



CCJE-BU(2015)5

Strasbourg, 12 June 2015

**BUREAU OF THE CONSULTATIVE COUNCIL
OF EUROPEAN JUDGES
(CCJE-BU)**

**Comments by the CCJE Bureau
on letters sent**

**by various judges and international, European and national
associations of judges**

**to the Council of Europe
and to its Consultative Council of European Judges**

concerning, *inter alia*, the suspension and arrest

**of Judge Özçelik and Judge Başer
in Turkey**

I

On April 27, 2015, the High Council of Judges and Prosecutors of Turkey decided on the suspension of Judges Başer and Özçelik of the Istanbul Criminal Court. Subsequently, both judges were arrested and detained on April 30 and May 1, respectively. These events, details of which will be given under III, below, have given rise to a number of letters of complaint which have come to the notice of the bureau of the CCJE.

By electronic messages of May 13 and May 20, two Turkish judges have alleged that, inter alia, both judges had been detained because of their decisions to release suspects who were subject to a criminal investigation. In addition, more than 25 additional complaints have been addressed to members of the bureau of the CCJE, some by judges, the majority anonymous, and the majority being individual complaints and not messages copied and forwarded. Invariably, in these letters it is alleged that the suspension and arrest of Judges Başer and Özçelik was unjustified and unlawful.

By an electronic message of May 1, 2015, addressed to the Director of Human Rights of the Council of Europe, Mr Coşkun Yorulmaz, Turkish advocate, representing his client Hidayet Karaca, has given a detailed account of the events leading to the arrest of the two judges as seen from his point of view. This account can be found in Annex I to this paper. The Director of Human Rights has referred Mr Yorulmaz's letter to the bureau of the CCJE for possible consideration.

The bureau of the CCJE has also taken notice of correspondence between the president of the European Network of Councils for the Judiciary (ENCJ), Lord Justice Geoffrey Vos, and the Deputy President of the High Council of Judges and Prosecutors of Turkey, Judge Metin Yandirmaz, as contained in the letters of May 18 and May 29, respectively. There has been similar correspondence between the Chairman of the Netherlands Council for the Judiciary, Mr F.C.Bakker, and the High Council of Judges and Prosecutors of Turkey by letters of May 11 and May 29, respectively. The European Association of Judges issued an "informative report" dated May 16, 2015, on the arrest and detention of the two judges and it passed a resolution demanding their immediate release.

Following its general policy, the bureau of the CCJE has invited the CCJE member from Turkey to provide the bureau with his views and with any additional information which may be deemed to be helpful to consider the complaints. For this purpose, the bureau has communicated Mr Yorulmaz's letter and its attachments to the CCJE Turkish member.

By letter of May 28, 2015, a communication by the High Council of Judges and Prosecutors was forwarded by the Turkish member of the CCJE to the bureau of the CCJE. In this communication, the undisputed facts are reported as they are described under III, below. In addition, the High Council stated that, since Mr Karaca was neither a judge nor a prosecutor, giving further information on his case was not the task of the High Council. The full text of the reply can be found in Annex II to this paper.

II

The Bureau of the CCJE is of the opinion that the aforementioned letters fall within the terms of reference of the CCJE. According to these terms of reference, one of the main tasks of the CCJE is to provide targeted cooperation, inter alia, at the request of CCJE members, judicial bodies or relevant associations of judges, to enable States to comply with Council of Europe standards. In this respect, letters from judges of the member states directed to the CCJE, the

correspondence between the ENCJ and the Netherlands Council for the Judiciary and the High Council of Judges and Prosecutors of Turkey, respectively, and the request of the Director of Human Rights of the Council of Europe to consider the letter from advocate Yorulmaz, a member of the Istanbul Bar, are such requests. This also applies to the report and the resolution of the European Association of Judges which has been brought to the notice of the CCJE.

III

Despite the fact that Mr Yorulmaz is not a judge, the bureau of the CCJE has decided, prior to possibly undertake a relevant targeted co-operation, to comment on the messages it received on the basis of his letter and the comment of the High Council for Judges and Prosecutors as provided to the bureau by letter of May 28, both to be found in Annexes I and II to this paper, because both letters give the most detailed account of the events in question. The following events have to be taken into account.

According to Mr Yorulmaz's letter and its attachments, Mr Yorulmaz represents his client Mr Hidayet Karaca. Mr Karaca was arrested in December 2014, and has since been detained, according to Mr Yorulmaz on the grounds that he is suspected of being "a leader of an armed terrorist network" although, again according to Mr Yorulmaz, he had only included a scene in a TV movie produced in 2009 and despite the fact he had not given any reason to justify an assumption that he would abscond.

Applications for the release of Mr Karaca were unsuccessful and appeals were dismissed. Following this, Mr Yorulmaz, according to his unchallenged account, renewed this application which in turn came before Judge Mustafa Başer of the 32nd Chamber of the Istanbul Criminal Court. According to this uncontested account, on Saturday, April 25, 2015, Judge Basser was drafting a decision to order the release of a number of detainees from prison, among whom was Mr Yorulmaz's client. This decision and a subsequent reaffirming decision by Judge Başer of Monday, April 27, according to Mr Yorulmaz's detailed account, were not at first written up by the court clerk because of an intervention by the chief inspector responsible for court clerks. Thus, in turn, these decisions were not executed by the public prosecutor's office.

Following news coverage of the release decisions that were to be rendered by Judge Başer and by Judge Özçelik of the 29th Chamber of the Istanbul Criminal Court, the Inspection Board of the High Council of Judges and Prosecutors initiated an investigation vis-a-vis the two judges, issued a preliminary report and requested their suspension. By a decision of the Second Chamber of the High Council of April 27 2015, the suspension of the two judges from their posts was ordered pursuant to Law No. 2802 on Judges and Prosecutors, on the grounds that they

- had acted in alliance with ideas and activities of the original suspects,
- intentionally and willingly had attempted to destroy the Republic of Turkey and partly or fully to prevent it from performing its duties,
- had committed misconduct and similar offences,
- in this connection had violated the explicit provisions of the law in order to make the release of the original suspects possible by an unlawful method.

Pursuant to articles 257/1, 312/1 and 314/2 of the Criminal Code, on the suspicion of attempting to destroy the Republic of Turkey, being a member of an armed terrorist organisation, misconduct and violation of secrecy, arrest warrants were issued against both judges. On April 30 and May 1, 2015, respectively, the 2nd and the 5th Chamber of the

Bakirkoy Assize Court ruled on the detention of the two judges, a ruling which was subsequently upheld on appeal by the 2nd Istanbul Anatolian Assize Court.

IV

In dealing with these requests, the bureau of the CCJE wishes to underline that it is in no position to examine or investigate the factual basis of the events which are alleged to have taken place as reported in the letter of Mr Yorulmaz and in further complaints and statements received, save insofar as they are undisputed as stated above.

With this in mind, the CCJE wishes to recall that the fundamental principles of the separation of powers, of the independence of the judiciary and of the personal independence of judges and their irremovability are necessary pre-requisites for a democratic society that is governed by the rule of law. These principles have been expressed in many constitutions of member states of the Council of Europe; they are the basis of the European Convention on Human Rights and they have been frequently recalled or used as a basis for further elaboration in many Opinions of the CCJE (cf. at least Opinion No.1, para. 63 ss.). According to paragraph 13 of Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges' independence, efficiency and responsibilities, all necessary measures should be taken to respect, protect and promote the independence and impartiality of judges. This includes measures taken by those institutions directly responsible for an independent judiciary, namely High Councils of the Judiciary, where they exist (cf. opinion 10, para. 14), ministries of justice and judges and prosecutors themselves. According to Article 1 of the UN Basic Principles of the Independence of the Judiciary, the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

Where the official performance of judges may give rise to criticism or even to disciplinary or criminal investigations, such proceedings must invariably follow the procedure set down by the relevant acts of parliament, in accordance with the due process that is set out in such laws and carried out with the necessary procedural guarantees for all parties involved (cf. opinion 10, para. 63). To replace such formal proceedings by actions aimed at sanctioning individual judges because of judgments they have rendered, or in order to induce them to render specific judgements in the future, is absolutely unacceptable. The CCJE will speak out strongly against any such actions wherever they may occur.

The CCJE observes that, although criminal investigations with respect to judges and courts are not illegal and there is in general no immunity of judges, the authorities concerned are under a duty to observe, guarantee and provide for the proper functioning of the judiciary as the third power of the state. It follows from this that the greatest care should be taken before investigatory measures are employed by any prosecution authority which may have the effect of impeding or obstructing the functioning of judicial business. With this in mind, suspending a judge and even arresting him/her on the ground that he/she had rendered or attempted to render a decision would appear to be justified only in absolutely exceptional circumstances. Such suspension and/or arrest will necessarily amount to the judge who has jurisdiction on pending cases being prevented from exercising his/her duties in court whereas, as a rule, decisions rendered, even if they are found to be wrong, should only be reviewed on appeal.

In the opinion of the CCJE, this approach also follows from the overriding principle of proportionality, which, as developed by the European Court of Human Rights, is a fundamental principle of the European Convention on Human Rights. All measures taken by the state and in particular all measures taken by the executive power of the state that affect human rights, must, in a democratic society, be done according to law. All measures will only be justifiable

and justified in so far as they are apt and necessary to achieve a legitimate goal which must be one, itself, which has a legal foundation.

V

With these principles in mind, the bureau of the CCJE emphasizes once again that it is not in a position to weigh or evaluate conflicting allegations of facts in relation to the present complaints. In particular, the bureau cannot judge or appraise the facts on which the investigations against the two judges concerned have relied. This would clearly be beyond the competence of the CCJE which cannot replace the assessment of facts and evidence made by the competent Turkish authorities by the bureau's own assessment. This also applies to the application of procedural law, both in the case of proceedings concerning the suspension of the judges as well as in relation to the pending criminal investigations.

As the undisputed report of the High Council of Judges and Prosecutors shows, in the case of the two judges the competent authorities have acted, procedural steps based on the law have been observed and judicial decisions have been given, purportedly applying the relevant disciplinary and criminal law. The bureau of the CCJE can and will not comment on the correctness of the application of procedural and substantive law in the course of these proceedings.

The bureau of the CCJE must, however, note the existence of several circumstances which give rise to doubts and which, above all, when looked at in the particular context, cause the greatest concern as to whether these proceedings and their results can be regarded as being consistent with European standards and with the requirements of fair process in a democratic society:

The first aspect which has to be noted in this context is the (undisputed) allegation that Judge Başer was prevented from putting his draft decision into writing so that in the end he had to do it himself. Obstructing a judge's work by refusing to permit his draft to be put in writing (or by ordering the clerk to refuse to do so) would be absolutely unacceptable. A judge's decision-making process must not be obstructed at all, his/her decisions, once handed down, being subject only to review on appeal.

It is equally unacceptable if, as has apparently been the case, the execution of a decision is prevented by persons not authorised to do so. Throughout its Opinion No.13, the CCJE has made it clear that judicial decisions have to be effectively executed because this is a fundamental element of the rule of law (cf., e.g., Opinion No.13, para. 7). Refusal to execute an otherwise executable judicial release order, therefore, would clearly amount to an obstruction of the course of justice and is absolutely unacceptable.

The fact that, as has been stated in the comments of the High Council, the inspectorate started its investigations after news coverage of the pending release decisions which could have happened at the earliest over the weekend between April 25 and 27 and that the inspectorate provided a provisional report as early as April 27, with the decision of the Second Chamber of the High Council rendered on the very same day indicates that these proceedings have been conducted rapidly. It is difficult to see how such a decision could be founded on a sufficiently thorough evaluation of facts, let alone after giving a proper opportunity for the judges to be heard and in accordance with all other necessary further procedural guarantees. It is not apparent why such speed in the proceedings was necessary, nor have sufficient grounds for such a headlong rush been given.

Taking these aspects into account overall and assessing in addition to this the unprecedented number of complaints which have reached the members of the bureau of the CCJE, the bureau

of the CCJE has concluded that it must express its grave and sincere concern with respect to the proceedings and decisions leading to the suspension and arrest of Judge Özçelik and Judge Başer. The uncontested facts, as they appear to the bureau, lead to the clear inference that these judges may have been removed only or predominantly because of their (intended) decision-making. This in turn would cast great doubts on whether the guarantees of personal and institutional independence of the judiciary have been sufficiently observed in Turkey. In addition, these events must be seen against a background of reports that a substantial number of judges in Turkey have, in recent months, against their will been removed from their offices and transferred to other posts. The extent of such transfers gives rise to additional doubts with respect to their causes. Regardless of whether they were justified by necessities of providing judicial services to all regions of the country, in the eyes of society and of the members of the judiciary concerned these moves might lead to the conclusion that judges may have in fact undergone such transfers because of their decision-making. This in turn would endanger and possibly undermine confidence in the impartiality and independence of the judiciary and the fundamental principles recalled under IV, above. To sustain and widen such confidence, however, must be the paramount aim of all concerned with the administration of justice.

VI

The CCJE is willing to provide further assistance in this matter, through a possible targeted co-operation, according to its Terms of Reference.

Enclosed: Annex I: Note on Hidayet Karaca case

Annex II: Communication of the High Council of Judges and Prosecutors of Turkey

ANNEX I

A NOTE ON HIDAYET KARACA CASE 28.02.2015

Following the police raids in the December of 2013 Samanyolu Media Group has become an open target for Recep Tayyip Erdogan for not buying into his rhetoric that the duly carried out criminal investigation which resulted in the indictment of 4 cabinet ministers was in fact a coup d'état to bring down his rule.

At a time where large media conglomerates were being hammered into submission by the threat of tax inspections or exclusion from public tenders, the refusal of a relatively small media group to toe the line did not go down well with Mr Erdogan who apparently liked his media with a one or more of his party 'commissars' nicely embedded in.

Dissent makes Mr Erdogan very angry. He tends to give vent to his anger by utilising his power to crush such dissent with little or no regard to the law. He therefore sent forward RTUK, the Turkish regulatory body for media. RTUK has since been very effective in the way it has singled out Samanyolu Media Group and punished it. Samanyolu Haber TV and Samanyolu TV were collectively at the receiving end of 145 separate administrative fines RTUK has issued between December 2013 and February 2015. The total sum of fines Samanyolu Media have so far been hit with is approximately YTL 4m and counting. On the other hand, Samanyolu programmes were suspended in more than 50 different occasions which effectively meant the viewers were left to watch low budget 'documentaries' from the 80s which RTUK conveniently picked for them instead of the suspended show.

In the meantime Mr Erdogan was doing his bit and telling the Turkish public at every opportunity not to watch 'their TV channels'. Public bodies up and down the country were quick to take the hint and start persecuting Samanyolu. Mayors who wanted to keep on the good side of Mr Erdogan used every trick in the book to stop Samanyolu channels filming in their respective towns. As a result film sets had to be removed to different towns at great expense. Some of the cast, clearly influenced by the climate of intimidation, terminated their contracts mid-season fearing loss of future work from state channels. Guests for live shows were appropriately told not to attend.

Government officials were quick to join in by imposing accreditation bans on Samanyolu channels for meetings they were attending. Mr Davutoğlu for instance saw nothing wrong in extending the ban into the UK where he was attending a financial forum and where British ambassador to Turkey was among the guests.

Inspectors from different public bodies but most importantly from the tax office have suddenly become a common sight at Samanyolu premises. Mr Erdogan was determined to stick to what previously worked for him and selectively use tax inspections as stick against a media group which dared to stand up to his authority.

At that point state-owned companies had long confined their advertisement budgets to media outlets which proved themselves as effective mouthpieces for Mr Erdogan regardless of their respective rating figures. Mr Erdogan, however, was not to be happy until and unless media

companies like Samanyolu had no advertisement revenues at all. That would inevitably take 'convincing' of private companies too to take their business elsewhere, which he did. Samanyolu's revenues from advertisement plummeted to record low figures.

As if the above were not enough to finish off a media group with relatively humble means, rowdy demonstrations were organised at the gates of Samanyolu Group premises in İstanbul where AKP supporters were let by the security forces to chant threatening and abusive slogans to the horror and dismay of Samanyolu employees who were left to watch the whole affair unfold from the windows of their offices.

WHAT IS HIDAYET KARACA BEING ACCUSED OF?

In layman's terms Hidayet Karaca is being accused of conveying Fethullah Gülen's directions for the arrest of Tahşiye members to the police officers who took part in the criminal investigation started by a public prosecutor against the same group. According to the public prosecutor who asked for the arrest of Hidayet Karaca it worked like this; Mr Gülen warns his followers of a fundamentalist terrorist group. Hidayet Karaca having heard the talk in question in a website considers that to be an instruction to actually arrest those terrorists. He then instructs the producers and script writers who work for Samanyolu to incorporate that 'instruction' into a TV movie. Subsequently one of the scenes in a movie shows some shady characters making a plan to use fundamentalist terrorists to set up a peaceful group of moderate Muslims. The police officers see the movie. They consider it to be an instruction coming from Mr Gülen to arrest Tahşiye group members. They go and make the arrests.

WHO ARE THE TAHŞIYE?

As far as Mr Erdogan is concerned they are a bunch of good people lead by a poor blind man who went to jail for nothing but not sharing the views of 'Pennsylvania'. In other words, they are yet another victim of 'Pennsylvania' just like himself. Military intelligence and MİT, the national intelligence service, beg to differ.

TAHŞIYE's activities get detected by MİT as early as 2004. After a 4 year surveillance MİT puts together a comprehensive report in 2008 in which it exposes the ideology and objective of the group, which it names TAHŞIYE, as well as its leading figures. MİT, then, shares the same report first with the police and then the military. As of February 2009 all of the intelligence services of the country are aware of the activities of a group called Tahşiye and so are the relevant operational departments of the police and the army.

So, who are the Tahşiye as far as the MİT, the police and the army are concerned? The MİT report in question reads;

- 'M. Doğan [the leader] and other members of the group fully support Usama Bin Laden and Al Qaeda...'
- 'M. Doğan said that his first and foremost objective was to gain control of all religious schools in Turkey and to present them to Al Qaeda's service'
- 'M. Doğan said that Turkey is an 'infidel state' and it would be freed by a war that Al Qaeda would fight as the army of Islam'

- 'The group is said to have some five thousand members'

- 'M. Doğan is a man of considerable wealth which he obtained from vast parcels of land his family owns in...'

- 'Amongst the most important sponsors of the group is his son-in-law Saim Aşçı, the owner of ... [a Turkish company] which is the Turkey distributor of ... [one of the biggest motor car manufacturers in the world]'

- The group publish books through publishing companies named Tahşiye, Rahle....'

On the other hand in various video clips posted in the internet Mehmet Doğan can be heard saying;

'Now Usama Bin Laden is calling [to arms]. It is obligatory for Muslims to comply'

' Join the war'

Once furnished with the report the police in May 2009 refer the matter to the public prosecutor, just like any competent police force would do. The public prosecutor immediately orders a criminal investigation to the matter. The police start collecting evidence. Police raids the house of a Tahşiye member in January 2010 where they find, amongst other weapons, 3 hand grenades. Muammer Güler, the then mayor of Istanbul, announces the operation as a success. He then goes on to officially commend the police chief who was in charge of the raids. 4 years later the same group member lodges a complaint against the police officers who took part in the public prosecutor's criminal investigation of Tahşiye amid rumours that he was 'encouraged' by the government to do so. It was that complaint which eventually has led to the unlawful detention of Hidayet Karaca, the CEO of Samanyolu Media Group.

HOW WAS HIDAYET KARACA ARRESTED?

On 23rd of March 2014 Pro-AKP newspaper run a story in which it claimed that Fethullah Gülen pointed the finger in the arrests of Mehmet Doğan, the leader of Tahşiye, and 10 of his friends back in 2010. That story would later turn out to be the blueprint for the public prosecutor's case against Hidayet Karaca.

Mehmet Nuri Turan, one of the 11 men arrested in 2010, filed a criminal complaint against the police officers who took part in the prosecutor's criminal investigation of the Tahşiye.

A prominent Pro-AKP journalist in July 2014 wrote; ' Is Cemaat [Hizmet Movement] ready for a payback for Tahşiye raids?'

On the 11th of December 2014 a famous twitter account with an astonishing track record of announcing police raids before they actually take place claimed that some 400 people including journalists would be arrested in dawn raids the following day.

On 12th of December 2014 Hidayet Karaca asked the chief public prosecutor whether he was the suspect of an ongoing criminal investigation. The chief public prosecutor replied in writing to say that as of 4:30pm that day he was not.

While Hidayet Karaca was outside the court waiting for the chief public prosecutor's answer, Mr Erdogan gave his presidential assent to a bill which meant when issuing arrest warrants courts would only have to look for 'reasonable doubt' as opposed to the previous requirement 'strong doubt based on concrete evidence'. It was published in the Official Gazette later that day thus have come into effect.

On the 13th of December 2014, the Twitter account above listed the names of 35 people, including Hidayet Karaca, who he claimed would be arrested the following day. He claimed that the public outcry caused by his previous tweets made the government to go back on its plans to arrest hundreds of people.

In the morning of 14th of December 2014 Pro-AKP news channels started announcing that Hidayet Karaca had been arrested at his house when in fact he was at his office. He drove to the Police Headquarters with his lawyer where he was arrested.

THE REASONS WHY HIDAYET KARACA'S ARREST AND SUBSEQUENT DETENTION IS UNLAWFUL

POLITICAL SHADOW CAST OVER MR KARACA'S DETENTION

A day after Mr Erdogan lowered the legal threshold concerning standard of evidence for arrest Mr Karaca was taken into custody. It is noteworthy that the same piece of legislation which lowered the said threshold also made it extremely difficult for lawyers to see their clients' criminal files. As a result Mr Karaca's lawyers were denied the right to have a proper examination of his file. On the other hand, AKP members were allowed to make public statements about the investigation which at times amounted to unlawful instruction and direction of the court.

UNFOUNDED ASSUMPTION OF RISK TO ABSCOND

Despite the fact that Mr Karaca has been to the chief public prosecutor's office to enquire whether there was an ongoing criminal investigation about himself two days before his arrest and the fact that has driven to the police headquarters when he heard in the news that he was being sought by the police the court saw nothing wrong in detaining him on the grounds that he could abscond.

THE JUDGE CONSIDERED INADMISSABLE EVIDENCE TO DETAIN MR KARACA

The same judge, who ignored legally obtained audio recordings of cabinet ministers and refused to detain them, inexplicably used fabricated audio recordings of Mr Karaca to order his detention despite protest from Mr Karaca's lawyers.

MAJOR LOGICAL ERRORS IN THE PROSECUTORS CASE

The public prosecutors claim that a TV movie filmed in 2009 is the result of an imaginary telephone conversation (see above) which is said to have taken place in 2013. This alone should result in the prosecutor's case to collapse, of course, in jurisdictions where the rule of law prevails. Yet, Mr Karaca is still behind bars.

MAKING A TV MOVIE MAY MAKE ONE A TERRORIST!

The particular offence under which Mr Karaca has been detained is 'being a leader of an armed terrorist network'. That particular offence would obviously require arms, terror and violence on the part of the offender. In Mr Karaca's case there is no weapon, no terrorist activity and no violence. The only evidence that the public prosecutor could come up with to back his claim is a scene in a movie. This case should have been thrown out by the very judge who has detained Mr Karaca instead.

AN ACCOUNT OF EVENTS WHICH LED TO UNLAWFUL ARREST OF TWO SENIOR CRIMINAL JUDGES

This is the account of events which unfolded on the night of Saturday the 25th concerning a criminal court order issued for the release of Hidayet Karaca, the CEO of Samanyolu Media Group.

BACKGROUND

Our client has been detained pending trial for over 4 months now on the ridiculous grounds of instructing police officers, through a scene in a TV movie, to arrest a number of people with alleged links to Al Qaeda. For more information as to the matter please see the attached document.

Since the detention of our client by the Judgeships (which were specifically formed by Erdogan in July 2014 to persecute anybody who he felt a threat to his growing authoritarianism especially those who were officially involved in investigating the corruption allegations against his family and his close circle of politicians, bureaucrats and businessmen) we have applied to them numerous times for the release of our client. All of our pleas were flatly refused by the same criminal judgeships of the peace as they are officially called with no consideration of the facts of the matter or the law. They have also denied us access to the file of our client under a piece of legislation which Erdogan has pushed through the parliament a day before our client was arrested.

There is a common perception that the judges who were appointed to the said 'judgeships' were handpicked from among those who were willing to help Erdogan implement his agenda. We did not care in the beginning whether that was really the case. We believed that their political views were irrelevant as long as they did their duty of upholding the constitution and the rule of law.

When Hidayet Karaca was first arrested the police kept him in custody for 2 whole days without asking him a single question. When they applied for a 3 day extension of time we objected. **Our objection was turned down by the judge who was in charge.** It was only 3 hours from the maximum 4 day custody time limit that the police started questioning our client.

When we applied to the judge to lift the restriction to see our client's file, **he turned down our application.**

When consequently our client was unlawfully detained we have appealed at another judgeship against the detention order. **Our appeal was turned down** with no consideration of the facts or the law.

We have subsequently filed for the release of our client in all of the 10 judgeships which have jurisdiction over the matter. All of which were flatly denied. The courts did not even bother to explain their decisions with a proper reasoning. The attitude of the judgeships towards our client from the start made us to suspect that the public perception that the judgeships are biased might actually be true. In any case, judges must not only be impartial and independent but must be seen to be so.

We then had to file for the removal of the judges at a higher criminal court in February 2015 on the basis of bias and their conduct prior to their appointment. The higher court were reluctant to consider the case as our application was passed around between different courts until it was finally referred to 'Justice Commission' which normally has the final concerning administrative disputes between courts. The Assize Court (Ağır Ceza Mahkemesi), the highest criminal court was in the opinion that *Asliye Ceza Mahkemesi* (Mid degree criminal court) did have jurisdiction in considering removal of judges from a case. The Commission instead of swiftly dealing with the matter chose to sit on their hands. Following a 2 month wait we decided to make another application both for the removal of the judges and the release of our client. This time *Asliye Ceza* accepted the Assize Courts argument, rightly assumed jurisdiction and removed all of the judgeships from our client's file. It then referred our application to another *Asliye Ceza* court to consider the release of our client. That particular *Asliye Ceza* court decided as follows,

*'It is evident that the suspects were detained well after the 4 day custody time limit had lapsed... The ECHR ruled in **Zeynep Avci v Turkey** that a detention order issued after a custodial time limit have lapsed would not make lawful the violation of such a limit...*

*A court is under a legal duty to clearly express in its detention order the facts from which it has inferred 'strong suspicion' that a crime has been committed. Upon perusal of the contents of the file **no facts or evidence were identified which in accordance with article 170 of the Criminal Procedure [CMK] would arouse even the 'requisite level of suspicion' to suggest that a crime has been committed, let alone a 'strong suspicion' [without which a suspect may not be detained].***

*Once the judge has established 'strong suspicion', before issuing a detention order he must go on to consider whether the conditions in article 100 of the Criminal Procedure [CMK] have been met ...When assessing the risk of absconding character of the suspect, his integrity, address, profession, means...should be taken into account. In the light of the [ECHR's] **NEUMEISTER [v. AUSTRIA]** decision, it is evident that it is very unlikely for the suspects to abscond taking into consideration ... that some of them are police officers and Hidayet Karaca is a journalist and that many of them had come forward when informed they were being sought.*

After discussing the points above the court must also discuss why a 'judicial control' order [a criminal measure similar to bail] as defined in article 109 of the Criminal Procedure [CMK] would not be adequate in the circumstances. Upon perusal of the file... it is understood in the light of the above ECHR ruling that even 'judicial control' measures would not be necessary let alone the detention of the suspects.

... with regard to the balance between public security and liberty, in order for an extension of detention new evidence must always be submitted [to the court]. Detention may not be extended solely on the grounds that there has been no change in the circumstances which existed when the first detention order has been made.

...it has not been considered [by the court] why the public prosecutor failed to submit his evidence after such a long time from the detention of the suspects.

Upon perusal of the contents of the file, bundles and CDs, and taking into consideration the laws as well as ECHR and Turkish Constitutional Court rulings, no facts or evidence which would justify detention has been identified.

For the reasons set out above, a conscientious verdict to release the suspects has been reached as requested by their counsel.'

ACCOUNT OF EVENTS FOLLOWING JUDGE'S RELEASE ORDER

At 9pm last Saturday we became aware that 32 'Asliye' Criminal Court was about to release our client through a post in Sabah's, a Pro-Erdogan daily, website which said a judge was drafting his decision to release a number of detainees from prison.

We immediately went to the court house where we found a few security guards taking down names of the lawyers who wanted to go in. They said it was with the orders of the chief

public prosecutor. We ignored them and went up to the 2nd floor where 32 'Asliye' Criminal Court was located.

When we arrived at the offices of the court we found Judge Mustafa Bařer dictating his decision to his clerk who was uploading it into 'UYAP', nationwide judicial intranet. When he was halfway in to decision the intranet suddenly shut down. Judge Bařer then started dictating his decision offline.

We then was alerted to a meeting which was going on at the top floor of the court house where the offices of the most senior public prosecutors were including the chief public prosecutor which the security guards confirmed when we asked them.

At that point the chief inspector who is responsible of the professional conduct of court clerks came to their room and summoned them upstairs to his office. One of the lady clerks passed out on her way to the inspector's office apparently due to stress. She was taken to hospital by an ambulance. We went up to the inspector's office and asked him whether it was the norm in that court house to summon court clerks to emergency one to one meetings when they are in performance of their duties. He said he was reminding them that they had to do their work properly. When we went back to the courtroom we found that one of the lady clerks had left the office without permission as she felt intimidated by the inspector's intervention.

When Judge Bařer was busy with getting the release orders ready, the 10th Criminal Judgeship, which is a lower degree court to *Asliye* Criminal Court, went completely out of its jurisdiction and gave a decision in which it said Judge Bařer's order to be void.

In the meantime former Minister of Justice Bekir Bozdađ, with total disregard of the Turkish Constitution, attacked Judge Bařer over Twitter branding his order 'a decision which defied the law'.

Mr Mustafa řentop, deputy PM followed suit and tweeted along the same line. What is shocking from a legal point of view is that Mehmet Yılmaz, the head of the HSYK, Supreme Board of Judges and Prosecutors, retweeted his statement.

When individual release orders were ready for the suspects, one of the clerks personally took it to the relevant public prosecutor's office. The office said they would not accept them. Then Judge Bařer himself took them there. He was also turned down.

Then we lawyers went to the offices of the duty prosecutor who was supposed to sign and forward the release orders to the prison where the suspects including our client were being held. He was not in his office. We called him at a mobile number which duty prosecutors used. He said he was within the court house but was not available to sign the release orders. When we said he was unlawfully delaying the release of our client he would not come to his office. He said he was told not to accept the orders by the deputy chief prosecutor.

Adv. Ömer Kavili, representative of the İstanbul Bar responsible of lawyers rights was with us at that moment. He asked us to go around and knock all the doors to make sure that the public prosecutor was not in one of the other rooms. He was not. It was unbelievable that a public prosecutor was hiding in order not to do his duty which was administrative in nature.

We then had to wait for the next duty public prosecutor who started at 9:30 Sunday morning. When we went into his office he said he would wait to see the decision of the 10th judgeship. We reminded him that he had no appellate powers which would let him to assess the merits of a court decision. He was apparently under a lot of pressure. He eventually returned the release orders to Judge Bařer saying he would not enforce them, a first in Turkish legal history.

On Monday the 27th of April Judge Bařer gave another decision to say that his order stood and that he would make a criminal complaint for false imprisonment and contempt of court against those who unlawfully defied it. He sent the release orders to the prosecutors for the 3rd time.

HSYK issued a statement on Monday morning that that they would be convening later that day to discuss the conduct of the two judges. They actually convened at 2pm.

When HSYK was deliberating what to do with the two judges who infuriated Erdogan with their decisions, Erdogan speaking at a press conference said the HSYK has reacted very slowly (Apparently he was expecting them to convene at the weekend) and 'hoped' they would come to an 'ideal conclusion' about the matter.

HSYK, unsurprisingly, suspended the two judges. The head of the HSYK apologised over twitter 'for being late '. Two days later he would apologise once again.

Unfortunately yesterday (30.04.2015) in an investigation started by a complaint from HSYK an arrest order was issued for the two judges, Judge Bařer and Judge zelik. Judge zelik presented himself to the public prosecutor last night who charged him for being 'a member of an armed terrorist organisation'. He was then detained pending trial.

Judge Bařer on the other hand tweeted that he was away from Istanbul and would be in the public prosecutor's office today (01.05.2015) at 8am CET.

Adv. Coskun Yorulmaz

ANNEX II

Communication of the High Council of Judges and Prosecutors of Turkey

According to the information obtained from the 2nd Chamber of the High Council of Judges and Prosecutors and the Chairmanship of the Inspection Board of the High Council of Judges and Prosecutors regarding the course of the suspension and detention of Mr. Metin ÖZÇELİK, Judge at the 29th Chamber of the Istanbul Criminal Court, and Mr. Mustafa BAŞER, Judge at the 32nd Chamber of the Istanbul Criminal Court;

Upon the news coverage of the aforementioned judges on some media organs stating that they had unlawfully rendered a release decision for some suspects, an investigation was initiated by the Inspection Board of the High Council of Judges and Prosecutors, a preliminary report was issued against the judges and their suspension was requested. Subsequently, with the Decision no. 2015/274 dated 27 April 2015 of the Second Chamber of the High Council of Judges and Prosecutors, it was ordered that the judges in question be suspended from their posts, pursuant to the relevant articles of the Law No. 2802 on Judges and Prosecutors, due to the fact that the pursuance of their duty would compromise the reputation of the judiciary on the grounds that they have acted in alliance with ideas and activities of the suspects against whom the Istanbul Chief Public Prosecutor's Office had been carrying out an investigation for the offences of discrediting and putting the Republic and the Government of Turkey in a difficult position before the national and international platforms; intentionally and willingly attempting to destroy the Republic of Turkey and to partly or fully prevent it from performing its duties by creating an image before the international judicial bodies as if it were aiding the Al-Qaeda terrorist organisation, which would incur criminal and civil liabilities on it; misconduct and similar offences; and in this connection, on the grounds that the judges in question have violated the explicit provisions of law in order to make the release of the said suspects possible by an unlawful method.

Arrest warrants were issued against both suspects (judges) respectively, pursuant to Articles 257/1, 312/1 and 314/2 of the Turkish Criminal Code, for the offences of "Attempting to destroy the Republic of Turkey and to partly or fully prevent it from performing its duties; being a member of an armed terrorist organisation; misconduct and violation of secrecy". Relying on the same articles of the arrest warrant, on 30 April 2015, the 2nd Chamber of the Bakirkoy Assize Court, authorized pursuant to Article 85 of the High Council of Judges and Prosecutors, ruled on the detention of Mr. Metin ÖZÇELİK; and on 1 May 2015, the 5th

Chamber of the Bakirkoy Assize Court ruled on the detention of Mr. Mustafa BAŞER. Upon the appeals against the decisions, the 2nd Istanbul Anatolian Assize Court rejected the request for the release of the judges. The examination and investigation into the relevant persons are still in progress.

On the other hand, since Mr. Hidayet Karaca is not a judge or prosecutor, making explanation or giving extra information is not the task of the High Council of Judges and Prosecutors. His case has been dealt with at the Courts and the judicial process has been going on its own way.