dirittifondamentali.it

La Corte EDU sulla ingiustificata custodia cautelare di magistrati turchi
(CEDU, sez. II, sent. 18 ottobre 2022, ric. n. 63634/16 e altri 134)

Il caso deciso della Corte EDU ha ad oggetto i ricorsi di centotrentacinque cittadini turchi i quali hanno lamentato la violazione dell'art. 5 § 1 della Convenzione. I ricorrenti, in particolare, hanno denunciato la lesione del loro diritto alla libertà e sicurezza nonché la presunta illegittimità della loro detenzione per mancato rispetto delle garanzie procedurali concesse ai membri della magistratura dal diritto interno, essendo stati posti in custodia cautelare all'indomani del tentativo di colpo di stato del 15 luglio 2016 con l'accusa di appartenere a un'organizzazione terroristica. Secondo quanto si legge nell'atto di ricorso le autorità nazionali avrebbero proceduto infatti all'arresto in violazione delle leggi nazionali che disciplinano l'arresto e la custodia cautelare dei membri della magistratura, ritenendo ricorresse un caso di *flagranza* di reato.
La Corte EDU, dopo aver respinto la richiesta di inammissibilità avanzata dal governo turco - e ripreso argomentazioni già svolte in un precedente caso - ha rilevato che la custodia cautelare dei ricorrenti non si è svolta secondo la procedura prescritta dalla legge ai sensi dell'articolo 5 § 1 della Convenzione, e non può dirsi strettamente richiesta dalle esigenze particolari dello stato di emergenza. Al riguardo, i giudici di Strasburgo hanno ritenuto che una interpretazione estensiva della nozione *in flagranza di reato* non può chiaramente considerarsi una risposta adeguata allo stato di emergenza pertanto - e conclusivamente - la decisione di porre i ricorrenti in custodia cautelare ha violato l'art. 5 § 1 della Convenzione.

***

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

SECOND SECTION

CASE OF XXX v. TÜRKİYE
(Applications nos. 63634/16 and 134 others see appended list)

JUDGMENT
STRASBOURG
18 October 2022

This judgment is final but it may be subject to editorial revision.

In the case of XXX v. Türkiye,

The European Court of Human Rights (Second Section), sitting as a Committee composed of:

Branko Lubarda, *President*,

Jovan Ilievski,

Diana Sârcu, *judges*,

and Dorothee von Arnim, *Deputy Section Registrar*,

Having regard to:

the applications against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by one hundred and thirty-five Turkish nationals, whose relevant details are listed in the appended table ("the applicants"), on the various dates indicated therein;

the decision to give notice of the complaints concerning the lawfulness and length of pre-trial detention and the alleged lack of reasonable suspicion regarding the commission of an offence, the alleged lack of prompt information of the reasons for the applicants' arrest and of any charge against them, as well as the ineffectiveness of judicial review of the lawfulness of detention, the absence of a remedy to obtain compensation and the lawfulness of the searches conducted by the authorities to the Turkish Government ("the Government") represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye, and to declare inadmissible the remainder of the applications;

the parties' observations;

the decision to reject the Government's objection to the examination of the applications by a Committee;

Having deliberated in private on 27 September 2022,

Delivers the following judgment, which was adopted on that date:

SUBJECT MATTER OF THE CASE

1. The present applications mainly concern the arrest and pre-trial detention of the applicants in the aftermath of the coup attempt of 15 July 2016, on suspicion of their membership of an organisation described by the Turkish authorities as the "Fetullahist Terror Organisation / Parallel State Structure" (*Fetullahçı Terör Örgütü / Paralel Devlet Yapılanması*, hereinafter referred to as "FETÖ/PDY"), which was considered by the authorities to be behind the coup attempt (further information regarding the events that unfolded after the coup attempt, including the details of the state of emergency declared by the respondent Government and the ensuing notice of derogation given to the Secretary General of the Council of Europe, as well as the legislative developments that followed the declaration of the state of emergency, may be found in the case of *Baş v. Turkey*, no. 66448/17, §§ 6-14 and §§ 109-10, 3 March 2020). All of the applicants were serving as ordinary judges or prosecutors at different types and/or levels of court, subject to Law no. 2802 on judges and prosecutors ("Law no. 2802") (see *Baş*, cited above, §§ 66-67), at the material time.

2. On 16 July 2016 the Ankara chief public prosecutor's office initiated a criminal investigation into, *inter alios*, the suspected members of FETÖ/PDY within the judiciary in accordance with the provisions of the ordinary law, on the ground that there had been a case of discovery *in flagrante delicto* falling within the jurisdiction of the assize courts (further information regarding the orders

issued by the chief public prosecutor's office within the context of that investigation, as well as the ensuing suspensions and dismissals of judges and prosecutors suspected of being members of FETÖ/PDY, may be found in *Baş*, cited above, §§ 9-10 and 15-21).

3. Following their arrest and detention in police custody on the orders of the regional and provincial prosecutors' offices, the applicants were placed in pre-trial detention on various dates, mainly on suspicion of membership of the FETÖ/PDY organisation, an offence punishable under Article 314 of the Criminal Code (see *Baş*, cited above, § 58). The pre-trial detention decisions were issued by the magistrates' courts located at the respective places of the applicants' arrest. In the majority of the decisions, it was noted specifically that the criminal investigation was governed by the ordinary rules, given that the offence of which the suspects were accused, namely membership of an armed terrorist organisation, was a "continuing offence" and that there was a case of discovery *in flagrante delicto* governed by the relevant provisions of domestic law (see *Baş*, cited above, § 67).

4. According to the latest information provided by the parties, most of the applicants were convicted of membership of a terrorist organisation by the first instance courts, and a few were acquitted. It appears that, for the most part, the appeal proceedings are still pending.

5. In the meantime, the applicants lodged individual applications with the Constitutional Court in respect of, *inter alia*, the alleged violation of their right to liberty and security on various accounts, including the alleged unlawfulness of their detention by reason of the disregard of the procedural safeguards afforded to members of the judiciary in domestic law, all of which were declared inadmissible (compare also *Turan and Others v. Turkey*, nos. 75805/16 and 426 others, §§ 26-27, 23 November 2021).

THE COURT'S ASSESSMENT

I. JOINDER OF THE APPLICATIONS

6. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

7. The applicants complained under Article 5 § 1 of the Convention that they had been placed in pre-trial detention in breach of the domestic laws governing the arrest and pre-trial detention of the members of the judiciary and disputed that there had been a case of discovery *in flagrante delicto* for the purposes of section 94 of Law no. 2802 (see *Baş*, cited above, § 67).

8. The Government invited the Court to declare this complaint inadmissible for the reasons that they had raised in the case of *Turan and Others* (cited above, § 55). They also added that one of the applicants (application no. 38986/19) had been granted some compensation by the Constitutional Court, which had found that the said applicant's detention had not been based on a reasonable suspicion. The Court notes that similar objections raised by the Government have already been dismissed in the case of *Turan and Others* (cited above, §§ 57-64) and sees no reason to depart from those findings in the present case. It notes in particular the absence of any finding in respect of the applicant in application no. 38986/19 constituting an acknowledgement that his placement in pre-trial detention had not been in accordance with a procedure prescribed by law and thereby removing his victim status in that regard. The Court therefore considers that this complaint is not

manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

9. The Court further considers, having regard to its findings in the cases of *Baş* and *Turan and Others* (both cited above, §§ 143-58 and §§ 79-92 respectively), that the pre-trial detention of the applicants had not taken place in accordance with a procedure prescribed by law within the meaning of Article 5 § 1 of the Convention and that, therefore, there has been a violation of Article 5 § 1 on account of the unlawfulness of the applicants' initial pre-trial detention. Moreover, while the applicants were detained a short time after the coup attempt – that is, the event that prompted the declaration of the state of emergency and the notice of derogation by Türkiye –, which is undoubtedly a contextual factor that should be fully taken into account in interpreting and applying Article 5 of the Convention in the present case, the measure at issue cannot be said to have been strictly required by the exigencies of the situation (compare *Baş*, cited above, §§ 115-16 and §§ 159-62, and *Turan and Others*, cited above, § 91).

III. OTHER COMPLAINTS

10. As regards any remaining complaints under Article 5 §§ 1, 2, 3, 4 and 5 and Article 8 of the Convention, the Court decides not to examine them, in view of its findings under Article 5 § 1 above and its considerations in the case of *Turan and Others* (cited above, § 98).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

11. The applicants requested compensation in varying amounts in respect of non-pecuniary damage. Most of the applicants also claimed pecuniary damage, corresponding mainly to their loss of earnings resulting from their dismissal, as well as the legal costs and expenses incurred before the domestic courts and the Court.

12. The Government contested the applicants' claims as being unsubstantiated and excessive.

13. For the reasons put forth in *Turan and Others* (cited above, §§ 102-07), the Court rejects any claims for pecuniary damage and awards each of the applicants a lump sum of 5,000 euros (EUR), covering non-pecuniary damage and costs and expenses, plus any tax that may be chargeable on that amount.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the complaint under Article 5 § 1 of the Convention concerning the lawfulness of the applicants' initial pre-trial detention admissible;
3. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the initial pre-trial detention of the applicants;
4. *Holds* that there is no need to examine the admissibility and merits of the applicants' remaining complaints under Articles 5 and 8 of the Convention;
5. *Holds*

(a) that the respondent State is to pay each of the applicants, within three months, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage and costs and expenses, plus any tax that may be chargeable on this amount, which is to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar
Branko Lubarda President