

Case comment - Mehmet Hasan Altan v Turkey (13237/17); Sahin Alpay v Turkey (16538/17)

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Human Rights - Emergencies - Derogations - Freedom of Expression - Detention

Mehmet Hasan Altan v Turkey (13237/17) [2018] ECHR 251; *Şahin Alpay v Turkey* (16538/17) [2018] ECHR 253.

European Court of Human Rights

Facts and decisions

In two similar cases, the European Court of Human Rights (ECtHR) has issued almost identical judgments against Turkey in respect of the decision to detain and charge two journalists for their alleged involvement in the failed coup d'état in July 2016. Although the European Court did not dispute the existence of an emergency situation at the time, nor contest the Turkish authority's decision to derogate from the ECHR pursuant to Article 15, the Court held that the authorities had acted beyond the exigencies of the situation, by subjecting the men to arbitrary pre-trial detention, resulting in violations of Articles 5 (right to liberty) and 10 (expression).

Whilst the individual backgrounds and circumstances of the applicants slightly differed, the most significant facts and legal issues that arose in the cases were similar. Both men, Mehmet Hasan Altan and Şahin Alpay, had prominent careers in journalism and also in academia to a different extent. In the build up to the failed coup, both men were critical of the Turkish Government.

Almost immediately after the coup attempt, the Turkish authorities blamed the network linked to Fetullah Gülen, a Turkish citizen living in the USA, who was considered to be the leader of a terrorist organisation known as the "Gülenist Terror Organisation / Parallel State Structure". On 20 July 2016 the government declared a state of emergency, initially for three months but subsequently extended on numerous occasions, whilst also informing the Council of Europe that the authorities were derogating from the ECHR pursuant to Article 15. Shortly after, the two applicants were arrested and questioned over their alleged links to the organisation. Both men unsuccessfully challenged their ongoing detention before the Turkish magistrates on several occasions.

It was not until April 2017 when the public prosecutor filed indictments with the Istanbul Assize Court against the two men and others accused of similar offences. Both men were accused of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence, and of committing offences on behalf of a terrorist organisation without being members of it. The prosecutor sought three aggravated life sentences and a sentence of up to fifteen years' imprisonment for both men.

However, in January 2018, the Turkish Constitutional Court determined that the pre-trial detention of the two applicants was disproportionate to the strict exigencies of the situation, and that their rights to liberty and security had been breached. Whilst dismissing some of the other connected complaints, the Turkish Constitutional Court determined that both men had also suffered breaches of the right to the freedom of expression. Following the intervention of the Constitutional Court, the second applicant, Alpay, was released pursuant to careful monitoring and house arrest whilst his trial was ongoing. In contrast, the Istanbul Assize Court

delivered a summary judgment in February 2018 against the first applicant, Altan, sentencing him to aggravated life imprisonment. Despite the ruling of the Constitutional Court, Altan was repeatedly unsuccessful when petitioning for his release.

In applying to the ECtHR, both men argued that their initial pre-trial detention and its continuation had been arbitrary in violation of the right to liberty (Article 5(1)), that their right to freedom of expression (Article 10) had also been violated as a result of their detention, and that the permissible restrictions under those articles had been applied for an improper purpose (Article 18). The applicants also made arguments pursuant to Article 5(3), 5(4), 5(5) which were rejected for different reasons.

In both cases, the ECtHR first considered the lawfulness of the derogation lodged by the Turkish authorities. As neither applicant disputed that the Turkish Government had notified the Secretary General of the Council of Europe of the derogation, the ECtHR accepted that the *procedural* requirements under Article 15 had been met. In respect of the *substantive* requirements under Article 15 – i.e. that there must be an emergency, that the measures taken must be strictly proportionate to the exigencies of the situation, and that they must not conflict with other obligations under international law – the Court stated its now accustomed position that States are afforded a wide margin of appreciation which is, nonetheless, accompanied by Court supervision. Subsequently, the ECtHR accepted that the attempted coup had posed a severe threat to the life and existence of the nation, in part owing to the Turkish Constitutional Court’s findings. However, the ECtHR then went on to consider whether the measures taken by the authorities complied with the other substantive requirements.

Firstly, in respect of Article 5, the ECtHR greatly relied upon the findings of the Turkish Constitutional Court. Owing to that Court’s findings that the “right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed a criminal offence”, and that the pre-trial detention of the two men had violated the Turkish Constitution, the ECtHR held that this amounted to an acknowledgment that Article 5(1) of the Convention had been violated.

As such, the ECtHR focussed on whether the authorities had afforded appropriate and sufficient redress for the violation. On this point the Court held that the Assize Court’s refusal to order the release of the applicants, which called into question the powers conferred on the Constitutional Court to give final, binding judgments, ran counter to the fundamental principles of the rule of law and legal certainty. Moreover, linking back to the derogation, the ECtHR agreed with the Turkish Constitutional Court’s decision that the pre-trial detention was disproportionate to the strict exigencies of the situation. Accordingly, the ECtHR found that Turkey had violated Article 5(1) in both cases.

In respect of Article 10, the ECtHR found that the refusal to release the two men following the Turkish Constitutional Court’s judgment demonstrated that the authorities had failed to afford appropriate and sufficient redress to the applicants. Consequently, the Court applied the three-stage test when ascertaining the lawfulness of the restrictions to Article 10. The Court did not deem it necessary to decide whether the restrictions were prescribed by law, but it did accept that the restrictions *prima facie* pursued the legitimate aim of preventing disorder and crime. However, on the question of whether the pre-trial detention of the two applicants was necessary, the European Court again agreed with the decision of the Constitutional Court, finding that the initial and continued pre-trial detention of the two men constituted a severe measure that could not be regarded as a necessary and proportionate interference in a

democratic society. Moreover, the Court agreed that the detention of the two men was not based on any concrete evidence other than their articles and comments, which could have had a chilling effect on freedom of expression and of the press.

Going further, the ECtHR also voiced concerns about the general political climate in Turkey and the assertion that journalists were often subjected to severe measures such as detention for dealing with matters of public interest. The Court stated that unless views constituted an incitement of violence, States cannot restrict the right of the public to be informed of them, even with reference to the legitimate aims set out in Article 10(2). Accordingly, the ECtHR found that Turkey had violated Article 10 in respect of both applicants.

In terms of just satisfaction, the ECtHR first ordered the Turkish authorities to take all necessary measures to put an end to Alpay's pre-trial detention, and secondly, that both applicants should be paid 21,500 Euros in non-pecuniary damages.

Analysis

The two cases are significant for numerous reasons, not least of all due to the fact that this was the first time that the ECtHR has examined the legality of the recent Turkish derogation under Article 15 of the ECHR in depth. More generally, the political circumstances surrounding these particular cases have attracted much scrutiny and criticism from some quarters in recent years, which in several ways remains the most interesting aspect of the two cases. Human rights advocates in particular have criticised the "chilling climate of fear" sweeping across Turkish society, owing to what they perceive as a clampdown on dissenting or alternative views following the coup and the declaration of an emergency (eg. Amnesty International, 'Weathering the Storm: Defending Human Rights in Turkey's Climate of Fear', April 2018).

On the one hand, the declaration of an emergency and the invocation of a derogation pursuant to Article 15 of the ECHR represents a *prima facie* commitment to a legal framework, in contrast to a counter-terrorism strategy rooted in a war paradigm which completely rejects the applicability of human rights. In that respect, the Turkish Government has, on the face of it, demonstrated its commitment to the rule of law and upholding basic human rights norms. However, as is well known, emergency situations and derogations are susceptible to exploitation by political leaders seeking to assert or consolidate their authority.

In that respect, it is significant that the most far-reaching comments of the European Court of Human Rights in these two cases concerned not just the particular circumstances of the two applicants, but the overall political environment in Turkey. More specifically, the Court stated that emergency situations cannot serve as a "pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society", and that even in such situations, "any measures taken should seek to protect the democratic order from the threats to it, and every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness". Furthermore, the Court held in both cases that the "pre-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty... will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices".

In essence, although sympathising with the Turkish authorities and the challenging circumstances surrounding the coup attempt, the European Court has stood its ground and

refused to condone the pre-trial detention of the two journalists. In that sense, the Court has acknowledged that whilst the circumstances provoking a state of emergency can inherently threaten the life of the nation, the way in which States respond can also threaten the principles underpinning democracy and the European Convention itself. At the same time, the two judgments have given strong backing to the Turkish Constitutional Court, whose decisions have been grossly undermined by the response of the Turkish Assize Court.

Lastly, it is also concerning that the Turkish Government is considering the reinstatement of the death penalty in the wake of the failed coup, possibly as a means to punish those involved. Such a policy would obviously be incompatible with Turkey's obligations under the ECHR, not least of all in respect of Protocols 6 and 13 to the ECHR concerning the abolition of the death penalty. Nonetheless, prior to the deeply controversial and divisive 2017 constitutional referendum in Turkey which sought approval to *inter alia* grant greater powers to the executive, President Recep Erdoğan pledged to reinstate the death penalty if the reforms were approved. However, following the narrow and contentious victory for the Government in April 2017, no further action has been taken at the time of writing.

Conclusions

Whilst the declaration of a state of emergency by a contracting party continues to be a matter that the European Court of Human Rights is reluctant to intervene in, the Court stood its ground when confronted with the arbitrary pre-trial detention and the chilling effect upon free speech that the prosecution of journalists can have. According to the Court, this could not be justified by the exigencies of the situation. Looking to the future, the Court's two decisions have once again reminded European states that derogations do not give the authorities *carte blanche* to suppress democratic activities, whilst also providing some much-needed support for the Turkish Constitutional Court.

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