The European Court of Human Rights' judgment in the case of *Taner Kılıç (no. 2) v. Turkey*

The European Court of Human Rights (the Court) delivered its judgment in the ground-breaking case of *Taner Kılıç (no. 2) v. Turkey* (no. 208/8) on 31 May 2022. The Turkey Human Rights Litigation Support Project, Human Rights Watch and the International Commission of Jurists submitted a joint third party intervention which concerns the pre-trial detention of Mr. Taner Kılıç, a respected human rights lawyer and former chair –(and currently honorary chair) of Amnesty International Turkey, on account of his activities as a human rights defender (HRD). In its long-awaited judgment, the Court deliberates on some of the most fundamental human rights challenges in Turkey today. These include the excessive and widely documented restrictions on freedom of expression of HRDs, the abusive resort to criminal law against legitimate activities protected under the European Convention on Human Rights (the Convention) and more particularly the arbitrary application of the anti-terrorism legislation against HRDs, with wide-reaching implications for public debate, participation in public affairs and the protection of human rights in Turkey and beyond.

In the *Taner Kılıç (no. 2) v. Turkey* judgment, the Court found a violation of Articles 5§1 (lack of reasonable suspicion justifying initial and continued pre-trial detention), 5§3 (failure to provide reasons for decisions concerning pre-trial detention), 5§5 (lack of compensation for unjustified pre-trial detention) and 10 (freedom of expression) of the Convention.

Firstly, the Court found there had been a violation of Article 5§1 of the Convention on account of the detention of Mr. Kılıç despite the lack of reasonable suspicion that he had committed an offence, both on the date when he was placed in pre-trial detention and after his detention was extended. Mr. Kılıç had been arrested in June 2017 on suspicion of belonging to the organisation FETÖ/PDY (an organisation described by the Turkish authorities as "Gülenist Terror Organisation/Parallel State Structure"). Two sets of criminal proceedings against him -which were later joined before an Istanbul Assize Court- accused him of being a member of multiple terrorist organisations. The putative basis was his alleged use of the ByLock messaging service and various action related to the defence of human rights. As regards to the alleged use of the ByLock messaging service, the Court referred to its conclusions in the *Akgün v. Turkey* case (no. 19699/18, §§ 159-185, 20 July 2021), in which it found that, in principle, the mere fact of downloading or using a means of encrypted communication or the use of any other method of safeguarding the private nature of exchanged messages could not in itself amount to evidence capable of satisfying an objective observer that illegal or criminal activity was taking place (paragraphs 106-109). With regard to the other grounds used by the domestic authorities as evidence of criminal activity, the Court noted in particular that the second set of criminal proceedings against Mr. Kılıç relied on facts which appeared to be ordinary peaceful and legal acts of a HRD (paragraphs 110-113). In conclusion, the Court considered that the evidence cited by the national judges had not met the standard of "reasonable suspicion" that was required by Article 5 of the Convention, that the interpretation and application of the legislative provisions relied on by the domestic authorities had been unreasonable, and that the applicant's detention was therefore arbitrary (paragraphs 114-116).

Secondly, in the absence of a reasonable suspicion that the applicant had committed an offence, the Court concluded that the initial detention order against the applicant and the subsequent decisions extending his detention lacked sufficient reasoning, which constituted a violation of Article 5§3 (paragraphs 117-120). Moreover, it held that there had been a violation of Article 5§5 on the ground that the Turkish law did not provide an enforceable right to compensation with respect to the unlawful detention.

Thirdly, in its assessment under Article 10, which reflected the third party intervention by the NGOs, the Court recalled the importance of the protection and the role of HRDs for the development and realisation of democracy and human rights (paragraph 145). It considered that the principles developed by the Court regarding the detention of journalists and media professionals could be applied *mutatis mutandis* to HRDs, where the pre-trial detention had been imposed in the context of criminal proceedings brought against them for conduct directly linked to human rights protection (paragraph 147). As Mr. Kılıç's continued pre-trial detention was based on, among other things, evidence directly related to his activities as a HRD, the Court held that it amounted to an "interference" in the exercise of his right to freedom of expression (paragraphs 149-151).

The Court noted that under Article 100 of the Turkish Code of Criminal Procedure, a person could only be placed in pre-trial detention where the facts give rise to a strong suspicion that they had committed an offence. In this connection, the lack of *reasonable* suspicion referred to above should, *a fortiori*, have implied the absence of *strong* suspicions when the national authorities were invited to review the lawfulness of the detention. In consequence, the Court found the interference in the exercise of his right to freedom of expression, was not prescribed by law and violated Article 10 of the Convention (paragraphs 153-158).

Lastly, although the Court found serious violations under Articles 5 and 10 of the Convention, developing its caselaw on the protection of the rights and freedoms of HRDs, it held that there was no need to examine the applicant's complaints under Article 18. The Court considered that under Article 10 it had taken sufficient account of the applicant's position as leader of an NGO and a HRD (paragraph 159). However, in their partly dissenting opinion Judges Küris and Koskelo stated that the Court, under Article 18, should have examined whether the Turkish authorities had pursued a "hidden agenda" resulting in violations of Articles 5 and 10 of the Convention. Referring to their previous partly dissenting opinions in the cases of *İlker Deniz Yücel v. Turkey* (no 27684/17, 25 January 2022), *Sabuncu and Others v. Turkey* no 23199/17, 10 November 2020) and *Ahmet Hüsrev Altan v. Turkey* (no 13252/17, 13 April 2021), the dissenting judges underlined that the Court should take into account, among relevant factors, the large number of cases brought against Turkey in which Article 18 complaints were raised in circumstances similar to those in the present case.

It is a matter of regret that the majority of the Court did not adequately take into account that the applicants' detention and prosecution was part of a broader pattern of repression against media, civil society and opposition politicians in the aftermath of the attempted coup in Turkey (see also here)despite this, the *Taner Kılıç (no. 2) v. Turkey* judgment is undoubtedly significant, by condemning unequivocally the Turkish authorities arbitrary use of criminal law against a high profile HRD on spurious grounds related to his human rights activities. In this judgment, the Court also showed that it will apply strict scrutiny under Article 10 for any interference with the exercise of HRDs' right to freedom of expression, applying *mutatis mutandis* principles developed regarding the detention of journalists and media professionals. Considering the widespread nature of ongoing criminal proceedings against HRDs in Turkey, this judgment represents a serious warning for the Turkish authorities.

Lastly, the judgment is also relevant to on-going proceedings against Mr. Kılıç himself. He was convicted by the Istanbul Assize Court relying on the same grounds which the Court found insufficient to justify his pre-trial, confirmed on appeal, and the case is currently pending before the Court of Cassation. The Court's finding concerning the lack of "reasonable suspicion" justifying his pre-trial detention, underscore the imperative of Mr. Kılıç's acquittal by the domestic courts.