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

Press Release
issued by the Registrar of the Court

ECHR 168 (2023)
06.06.2023

Violation of the Convention for failure to respect the confidentiality of meetings between S. Demirtaş and F. Yüksekdağ and their lawyers

In today's **Chamber** judgment[1] in the case of Demirtaş and Yüksekdağ Şenoğlu v. Türkiye (applications nos. 10207/21 and 10209/21) the European Court of Human Rights held, by a majority (6 votes to 1), that there had been:

a violation of Article 5 § 4 (right to a speedy review of the lawfulness of detention) of the European Convention on Human Rights.

The case concerned two former co-chairs of the Peoples' Democratic Party (HDP) who are currently in prison. They complained that they had not had effective legal assistance in order to appeal against their pre-trial detention, on account of the prison authorities' surveillance of their meetings with their lawyers and the seizure of the documents exchanged with them. The measures in question were ordered by the Turkish courts for a three-month period under Emergency Legislative Decree No. 676, which was enacted following the attempted coup of 15 July 2016.

The Court found, in particular, that the domestic courts had not demonstrated the existence of exceptional circumstances that could justify derogating from the core principle of the confidentiality of the applicants' meetings with their lawyers, and that the breach of lawyer-client privilege had deprived the applicants of effective assistance from their lawyers for the purposes of Article 5 § 4 of the Convention. It also observed that the restrictions in issue had not been accompanied by adequate and effective safeguards against abuse. Lastly, the Court found that the national authorities had not adduced any detailed evidence capable of justifying the imposition of the measures in question on the applicants under Emergency Legislative Decree No. 676.

Principal facts

At the relevant time the applicants, Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu – Turkish nationals born in 1973 and 1971 respectively – were co-chairs of the HDP, a left-wing pro-Kurdish political party. They had been re-elected to the Turkish Grand National Assembly in the 2015 parliamentary elections.

On 4 November 2016 the applicants were placed in pre-trial detention for terrorism-related offences. On conclusion of the domestic proceedings in their respective cases they each lodged an application with the European Court of Human Rights, alleging a violation of the Convention on account of their detention. On 22 December 2020 and 8 November 2022 the Court delivered judgments in which it held, among other findings, that the applicants' pre-trial detention had been contrary to Articles 5 (right to liberty and security), 10 (freedom of expression) and 18 (limitation on use of restrictions on rights) of the Convention, and to Article 3 of Protocol No. 1 (right to free elections)[2].

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

[2] For further details see the judgments in *Selahattin Demirtaş v. Turkey (No. 2)* [GC], no. 14305/17, 22 December 2020, and *Yüksekdağ Şenoğlu and Others v. Türkiye*, nos. 14332/17 and 12 others, 8 November 2022.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

On 15 November 2016, in the context of the applicants' detention and at the request of the Diyarbakır public prosecutor, the Diyarbakır 4th Magistrate's Court ordered the following measures under Emergency Legislative Decree No. 676: audio and video recording of the applicants' meetings with their lawyers; presence of an official during the meetings; and seizure of all the documents exchanged between the applicants and their lawyers.

The applicants appealed unsuccessfully against the orders, arguing that the judge had ordered the restrictions in question in an unlawful and arbitrary manner. On 2 and 3 January 2017 they lodged individual applications with the Constitutional Court alleging a violation of their right to liberty and security and their right to a fair trial. The Constitutional Court found no violation of the applicants' right to liberty and security, ruling that the measures in question were to be considered proportionate during the state of emergency. It declared the complaint concerning the right to a fair trial inadmissible.

In the proceedings before the European Court the applicants complained that they had not had effective legal assistance in order to appeal against their pre-trial detention, on account of the prison authorities' surveillance of their meetings with their lawyers and the seizure of the documents exchanged with them.

The measures in question, which had been ordered for a three-month period, ended on 14 February 2017.

Complaints, procedure and composition of the Court

The applicants relied on Article 5 § 4 of the Convention (right to a speedy review of the lawfulness of detention).

The applications were lodged with the European Court of Human Rights on 13 February 2021.

Judgment was given by a Chamber of seven judges, composed as follows:

Arnfinn **Bårdsen** (Norway), *President*,
Jovan **Ilievski** (North Macedonia),
Egidijus **Kūris** (Lithuania),
Pauliine **Koskelo** (Finland),
Saadet **Yüksel** (Türkiye),
Frédéric **Krenc** (Belgium),
Davor **Derenčinović** (Croatia),

and also Hasan **Bakırcı**, *Section Registrar.*

Decision of the Court

Right to effective assistance by a lawyer

The Court observed that under Emergency Legislative Decree No. 676, measures such as those applied in the present case which limited lawyer-client privilege could be ordered only "where information, findings or documents [had been] obtained indicating that the safety of society and prison security [were] under threat; that terrorist organisations or other criminal organisations [were] led [by a person suspected of terrorism-related offences]; that orders and instructions [had been] given to those organisations; or that secret, explicit or encrypted messages [had been] transmitted."

It was apparent from the reasoning of the decisions given by the Diyarbakır 4th Magistrate's Court that the requirement for "information, findings or documents" to have been obtained had not been

satisfied. Moreover, the decisions in question had been couched in stereotypical language and had not complied with the requirements laid down by domestic law.

Furthermore, the Constitutional Court had not carried out an adequate assessment on this point or an individualised examination of the applicants' situation. It had also observed that the applicants had been found guilty of a terrorism-related offence, although at the material time, on 15 November 2016, the applicants had not been found guilty of any offence. In this context, the Court emphasised that it had found in its previous judgments[3] concerning the applicants that there were no facts or information capable of satisfying an objective observer that they had committed the alleged offences, and that none of the decisions on the applicants' pre-trial detention contained evidence that could indicate a clear link between their actions and the terrorism-related offences for which they had been detained.

Lastly, the Court observed that if a detained person was unable to have confidential meetings with his or her lawyer, it was highly likely that he or she would not feel free to talk to the lawyer. The legal assistance provided by the latter was thus liable to lose its usefulness in practice.

The Court therefore concluded that the applicants had been deprived of effective assistance from their lawyers for the purposes of Article 5 § 4 of the Convention.

Safeguards against abuse

The Court reiterated its well-established case-law to the effect that the privilege attaching to conversations between a prisoner and his or her lawyer constituted a fundamental right of the individual and directly affected the rights of the defence. Derogations from that principle could be allowed only in exceptional cases and had to be accompanied by adequate and sufficient safeguards against abuse.

The national legislation applied in the present case had not been accompanied by any such safeguards. Once the restrictive measures had been ordered by a judge the authorities were authorised, and obliged, to monitor and record prisoners' meetings with their lawyers and to seize any documents exchanged between them. Moreover, the legislation did not specify how the information obtained as a result of the surveillance was to be used. Likewise, it did not indicate which authority was to be entrusted with examining the information, nor did it determine how the persons concerned could ascertain whether there had been any abuse of their rights or obtain a review in that regard. The scope and manner of exercise of the discretion left to the authorities was in no way defined and no specific safeguards were provided for.

Conclusion

The Court considered that the domestic courts had not demonstrated the existence of exceptional circumstances that could justify derogating from the core principle of the confidentiality of the applicants' meetings with their lawyers, and that the breach of lawyer-client privilege had deprived the applicants of effective assistance from their lawyers for the purposes of Article 5 § 4 of the Convention. Moreover, having regard to the findings made in its previous judgments[4], the Court considered that it was not possible to demonstrate the existence of such circumstances in so far as the Court had rejected the Government's argument that the applicants had been in pre-trial detention for terrorism-related offences. Furthermore, it observed that the restrictions in issue had not been accompanied by adequate and sufficient safeguards against abuse.

Lastly, the Court found that the national authorities had not adduced any detailed evidence capable of justifying the imposition of the impugned measures on the applicants under Emergency Legislative Decree No. 676.

[3] *Selahattin Demirtaş (No. 2)* and *Yüksekdağ Şenoğlu and Others*, cited above.
[4] *Selahattin Demirtaş (No. 2) and Yüksekdağ Şenoğlu and Others*, cited above.

There had therefore been a violation of Article 5 § 4 of the Convention.

Just satisfaction (Article 41)

The Court held that Türkiye was to pay the applicants 5,500 euros (EUR) each in respect of non-pecuniary damage and EUR 2,500 jointly in respect of costs and expenses.

Separate opinion

Judge Yüksel expressed a dissenting opinion which is annexed to the judgment.

The judgment is available only in French.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Inci Ertekin (tel.: + 33 3 90 21 55 30)
Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)
Denis Lambert (tel.: + 33 3 90 21 41 09)
Neil Connolly (tel.: + 33 3 90 21 48 05)
Jane Swift (tel.: + 33 3 88 41 29 04)