

TURKISH LAWYERS TRIAL

Trial Observation Report

Hearing of 13th November 2014

Tony Fisher

Report of hearing at Çağlayan Justice Palace 13th November 2014

TRIAL OF KURDISH LAWYERS – ISTANBUL 13th November 2014

Background to this case

For the last two years the Human Rights Committee of the Law Society of England and Wales have, along with lawyers from a number of other countries in the EU and the US, been observing the trial of 45 mainly Kurdish lawyers who have been on trial in Istanbul, Turkey. The background to the case is as follows:

- In November 2011 mass arrests of Kurdish and Turkish lawyers took place in raids carried out simultaneously in many Turkish cities and provinces.
- The arrest of these lawyers is linked with many thousands of other arrests which have taken place, mainly of Kurdish Turkish nationals, since 2009. Most of those arrested have been associated in some way with alleged membership of a Kurdish organisation established by Kurdish leader Abdullah Ocalan, namely the union of Communities in Kurdistan (otherwise known as the KCK).
- The trials of these individuals, including the lawyers' trial, have become known as the KCK trials. In all some 8,000 defendants have been charged with terrorist offences. They include politicians, journalists, academics and other human rights defenders as well as the lawyers.
- The factual link between the lawyers arrested and charged in this case is that they have all, at various times, and for various lengths of time, acted as representatives of Mr Ocalan. Previous hearings have taken place in July 2012, on 6th November 2012, 3rd January 2013, 28th March 2013, 21st June 2013, 17th September 2013 and 19th December 2013.
- the essence of the case against each of the defendants is essentially the same i.e. that in their capacity as lawyers for the PKK leader Mr Ocalan they effectively acted as "mediators" who provided members of an illegal organisation with "information and direction" from Mr Ocalan and as such were involved in the "strategy and management" of an illegal organisation as part of a leadership committee.
- The hearings have been attended by members of the international legal community who have prepared various reports criticising apparent breaches of articles 5, 6 and 8 of ECHR, (both in relation to the defendants themselves and in relation to the breach of confidentiality of other clients of the accused lawyers); and under article 8 (in relation to the invasion of family life resulting from searches of the defendants homes and intercepts of their private conversations with their professional colleagues, their clients and their families). There has also been much criticism of the government's failure to respect the United Nations Basic Principles on the Role of Lawyers adopted in 1990, and the apparent identification of the lawyers with the clients they represent.
- Methods used to collate evidence, including the use of telephone intercepts, search warrants in relation to both office and personal accommodation, and detailed

analysis of publications made and interviews given by various defendants to the media, have also received international censure. Other forms of surveillance (including “technical searches” making use of telephone signals to identify the geographical location of defendants) were also used in collating evidence. Items confiscated and examined included hard disks containing confidential client information with regard to other clients, together with the Defendants’ physical case files. These were subject to detailed scrutiny by the police. Evidence of the contents of confidential client files has been used against the lawyers to try to establish their own involvement in terrorist activities. Efforts to secure that such evidence, tainted with alleged illegality, is excluded from the case, have failed.

- Many of the lawyers remained in custody for a period in excess of two years, although all were eventually released on bail in March 2014.

The wider political background.

The prosecution of the lawyers cannot be understood without some information concerning the wider political context in which the charges have been laid.

The Kurdish community within Turkey consists of some 20 million people. They form part of a wider community of Kurds who have traditionally been concentrated in south east Turkey, Northern Iraq, and Syria, an area referred to generically by the Kurdish people as Kurdistan. The PKK are a terrorist organisation whose stated aim has been to establish an independent Kurdistan, although in recent years the invective has changed to a series of demands for the establishment of autonomous areas where Kurdish rights and culture are respected. Kurdish political parties within Turkey have also continuously campaigned for respect for the Kurdish culture and language over many decades. The “war” between the state authorities in Turkey and the PKK has raged with varying intensity since the 1980's and has seen many thousands of casualties on both sides. During the 1990's the state was guilty of many atrocities in south east Turkey including the destruction of over 3,000 villages and the resultant internal migration of many millions of Kurds to other parts of Turkey. These atrocities led to a substantial number of applications to the European Court of Human Rights during the 1990's and many judgements against Turkey involving the payment of substantial damages to victims of torture, arbitrary killing, unlawful detention and destruction of property. Many millions of Kurds have been “caught between two fires” between the state security forces and the PKK for nearly three decades now. The tensions between the demands of the Kurdish communities for respect for the Kurdish culture and language, and the Turkish state's determination to secure the indivisibility of the state have not been resolved. The Kurdish problem remains one of the greatest challenges faced by Turkey in its efforts to become an effective modern democracy with appropriate respect for human rights, due process, and the rule of law.

Some progress has been made in terms of legislative protection for those in custody and the level and intensity of human rights abuses is recognised as haven fallen back over the last twenty years. Much of the effort made has been driven by Turkey’s desire to join the EU. However, efforts to broker a lasting resolution of the Kurdish issues have failed. The Turkish authorities withdrew from discussions with the PKK in Oslo in 2010. During the course of this trial, since 2011, the political situation has developed further. Fresh dialogue and a new cease fire was announced in January 2013 when direct discussions resumed between the PKK, Mr Ocalan and Turkish state officials. These have perished on the vine in light of other

political and civil realities in Turkey and the region over the last two years. The more general civil society unrest resulting in the Gezi Park riots in Istanbul in June 2014 and now the multi-national efforts to counter the threat of Islamic State in Levant in Syria and Iraq which have seen the PKK and other Kurdish forces (the traditional enemies of the Turkish state) armed by the US and coalition forces have put Turkey in an almost impossible position. Whilst it grapples with its desire to join with the coalition forces to resist the spread of ISIL it is at the same time trying to retain its options with regard to the Kurdish issues within its own territory. We have seen over this period the intervention of Mr Ocalan to quell violence and civil unrest and the unusual sight of the Turkish government publicising his messages to his own followers in order to bring civil order without further oppression by Turkish security forces, and the concomitant censure that such oppression would otherwise bring to Turkey from the international community.

Other relevant events during the course of the trial and since previous hearing

On 18th January 2013, during raids carried out in seven cities spread across Turkey, another 15 lawyers were arrested and detained. Most were members of the Progressive Lawyers Association and/or worked for the People's Legal Aid Bureau, organisations whose lawyers are known for their work on human rights and torture issues. On 24th January 2013 four Ankara lawyers were sentenced to imprisonment for long periods for alleged membership of a terrorist organisation. There are further allegations of mis-treatment and the unauthorised taking of intimate DNA samples from many of these lawyers. Nine of the lawyers arrested on 18th January 2013 were appointed as defence lawyers in the present case.

The international legal community has responded forcibly to these events. Amongst the many reports and submissions made is a letter written by the President of the Law Society of England and Wales to (then) Prime Minister (and now President) Erdogan on 8th February 2013 calling for:

1. The immediate release of the arrested lawyers on bail whilst their cases were progressed;
2. Steps to be taken to ensure generally that lawyers are able to perform their professional duties without intimidation, hindrance, harassment or improper interference including those who represent individuals accused of terrorism or other criminal activities aimed at the government;
3. Steps to be taken to ensure that prosecuting authorities do not identify lawyers with their clients or their clients' causes as a result of discharging their functions;
4. The full implementation of all International and all European obligations ratified by Turkey concerning the right to a fair trial, i.e. Art. 14 of the International Covenant on Civil and Political Rights, Art. 6 European Convention on Human Rights, and the full respect in Turkey for the UN Basic Principles on the Role of Lawyers; and
5. Steps to be taken to ensure police and judicial officers are provided with education and training about the rights guaranteed by the ICCPR and ECHR and Turkey's legal obligations to ensure effective protection of those rights for all.

Further representations have been made to the Turkish government from the Office of the United Nations High Commissioner for Human Rights. On 2nd February 2013, the High Commissioner wrote a letter to the Turkish Prime Minister (now President), Mr Erdogan, signed by no less than five high ranking members of the Office, namely three Special

Rapporteurs¹ together with the Chair-Rapporteur of the Working Group on Arbitrary Detention and the Independent Expert on minority issues. In the letter concern is expressed:-

“that the arrests, charges and criminal proceedings brought against the lawyers in the present case are mainly linked to the contacts they had with their clients within the scope of their professional duties and the legitimate exercise of their profession.”

Concern was also expressed (as it has been before by the UN) about the broad definition and interpretation of the crime of terrorism and the notion of “membership of an illegal organisation” within Turkey and its impact upon fundamental rights such as the right to liberty and the right to freedom of expression.

Recent Developments

Since the last hearing in the present case, there has been a significant development which raises a number of new constitutional issues with regard to the further progress of the case.

On 21st February 2014 the Turkish Parliament passed a new law reducing penalties for certain terrorist offences and most importantly abolishing the Istanbul 16th Specialized Heavy Penal Court in which the trial was proceeding. Lawyers acting for the remaining accused who were in custody immediately demanded their release on bail. The new law entered into force on 6th March 2014 (Code number 6526). A petition submitted to the Istanbul 1st Heavy Penal Court resulted in the release of all of the remaining lawyers on March 18, 2014. The trial was transferred to the Istanbul 19th Heavy Penal Court and the date of the new hearing was fixed at 13-14th November 2014, to be held at Çağlayan Justice Palace in central Istanbul rather than at the prison at Silivri where previous hearings had taken place. A new judge was appointed.

Legal Issues identified in previous hearings

As previously identified there are many aspects of the case which should be of considerable concern to the international legal community. The methods used to secure evidence in support of the charges against the lawyers raise very significant issues:

- under articles 5, 6 and 8 of ECHR, (both in relation to the defendants themselves and in relation to the breach of confidentiality of other clients of the accused lawyers); and
- under article 8 (in relation to the issues which the invasion of family life resulting from searches of the defendants homes and intercepts of their private conversations with their families raise).

The refusal to give reasons for decisions, the long period of pre-trial detention without apparent justification, and the process now followed after the abolition of the court in which the case was proceeding only intensify concerns that the defendants are not receiving and will not receive a fair trial.

¹ The Special Rapporteurs on the situation of human rights defenders, on the independence of judges and lawyers, and on the promotion and protections of human rights and fundamental freedoms while countering terrorism all signed the communication.

The Hearing on 13th November 2014

The day consisted for the most part of a series of representations by the Defendants lawyers, after the defendants themselves had been summoned to appear in front of the judge. At least half of the defendants were absent anyway, having been given leave of absence it appears because of their other commitments. All of them deferred on this occasion to arguments to be put by their lawyers. They all again demanded to be heard in Kurdish (and in one case then disagreed with the interpretation given by their own Kurdish interpreter). The principle arguments advanced on behalf of the defendants were as follows:-

- Firstly that they should all be acquitted on the basis that the whole trial had been pursued as a result of a fatally flawed and unfair procedure. They were being judged because of the client/lawyer relationship between themselves and Mr Ocalan. A number of representations were made that the government were talking to Ocalan and so it was wrong to prosecute the lawyers for doing so. These were arguments used many times before in previous hearings.
- Various representations were made calling for the independence of the judiciary from government pressure. Strong criticism was made of the previous judges for their refusal to exclude evidence illegally obtained.
- Numerous complaints were made concerning the political motivations behind the prosecutions.
- The principal of double jeopardy was again raised since many defendants had been tried and acquitted on similar charges previously.
- The most significant new arguments were based on the fact that the original specialised court had been abolished as a result of constitutional changes which meant that the case could not simply continue from where it left off. No less than 8 judges had been involved since the case began² and it was argued that it would be unconstitutional for the case to continue, at least until the outcome of other cases proceeding before the Constitutional Court, where similar processes were being challenged, had become known. A specific application was also made that the current case be referred to the constitutional court for determination on procedure

Outcome and Commentary

All of the defendants' demands, articulated through their lawyers, were again refused, with no reasons being given other than that they effectively amounted to an abuse of process. The judges sat passively through some five hours of oratory from the lawyers without any interruption or questioning of the lawyers or any of the defendants. The prosecutor also remained passive, and when invited by the principal judge to comment on the applications being made simply said they should not be granted, again giving no reasons. Months of painstaking research and drafting by the defence lawyers therefore simply received a blanket denial.

² See the judgement of the court in *Moiseyev v. Russia*, 62936/00, 9 October 2008 when similar unpredictable and unjustified changes of judicial oversight resulted in a finding of violation of Article 6.1 ECHR

This refusal to give reasons continues the practice of both the current court, and the previous (now dissolved) court at all of the hearings in this trial. The giving of reasons is one of the cornerstones of the judicial function and a central aspect of the rule of law. The ECHR has on numerous occasions reinforced this principle³. At previous hearings the defendants' bail applications were also routinely refused without any reasons at all being given. Carefully crafted applications for the exclusion of evidence which had been obtained illegally were also summarily dismissed.

Reasons are a check on arbitrary decision-making and fundamental to the transparent administration of justice. They satisfy a basic need for fair play. Proper reasons expose decisions which are ultra vires, disclose an error of law, or any unsubstantiated findings.

Further Action

A group of international lawyers from England, Germany and Holland have now resolved to commission an independent report from an independent expert in Turkish Constitutional Law with regard to the arguments put concerning the conflicts between the process adopted by the trial judges and the Turkish constitution. It is hoped that a meeting of experts will be held prior to the resumption of the trial in May 2015 and that a copy of the final report of the constitutional expert can be provided to the lawyers acting for the defendants with a view to this being presented as part of the evidence.

The case has now been adjourned to May 2015. The international legal community has a duty to stand by these lawyers to try and do whatever we can to secure that they ultimately receive a fair trial.

Tony Fisher
Human Rights Committee
Law Society of England and Wales
19th November 2014

³ See for instance *Boicenco v. Moldova*, 41088/05, 11 July 2006