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

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ECHR 240 (2022)
11.07.2022

Türkiye has failed to fulfil its obligation under Article 46 § 1 to comply with the judgment delivered on 10 December 2019, which called on the Government to end the applicant's detention and secure his immediate release

In today's Grand Chamber judgment[1] in the proceedings under Article 46 § 4 of the Convention in the case of Kavala v. Türkiye (application no. 28749/18), the European Court of Human Rights held, by 16 votes to 1, that there had been:

a violation of Article 46 § 1 (binding force and execution of judgments) of the European Convention on Human Rights.

The case concerned the question referred to the Court by the Committee of Ministers of the Council of Europe, as to whether the Republic of Türkiye had failed to fulfil its obligation under Article 46 § 1 of the Convention to abide by the Chamber judgment delivered by the Court in the case of *Kavala v. Turkey* on 10 December 2019.

The Court noted that, following the Chamber judgment, the domestic courts had ordered that Mr Kavala be released on bail on 18 February 2020. However, Mr Kavala had been arrested on the same date by order of the public prosecutor in relation to the attempted coup (Article 309 of the Criminal Code), then placed in pre-trial detention on the following day. He had also been placed in pre-trial detention in relation to the charge of espionage (Article 328 of the Criminal Code) on 9 March 2020.

With regard to this new charge of military or political espionage, it appeared from the order of 9 March 2020 returning Mr Kavala to pre-trial detention and the bill of indictment of 28 September 2020 that the espionage suspicions had been based on facts that were similar, or even identical, to those that the Court had already examined in the *Kavala* judgment.

The Court further observed that the suspicion of espionage had also been based on the activities carried out by Mr Kavala in the context of his NGOs.

The Court therefore concluded that neither the decisions on Mr Kavala's detention nor the bill of indictment contained any substantially new facts capable of justifying this new suspicion. As during Mr Kavala's initial detention, the investigating authorities had once again referred to numerous acts which were carried out entirely lawfully to justify his continued pre-trial detention, notwithstanding the constitutional guarantees against arbitrary detention.

The Court noted that Türkiye had taken some steps towards executing the Chamber judgment of 10 December 2019 and had also presented several Action Plans. It noted, however, that on the date on which the Committee of Ministers had referred the matter to it, and in spite of three decisions ordering his release on bail and one acquittal judgment, Mr Kavala had still been held in pre-trial detention for more than four years, three months and fourteen days.

The Court considered that the measures indicated by Türkiye did not permit it to conclude that the State Party had acted in "good faith", in a manner compatible with the "conclusions and spirit" of the *Kavala* judgment, or in a way that would have made practical and effective the protection of the Convention rights which the Court had found to have been violated in that judgment.

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

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.

Principal facts

The applicant, Mr Mehmet Osman Kavala, is a Turkish national who was born in 1957 and lives in Istanbul. A businessman and human-rights defender in Türkiye, Mr Kavala was involved in setting up numerous non-governmental organisations ("NGOs") and civil-society movements operating in the areas of human rights, culture, social studies, historical reconciliation and environmental protection.

Mr Kavala was deprived of his liberty, without interruption, between 18 October 2017 and – at the least – 2 February 2022, the date on which the Committee of Ministers decided to refer the matter to the Court under Article 46 § 4 of the Convention. On the last-mentioned date, his detention had lasted four years, three months and fourteen days.

Mr Kavala was initially suspected of having committed two offences: attempting to overthrow the Government through force and violence in the context of the Gezi Park events, and attempting to overthrow the constitutional order in the context of the attempted *coup d'état* of 15 July 2016.

The first charge, under Article 312 of the Criminal Code, was related to the Gezi Park events, which had occurred between May and September 2013 and been marked by a series of demonstrations triggered by an urban development project that included the construction of a shopping centre on the site of Gezi Park. The protest movements had escalated in June and July 2013 and spread to several towns and cities in Türkiye, taking the form of meetings and demonstrations which sometimes led to violent clashes. Four civilians and two police officers had been killed, and thousands of people were wounded.

The second charge, under Article 309 of the Criminal Code, was related to the violent attempted *coup d'État* of 15 July 2016, which had led to the declaration of a state of emergency in Türkiye from 20 July 2016 to 18 July 2018.

On 18 February 2020 Mr Kavala was acquitted of the charge related to the Gezi events. However, the decision to release him on bail, delivered on the same date, did not lead to his actual release. Mr Kavala was placed in police custody on the same date, then on the following day he was placed in pre-trial detention in relation to the attempted coup. His release was ordered on 20 March 2020. In the meantime, on 9 March 2020, Mr Kavala had already been placed in pre-trial detention for military or political espionage, an offence listed in Article 328 of the Criminal Code. When the Committee of Ministers referred the question to the Court, Mr Kavala's pre-trial detention was based on this charge.

On 4 March 2022 the prosecutor's office made submissions to the Istanbul 13th Assize Court, requesting that Mr Kavala be convicted of attempting to overthrow the Government through force and violence, primarily in the context of the Gezi Park events. On 25 April 2022 the Istanbul 13th Assize Court found Mr Kavala guilty of the charge under Article 312 of the Criminal Code and sentenced him to aggravated life imprisonment; in addition, it ordered that he continue to be held in pre-trial detention on that charge. At the same time, it decided to acquit him of the charge of military or political espionage (Article 328 of the Criminal Code) and ordered his release in connection with that particular charge. The criminal proceedings are still pending before the national courts.

Mr Kavala is currently still detained.

Complaints, procedure and composition of the Court

The question referred to the Court by the Committee of Ministers was whether the Republic of Türkiye had failed to fulfil its obligation under Article 46 § 1 of the Convention to abide by the judgment delivered by the Court in the case of Kavala v. Turkey on 10 December 2019.

On 2 February 2022 the Committee of Ministers decided to refer its question to the Court under Article 46 § 4 of the Convention. On 21 February 2022 the Committee sent the referral request to the Court. The request was allocated to the Grand Chamber. The Committee of Ministers, the Government and Mr Kavala each submitted written comments, as did the Commissioner for Human Rights of the Council of Europe.

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

Robert **Spano** (Iceland), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Síofra **O'Leary** (Ireland),
Georges **Ravarani** (Luxembourg),
Marko **Bošnjak** (Slovenia),
Egidijus **Kūris** (Lithuania),
Yonko **Grozev** (Bulgaria),
Carlo **Ranzoni** (Liechtenstein),
Stéphanie **Mourou-Vikström** (Monaco),
Pauliine **Koskelo** (Finland),
Jolien **Schukking** (the Netherlands),
Arnfinn **Bårdsen** (Norway),
Raffaele **Sabato** (Italy),
Saadet **Yüksel** (Turkey),
Peeter **Roosma** (Estonia),
Kateřina **Šimáčková** (the Czech Republic),
Davor **Derenčinović** (Croatia),

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

Decision of the Court

Alleged failure to fulfil the obligation under Article 46 § 1

By an interim resolution of 2 February 2022 (CM/ResDH(2022)21), the Committee of Ministers referred to the Court, in accordance with Article 46 § 4 of the Convention, the question whether Türkiye had failed to fulfil its obligation under Article 46 § 1 of the Convention to abide by the Court's Chamber judgment of 10 December 2019 in the case of *Kavala v. Turkey* of 10 December 2019.

The Court referred at the outset to the general principles set out in the *Ilgar Mammadov* judgment (proceedings under Article 46 § 1, or infringement proceedings) relating to the execution of its judgments under Article 46 §§ 1 and 2 of the Convention and to the nature of the Court's own task in infringement proceedings under Article 46 § 4.

The infringement procedure did not aim to reopen the question of violation, already decided in the Court's initial judgment or to provide for payment of a financial penalty. It sought to add pressure in order to secure execution of the Court's initial judgment. It had been introduced in order to increase the efficiency of the supervision proceedings – to improve and accelerate them.

In the *Kavala* judgment, the Court had found a violation of Article 5 §§ 1 and 4, and of Article 18 combined with Article 5 § 1 of the Convention, with regard to the charges against Mr Kavala under Articles 309 and 312 of the Criminal Code in October 2017 which had given rise to his placement in pre-trial detention. Under Article 18 combined with Article 5 § 1, the Court had held that the charges brought against Mr Kavala were not based on reasonable suspicions and the actual purpose of the impugned measures had been to silence him and to dissuade other human-rights defenders.

As regards the violation of Article 5 § 1 of the Convention, the Court reiterated that it had examined in detail the reasonableness of the suspicions against Mr Kavala in relation to the offences set out in Articles 312 and 309 of the Criminal Code. With regard to the first charge, related to the Gezi Park events (Article 312 of the Criminal Code), the Court had found that "... in the absence of facts, information or evidence showing that he had been involved in criminal activity, ... the applicant could not reasonably be suspected of having committed the offence of attempting to overthrow the Government, within the meaning of Article 312 of the Criminal Code".

With regard to the charges against Mr Kavala concerning the attempted coup (Article 309 of the Criminal Code), it had held that: "… the evidence in the case file is insufficient to justify this suspicion ... the mere fact that the applicant had had contacts with a suspected person or with foreign nationals cannot be considered as sufficient evidence to satisfy an objective observer that he could have been involved in an attempt to overthrow the constitutional order."

In its overall analysis, the Court had also concluded that there was no plausible reason to suspect that the applicant had committed "any criminal offence", noting in particular that "the measures were essentially based not only on facts that cannot be reasonably considered as behaviour criminalised under domestic law, but also on facts which were largely related to the exercise of Convention rights".

The Court's reasoning showed clearly that its findings had applied to the totality of the charges against Mr Kavala concerning the Gezi Park events and the attempted coup. Consequently, in the absence of other relevant and sufficient circumstances, a mere reclassification of the same facts could not in principle modify the basis for those conclusions, since such a reclassification would only be a different assessment of facts that had already been examined by the Court. Were it otherwise, the judicial authorities could continue to deprive individuals of their liberty simply by opening new criminal investigations in respect of the same facts.

Even more importantly, the Court had also identified the ulterior purpose of these measures, which was to silence Mr Kavala as an NGO activist and human-rights defender.

It followed that the finding of a violation of Article 5 § 1, read separately and in conjunction with Article 18, vitiated any action resulting from the charges relating to the Gezi Park events and the attempted coup. In the absence of other relevant and sufficient circumstances capable of demonstrating that Mr Kavala had been involved in criminal activity, any measure, especially one depriving him of his liberty, on grounds pertaining to the same factual context, would entail a prolongation of the violation of Mr Kavala's rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment.

The Court noted that, following the judgment concerning Mr Kavala, the domestic courts had ordered that he be released on bail on 18 February 2020, but that on the same day he had been arrested by order of the public prosecutor in relation to the attempted coup (Article 309 of the Criminal Code), then placed in pre-trial detention on the following day. It further noted that Mr Kavala had also been placed in pre-trial detention in relation to the charge of espionage (Article 328 of the Criminal Code) on 9 March 2020.

Further, with regard to the Government's argument that Mr Kavala ought to have lodged a new application with the Court, the Court considered that the fact that Mr Kavala had not applied to the Court in respect of the same complaint that he had submitted to the Constitutional Court regarding his continued detention had no fundamental bearing for the purpose of its examination of whether Türkiye had complied with its obligation under Article 46 § 1. It noted that the Court and the Committee of Ministers, in the context of their different duties, could be required to examine, even simultaneously, the same domestic proceedings without upsetting the fundamental institutional balance between them. In the Court's view, in the present case it was important to note that the Committee of Ministers had not terminated its supervision of the execution of the *Kavala* judgment

and that it had decided to bring infringement proceedings before the Court. Having received that request, the Court was required to make a definitive legal assessment of the question of compliance with the judgment in question.

With regard to Mr Kavala's detention between 18 February and 20 March 2020 in relation to charges arising from the attempted coup, the Court noted that the evidence, which had already been in the case file since 18 October 2017 (the date on which Mr Kavala had initially been placed in pre-trial detention), was supplemented by the prosecutor's office in its request of 18 February 2020. However, it was clear that the information obtained subsequently (the testimony by a hotel employee, H.J.B.'s activities in the context of a foundation based in the United States or additional data on telephone signals) had not contained any new fact related to the constituent elements of the alleged offence, such as evidence which might have enabled the nature of the presumed relationship to be clarified or Mr Kavala's actions to be linked to a criminal aim. It essentially supplemented the prior evidence relating, not to Mr Kavala, but to the activities of H.J.B., and specified the frequency of the presumed contacts between Mr Kavala and H.J.B. However, the Court considered that it was not necessary to dwell further on this detention which, in any event, had ended before the *Kavala* judgment had become final on 11 May 2020.

Turning to the question whether the charges brought against Mr Kavala had changed in substance, the Court observed that the charge of military or political espionage on which Mr Kavala's pre-trial detention from 9 March 2020 until the date of referral to the Court had been based was, technically speaking, a new charge, which had not been examined by it in the initial judgment. It had nevertheless to satisfy itself that this charge was not based on the same facts that it had been required to examine in the initial judgment. In the context of infringement proceedings following a finding of a violation of Article 5 § 1, read separately and in conjunction with Article 18 of the Convention, the Court could not disregard the conclusions and indications addressed by it to the respondent State in the initial judgment on the sole grounds that a new charge had been brought against Mr Kavala under domestic law. In its analysis, the Court had to look behind appearances and investigate the realities of the situation complained of. If this were not the case, the obligation to comply with a judgment delivered by the Court would be deprived of its substance in practice. The Court's examination was of paramount importance where, as in the present case, the immediate release of a detained person had been ordered by the Court following a violation of Article 5 § 1, read separately and in conjunction with Article 18 thereof.

With regard to this new charge of military or political espionage, it appeared from the order of 9 March 2020 returning Mr Kavala to pre-trial detention and the bill of indictment of 28 September 2020 that the espionage suspicions against him had been based on two sets of facts: firstly, the alleged relations between Mr Kavala and H.J.B., and, secondly, the activities carried out by Mr Kavala in the framework of his NGOs. The Court noted striking similarities, or even complete duplication, between these facts and those that it had already examined in the *Kavala* judgment.

With regard to the alleged relations between Mr Kavala and H.J.B., the Court noted, firstly, that this was the only fact that had been alleged against Mr Kavala in the context of the charge relating to the attempted coup, and, secondly, stressed that the above finding also applied to the charge of military or political espionage. This was therefore clearly a fact that had been previously examined by the Court in the context of its initial judgment, although it had been invoked again in the context of Mr Kavala's new detention under a new criminal reclassification, without any distinctive fact in connection with the charge of espionage being provided by the investigating authorities.

The Court further observed that the bill of indictment of 28 September 2020 indicated that the suspicion of espionage had also been based on the activities carried out by Mr Kavala in the context of his NGOs. However, it pointed out that in the initial *Kavala* judgment it had already examined these activities in detail and had found a violation of Article 5 § 1, read separately and in conjunction with Article 18. Although Mr Kavala had been formally accused of a new charge, different from those

which had been used to justify his previous detention, the facts listed in the bill of indictment were essentially identical to those already examined by the Court in the Chamber judgment. That being so, the Court could only reiterate the considerations in that judgment, to the effect that the fact of referring to "ordinary and legitimate activities on the part of a human-rights defender and the leader of an NGO" had undermined the credibility of the accusation and that, clearly, there could not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred.

The Court therefore concluded that neither the decisions on Mr Kavala's detention nor the bill of indictment contained any substantially new facts capable of justifying this new suspicion. As during Mr Kavala's initial detention, the investigating authorities had once again referred to numerous acts which were carried out entirely lawfully to justify his continued pre-trial detention, notwithstanding the constitutional guarantees against arbitrary detention.

The whole structure of the Convention rested on the general assumption that public authorities in the member States acted in good faith. Failure to implement a final, binding judicial decision would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States had undertaken to respect when they ratified the Convention.

The Court noted that Türkiye had taken some steps towards executing the Chamber judgment and had also presented several Action Plans. It noted, however, that on the date on which the Committee of Ministers had referred the matter to it, and in spite of three decisions ordering his release on bail and one acquittal judgment, Mr Kavala had still been held in pre-trial detention for more than four years, three months and fourteen days.

The Court considered that the measures indicated by Türkiye did not permit it to conclude that the State Party had acted in "good faith", in a manner compatible with the "conclusions and spirit" of the *Kavala* judgment, or in a way that would have made practical and effective the protection of the Convention rights which the Court had found to have been violated in that judgment.

In response to the question referred to it by the Committee of Ministers, the Court concluded that Türkiye had failed to fulfil its obligation under Article 46 § 1 to comply with the *Kavala v. Turkey* judgment of 10 December 2019.

The Court held that the Government of Türkiye was to pay Mr Kavala 7,500 euros in respect of costs and expenses.

Separate opinions

Judges Bošnjak and Derenčinović expressed a joint concurring opinion. Judge Yüksel expressed a partly dissenting opinion. These opinions are annexed to the judgment.

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.