registrar.*

Decision of the Court

The Government argued that the measures taken after the attempted military coup, notably numerous legislative decrees, had been justified by the state of emergency. Türkiye had not breached any of the rights under the European Convention as it had exercised its right to derogate under Article 15 (derogation in time of emergency).

The Court recognised the urgency and severity of the situation that the Turkish authorities and courts had had to grapple with in the aftermath of the coup attempt. However, since Article 15 expressly excludes Article 7 from derogation, it was only in relation to the other articles relied on by the applicant that the significance of the derogation was assessed, as explained below.

Article 7 (no punishment without law)

The Court reiterated that Article 7 embodied the principles that only the law could define a crime and prescribe a penalty and that criminal law should not be extensively construed to the detriment of an accused. It followed that an offence had to be clearly defined in law and, in principle, an element of personal liability had to be detected in the conduct of the person who had physically committed the offence.

The Court noted that the applicant's conviction of membership of an armed terrorist organisation had been based on Article 314 § 2 of the Turkish Criminal Code, read in conjunction with the Prevention of Terrorism Act and the relevant case-law of the Court of Cassation. That legal framework was, in principle, clear enough for the applicant to know, if need be with appropriate legal advice, what acts and omissions would make him criminally liable.

The definition of the crime of being a member of an armed terrorist organisation under that legal framework required specific knowledge and intent. In particular, it had to be proven that there was an "organic link" with the organisation "based on the continuity, diversity and intensity of an individual's activities" and that "a person ... must know that the organisation is one that commits crimes [or] aims to commit crimes" and must "possess a specific intent for the realisation of that purpose". Moreover, conviction for membership of an armed terrorist organisation would only

follow where it was demonstrated that the accused had "acted knowingly and willingly within the organisation's hierarchical structure and embraced its objectives".

The Court went on to emphasise that clearly setting out an offence in national law was not sufficient. National courts also had to comply with the law and not circumvent it in its interpretation and application to the specific facts of a case. The Turkish courts had, however, simply equated the use of ByLock with knowingly and willingly being a member of an armed terrorist organisation, irrespective of the content of the messages or the identity of the persons with whom the exchanges had been made. Nor had the courts duly established that all the requirements of the offence (including the necessary intent) had been fulfilled.

Such an expansive interpretation of the law had created an almost automatic presumption of guilt based on ByLock use alone, making it nearly impossible for the applicant to exonerate himself from the accusations against him. It was akin to treating the applicant's offence as one of strict liability, and clearly departed from the requirements laid down in domestic law. The scope of his offence had therefore been extended to his detriment in a manner which he could not have foreseen, contrary to the object and purpose of Article 7 which is to provide effective safeguards against arbitrary prosecution, conviction and punishment.

Article 6 (right to a fair trial)

The Court noted that national courts could not use evidence, whether electronic or not, in a manner that undermined the basic tenets of a fair trial. While it might be important in the fight against terrorism to use electronic evidence, the proceedings as a whole, including the way in which the evidence had been obtained and presented, had to be fair. In particular, the applicant had to be given the opportunity to challenge the evidence and to oppose its use in proceedings that complied with the guarantees of Article 6 § 1 of the Convention.

However, in the Court's view the Turkish courts had failed to put in place appropriate safeguards in the applicant's case *vis-à-vis* the key ByLock evidence at issue.

In particular, the courts had given no explanation why the raw ByLock data that had been collected by the intelligence services, particularly to the extent that they concerned the applicant, had been kept from him. Nor had the applicant been given the opportunity to comment on the decrypted ByLock material concerning him, which could have enabled him to challenge the validity of the inferences drawn from the use of that application.

Furthermore, the courts had not entertained the applicant's request that the raw data be submitted to an independent examination for verification of its contents and integrity.

A number of arguments raised by the applicant pointing to concerns over the reliability of the ByLock evidence – such as the inconsistency between the different ByLock user lists issued by the intelligence services, as well as between the number of users identified and eventually prosecuted and the number of downloads – had similarly been left unanswered.

Those shortcomings had been compounded by the deficiencies in the courts' reasoning as regards the ByLock evidence. In particular, the applicant had argued that ByLock had been downloadable from publicly available application stores or sites until early 2016 – that is, for approximately two years – without any control mechanism. That argument called for further explanation by the courts, and in particular as to how it had been ascertained that ByLock was not, and could not have been, used by anyone who was not a "member" of the FETÖ/PDY within the meaning of Article 314 § 2 of the Turkish Criminal Code.

Overall the courts had failed to put in place enough safeguards to ensure that the applicant had had a genuine opportunity to challenge the evidence against him effectively, to address the salient issues lying at the core of the case and to provide reasons justifying their decisions.

Such shortcomings had been incompatible with the very essence of the applicant's procedural rights under Article 6 § 1, undermining the confidence that courts in a democratic society had to inspire in the public. The criminal proceedings against the applicant had therefore fallen short of the requirements of a fair trial, in breach of Article 6 § 1 of the Convention.

Lastly, none of the courts, including those involved in the applicant's case, had examined the fair trial issues relating to the ByLock evidence from the standpoint of Article 15 of the Convention or Article 15 of the Turkish Constitution, which similarly regulates derogations in times of emergency. Nor had the Government provided any detailed reasons as to whether those fair trial issues had originated in the special measures taken during the state of emergency and, if so, why they had been necessary or whether they had been a genuine and proportionate response to the emergency situation.

The limitations on the applicant's fair trial rights could not therefore be treated as having been strictly required by the exigencies of the situation. A finding to the contrary in such circumstances would negate the safeguards provided by Article 6 § 1 of the Convention, which always had to be guided primarily by the rule of law. A valid derogation under Article 15 did not give *carte blanche* to the authorities to engage in conduct that could lead to arbitrary consequences for individuals.

Article 11 (freedom of assembly and association)

The Court considered that the judicial authorities' relying, in the bill of indictment and in the judgments, on the applicant's membership of a trade union and association, even if only as a source of corroboration, had been sufficient to constitute an interference with his rights under Article 11 of the Convention.

Furthermore, the scope of Article 314 of the Criminal Code had been extended in a manner which could not have been foreseen to include the applicant's membership of a trade union and an association as indications of criminal conduct, even though both had been operating lawfully before the attempted *coup d'état*.

Indeed, the courts had not explained what the trade union and association had done to bring about their dissolution or assessed whether the applicant's membership of them had involved incitement to violence or rejection of a democratic society's foundations.

Such an interpretation had extended the scope of the law in a manner which the applicant could not have foreseen, and the interference with his rights had not therefore been "prescribed by law", in violation of Article 11.

As concerned the applicant's complaint under Article 11 from the standpoint of Article 15, the Government did not explain whether the specific use made by the courts of the applicant's membership of the trade union and association as corroborating evidence to convict him had been strictly required by the exigencies of the situation. Nor had they pointed to any domestic judgments where such assessment had been undertaken, in the context of the applicant's case or elsewhere.

Other complaints

The Court held, by 16 votes to 1, that it was not necessary to examine separately the applicants' remaining complaints: under Article 6 §§ 1 and 3 (right to a fair trial/effective legal assistance) concerning the courts' alleged lack of independence and impartiality and restrictions on his communicating with his lawyer; or under Article 8 (right to respect for private and family life) with regard to IT information used in the case against him and the allegation that it had been collected, retained and processed unlawfully.

Article 41 (just satisfaction)

The Court held, by 10 votes to 7, that the finding of a violation was in itself sufficient just satisfaction for any non-pecuniary damage sustained. It also held, by 14 votes to 3, that Türkiye was to pay the applicant 15,000 euros (EUR) in respect of costs and expenses.

Article 46 (binding force and implementation)

The Court held that Türkiye had to take general measures as appropriate to address the problem which had led to the findings of violation in this judgment, notably with regard to the Turkish judiciary's approach to the use of ByLock.

Separate opinions

Judge Schembri Orland, joined by Judges Pastor Vilanova and Šimáčková, expressed a partly dissenting opinion. Judges Krenc and Sârcu made a joint statement of partial dissent. Judge Serghides expressed a partly concurring, partly dissenting opinion. Judges Ravarani, Bårdsen, Chanturia, Jelić, Felici and Yüksel expressed a joint partly dissenting opinion. Judge Felici expressed a partly dissenting opinion. Judge Yüksel expressed a partly dissenting, partly concurring opinion.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.