TURKEY REPORT

October 2018

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TRIAL OF KURDISH LAWYERS – ISTANBUL 30th October 2018

Background to this case

This case (which has been referred to historically as the "KCK Lawyers Trial" but will now be referred to as the "Asrin Office Lawyers Case" since all of the 45 defendant lawyers operated from that office) involves the prosecution of a large number of Turkish and Kurdish lawyers for terrorist related offences (membership of an illegal organisation). It has been going on since November 2011 when mass arrests of Kurdish, Turkish and Arabic lawyers took place in raids carried out simultaneously in many Turkish cities and provinces. The lawyers have been charged with terrorist offences related to their representation of Abdullah Ocalan, the leader of the PKK. For reports in relation to previous hearings see here

Since 2011, three general elections have taken place in Turkey, and a referendum in 2017 narrowly resulted in amendments to the constitution which provide the President executive powers to effectively run the country. The trial has continued through a period of substantial political and social change within Turkey. In July 2016 an attempted coup, which has been attributed by the Turkish authorities to members of the Gulen movement, failed. Subsequent to this a state of emergency was declared which continued uninterrupted until President Erdogan reached his final destination and was installed as the executive President under the new constitution in 2018. All of the emergency decrees which were passed during the state of emergency, many of which had wide ranging (and negative) effects on the rule of law, respect for the separation of powers, and the independence of judges and lawyers, were passed into the general law before the state of emergency came to an end. Further presidential decrees passed in 2018 have given the President the power to start investigations and disciplinary proceedings against bar associations within Turkey. The scale of the purge undertaken by President Erdogan since the attempted coup in 2016 has been summarised by the European Commission in its report dated April 2018 as follows:

> "Overall, over 150 000 people have been taken into custody since the state of emergency began. This included a large number of critical voices. Over 78 000 people have been arrested based on terror-related charges, of which, at the end of January 2018, 54 000 had been released pending trial with judicial control and 24 660 remained in pre-trail detention.

Judicial processes involving suspected members of the Gülen movement and coup plotters raised serious questions about the respect of international standards. It is of particular concern that relatives of suspects were directly or indirectly targeted by a series of measures, including dismissal from public administration and confiscation or cancellation of passports. A set of unofficial criteria were relied upon to determine alleged links to the Gülen movement, including the attendance of a child at a school affiliated with the organisation, the deposit of money in a bank affiliated with the organisation or the possession of the mobile messaging application ByLock. In September 2017, the Court of Cassation held that the possession of ByLock constitutes sufficient evidence for establishing membership of the Gülen movement. In October 2017, however, it ruled that sympathising with the Gülen movement does not amount to being a member of it and therefore does not constitute sufficient evidence of membership. Several people who had been arrested as a result of alleged usage of ByLock were released, after it was proven in December 2017 that hundreds of people had been wrongfully accused of using the mobile application".

The pressure under which the legal profession has been operating more generally has been summarised in a joint submission made by the Law Society, the Bar Human Rights Committee and the IBA Human Rights Institute recently to the UN Special Rapporteur on the Independence of Judges and Lawyers which can be visited here.

The hearing on 30th October 2018 – the current "Theory of the Case"

The hearing took place in Heavy Penal Court number 19 at the Central Criminal Court.

It is almost astonishing that the case against these lawyers has now been proceeding through various courts and with a least two dozen different judges presiding for almost seven years. The chronology of background events which is gradually revealing itself is perhaps even more astonishing;

1. The case started with an Orwellian nightmare concerning the arrest and detention of the lawyers and the confiscation of their client records (a dramatization of which can be read in a Law Society Gazette article which I wrote which can be accessed here). Since it began it has become emblematic of the tragic victimisation and endless prosecution of lawyers in Turkey.

2. The judge and prosecutor* who led the original case are now behind bars facing charges that they were part of a Gulenist plot to undermine the peace process concerning the Kurdish issue in Turkey which was being pursued in Oslo in 2010.
3. The lawyers acting for the defendants, having carried out a detailed forensic search of other prosecution files since the attempted coup took place, have established that the investigation of the lawyers started at the same time as the investigation of a number of high-level MIT (intelligence agency) personnel (the Undersecretary and four members of the MIT) who were also involved in that peace process.
4. On 7th of February 2012, high level MIT members were called to give testimony relating to the work done in relation to the peace process. As a result of certain documents having been made available to the defence lawyers in the present case, they have established that this investigation was based on the same [fabricated] evidence as the investigation which led to the indictment of the lawyers. After the MIT case had been investigated on 7th February of 2012 it was referred to as the "7 February MIT Crisis" case in public. It seems that the files were split thereafter and the MIT file pursued as a separate investigation with a new case number from 13th of February 2012. The suspicion now is that the original [fabricated] investigation against both lawyers and also MIT high level personnel was being carried out clandestinely on a step by step basis. The new investigation file in relation to the lawyers contained information drawn from the original investigation file which it is suspected was fabricated in an attempt to secure convictions of both the MIT officers and the lawyers. The lawyers have now requested that the original investigation file be disclosed in the present case.
5. After 7th February 2012 there was an amendment to the statutory rules governing the prosecution of MIT personnel which required the permission of the Prime Minister before MIT officers could be prosecuted for conduct during the course of an official investigation.[1] The Prime Minister did not give permission to prosecute the MIT personnel and a decision of non-prosecution was made in their case on 22nd March 2013. The statutory amendment reinforced the legal framework that leaves

[1] "Investigation of an MIT member or any public official assigned by the Prime Minister to perform a specific duty due to crimes derived from the nature of their duty or that are alleged to have been committed during the conduct of their duty or due to allegations of crimes that fall under the mandate of high criminal courts in accordance with paragraph 1 of Article 250 of Law no. 5271, requires the **permission** of the Prime Minister."

MIT free from judicial oversight. The MIT officers were never in fact charged with any offences although apparently they were kept under surveillance.

6. In 2014 another investigation had started and this has resulted in the prosecution of judges, prosecutors and police who have apparently admitted in other cases having fabricated crimes and evidence in the present case. The indictments in these cases have been added to the case file in the present case. Those accused judges, prosecutors and police officers were the same judges, prosecutors and police officers involved in the present case during the investigation and prosecution against the lawyers. One of the main allegations against those officials was 'disrupting the peace process conducted by the state'. Applications also have been made to have the whole of those files in these separate prosecutions made available to the court in the present case.
7. In 2015 a further investigation started against officials including some prosecutors and high level police officers concerning events which had led to what has been described as the "7 February 2012 MIT Crisis" referred to above. Briefly, it seems that the new investigation was started into the previous (fabricated) investigation (which included the evidence produced against the lawyers in the present case). The defence lawyers have also demanded this ongoing investigation's case-file.
8. In July 2018 high level prosecutors and police officers were also arrested on suspicion of having organized the previous [fabricated] investigation in the MIT case and also in the case. It is believed this new ongoing investigation like the other ongoing prosecutions will illustrate that the allegations against the lawyers, being based on fabricated evidence, have no merit.
9. The judge is considering this request and has applied for release of the file.

Notwithstanding the obvious doubts which these investigations throw on the reliability of the evidence against these lawyers the Defendant lawyers (many of whom spent up to two years in pre-trial detention and were released five years ago) now still face the daily uncertainty of a serious criminal prosecution. They still face the threat of long periods in prison based on evidence tainted by so many kinds of apparent illegality and suspicion. The case was adjourned to 5th March 2019 for the Supreme Court to decide whether the current case should be joined with any of the other prosecutions. Further decisions will be needed if joinder takes place concerning the appropriate court in which the joined proceedings should take place.

Conclusion

As time has progressed the number of defendants appearing at each hearing, as well as the number of international observers, has dwindled as resources have become stretched to arrange for observation of the large number of trials of lawyers, journalists, politicians and academics which are now taking place in Turkey. The present hearing was observed by myself, representing the Law Society and Lawyers for Lawyers, two German lawyers and three French lawyers. The need for continued support is clearly apparent however. The pressure on the lawyers representing the defendant lawyers is clearly increasing and the presence of international observers clearly has some positive effect on the way in which they are treated at the hearings.

On 13th November 2018 there is a hearing in Strasbourg in the cases of Ahmet TUNÇ and Zeynep TUNÇ against Turkey and Ahmet TUNÇ and Güler YERBASAN against Turkey. These two cases involve individuals killed by the security forces during the curfew in the south eastern city of Cizre in January 2016. It is important from a number of different perspectives, particularly because the European Court of Human Rights will be considering the question of whether the right of individual petition to the Constitutional Court in Turkey remains an effective domestic remedy. Decisions made in that respect may have wide ranging consequences for thousands of other cases proceeding at the court.

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