

The Criminal Case of the Judges Baser and Özcelik

Report on Hearing of 10th Feb. 2016

The second hearing in the criminal case against the two judges Mustafa BASER and Metin ÖZCELİK took place at the Court of Cassation in Ankara on February 10th. The hearing was attended by Gerhard Reissner on behalf of the European Association of Judges (EAJ) and the International Association of Judges (IAJ) and Gerritjan van Oven on behalf of Judges for Judges in order to observe the procedure.

The hearing took place in another room than last time, which was not equipped with a video-screen on, which the lawyers and the public could follow the text of the minutes, which is simultaneously produced following the dictation of the chair of the panel. This was criticized by the lawyers and after some debates it was announced that these facilities would be provided in the afternoon. The lawyers protested and argued that they have a right to follow exactly what will be in the minutes. Nevertheless the video-screen was established not earlier than after the lunch break.

After the usual formalities in the beginning of an hearing the decision of the competent 17. Chamber of the Court of Cassation regarding the motion to change the judges because they were accused to be biased was read out. The motion had been rejected. Regarding the 17. Chamber the observers saw a written decision with a dissenting opinion of one or two (?) members, who expressed that they see no legal ground to keep the judges in detention and referred to a lack of evidence that the judges had committed the crimes they are accused of.

It was also interesting that the panel this time was chaired by another judge than in January. This is possible, because the chair of the chamber is free how to compose the chamber, a very unusual legal provision, which in any case is in conflict with the principle of "the natural judge", which in many countries is used in order to prevent undue influence.

What followed was a new motion of the lawyers this time asking for the exchange of some members of the panel, because they were members of the "Unity in Judiciary Platform" (YBP), a broad group of judges, which had been formed to bring their candidates for becoming members of the High Council for Judges and Prosecutors in this position. They argue that this platform not only had promised to cooperate with the government but also had publicly condemned the accused judges in this case and so disregarded the presumption of innocence. The judges concerned by this motion announced that they were no members of this platform.

Once again the lawyers claimed that before entering in the procedure decisions had to be made, if the court, which issued the arrest warrant against the accused judges and which was involved in the pre-trial stage was competent or not. They underlined that so far the 16. Chamber had avoided to definitely deciding on this question, which in the eyes of the observers is a correct statement. The lawyers and the accused judges themselves argued again that such a decision regardless of its outcome is necessary,

because there are several mistakes and failures in the pre-trial stage, which have to be remedied before the start of the procedure. As far as the observers understood one of the aspects is that there could neither be a trial nor an ongoing detention, if the pre-trial decisions had would have been taken by a court without jurisdiction.

After a long debate and a break and another debate, in which sometimes five people spoke at the same time (judges, prosecutors, defense lawyers), the prosecutor argued that after the indictment had been accepted by the court no objections regarding procedural questions of the pre-trial stage are possible and immediately after this statement the panel followed this argumentation without further explanation. Not knowing the details of the Turkish Criminal Procedural Code the observers would have been interested to learn when and how such arguments should have been previously put forward

The lawyers once again claimed that in this way they had no possibility to prepare an adequate defense and that such a procedure would be unfair. The chair said that it was obvious that the lawyers wanted to delay the procedure and asked the prosecutor to present the indictment. When the Prosecutor started to read out the indictment, which was said that it has 120 pages, at the same time the lawyers went on with presenting arguments for their positions. The chair did not react and the prosecutor went on until after some minutes the lawyers announced that they intended to step down from their office, because the procedure is unfair and they have no possibility to effectively defend their clients. At this stage a break was announced. After the lunch break the court announced its decision, that all remedies and objections were rejected, because there is the possibility to raise these arguments in the appeal stage of the procedure. Now all lawyers but two stepped down, the remaining once asked for a break to discuss the strategy among the lawyers. The chair ordered a ten minutes break, after which the two lawyers asked for a prolongation of the break, because they wanted to speak about the issue with their clients. When this was rejected by the court using the argument that there is no respective provision in the procedural code, the last two lawyers also stepped down and the two accused judges remained without lawyer.

Due to the type of the offense a defense lawyer is necessary, so the procedure could not go on.

The prosecutor put the motion to keep the judges in detention. Both of them delivered a long and impressive argumentation, why there is no legal basis to keep them in prison. There is neither one of the reasons for a pre-trial detention, as is foreseen in the law and requested by the European Convention on Human Rights nor is there any idea of a proof that they have committed the crimes, which they are accused of. Indeed normally it should be an indispensable requirement to put someone in detention that there is not only the assertion but convincing factual indicators that there is a fast likelihood to proof these accusations.

This long presentations of judge Baser ad judge Özcelik, in which they complemented each other were the most interesting part of this day, because the observers, who still don't know the indictment and what exactly the judges are accused of, for the first time learned something of the merits of the case. There some interesting and astonishing elements were disclosed. It looks as if the fact that the judges had ordered to release police officers and a journalist is not part of the accusation, although it was the

start of the case against the judges and their arrest. Obviously the argument that the fact that a judge orders to release somebody shows that he belongs to something to which the released persons are said to belong, has been recognized as absurd. The arguments the judges mentioned in their speech were that the connection dates of all telephone calls of the two judges within the last 8 (eight!!!) years had been screened and analyzed. Both judges argued that there is nothing which could proof the allegations. One argument was that the only one phone call from this long period of observation, which the prosecution uses as an argument, was that this call was to someone who called someone who called someone who is thought that he maybe a member of the Gülen movement.

It seems unbelievable that in a state governed by the rule of law a judge is systematically observed for a period for, 8 years. It will be interesting, when in the ongoing procedure the respective files will be opened and made public, especially who had ordered such investigation.

Defendant Özcelik said that he had the impression that the court, in practice, did already condemn him even before the procedure on the merits had started.

In spite of their arguments after a break the court announced that the accused judges should remain in detention, that they have 15 days to reorganize their defense otherwise a court appointed defense counsel would be assigned, and announced, which witnesses the court is going to hear. The two accused judges put the motion that they want to be present, when the witnesses will be questioned and that they want to have the possibility to ask their questions in order to defend themselves.

A positive aspect was that the court made it possible that the accused could see their families, which again had traveled from Istanbul to Ankara to follow the hearing, among them the wife of defendant Özcelik, a medical doctor, who worked for the Bezmialem Vakif University Hospital who was fired without reasoning and the couple's 5 year old son, who was expelled from his kindergarten.

Also the observers had a short possibility to speak with the accused judges and their families. It was another shock to hear, that they were kept in the worst of the six categories of prison facilities (class F), where they are imprisoned together with criminals, whom they themselves had had convicted because of serious crimes.

An overall observation still the fact that the decisions of the panel are so far always very straight forward without concrete motivation. E.g. the motivation of the ongoing detention order was only, it is a serious crime and there is the danger of taking flight or to influence witnesses, but no arguments were given why this would be the case.

During the day the observers got the information by some of the persons present in the hearing that the day before disciplinary investigation against 70 or more administrative judges had been started and they were suspended from promotion. It was said that the minister of interior had send a list of judges to the High Council and the High Council took this decision without even hearing the respective judges. Later the day the observers discovered such reports also in some media.

Other judges, who attended the meeting reported, that the majority of judges is frightened that they themselves might be the next, if they issue an unwanted decision. Insofar the present case is of outmost importance.

The next hearing was scheduled for 14.3.2016.

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