

## The Criminal Case of the Judges Baser and Özcelik

Hearing of 21<sup>st</sup> Jan. 2016

On behalf of the European Association of Judges (EAJ) and the International Association of Judges (IAJ) I attended the first hearing in the criminal case against the two judges Mustafa BASER and Metin ÖZCELİK, which took place at the Court of Cassation in Ankara. Due to the fact that the two accused persons are judges and one of the offences that they are accused of is miscarriages of office the jurisdiction of the Court of Cassation takes place, which acts as a first instance court applying the respective procedural provisions. The panel is composed of five Supreme Court judges. I was told that most of them had been appointed recently.

Government had enacted a legislation to establish the 16<sup>th</sup> Chamber of the Court of Cassation. In this chamber the newly established Presidency Committee of the Court of Cassation allocated special criminal cases like that of organized crime and established the jurisdiction for the case against Baser and Özcelik. New judges were appointed and assigned to this chamber, which previously have been first instance or high judges.

Shortly after the judges had been arrested the European Association of Judges adopted a resolution and requested to release the judges. This document is attached.

Nevertheless the judges have been in custody since then, although also in Turkey manifest reasons to keep somebody in detention in the pre-trial procedure are necessary, which have to be checked every month. Astonishing enough one of them, who was outside attending a marriage ceremony hurried back to Istanbul as soon as he got to know that an arrest warrant had been issued.

The offences, which the judges are accused of are a) attempting to overthrow government by using force, b) being member of an armed terrorist organisation, c) misconduct in office and d) disclosure of confidential information. The argumentation regarding the first two most serious crimes seems to be as follows. The police officer and the journalist who should have been released by order of the now accused judges are suspected to be members of such a network of terrorists. The fact that they had been involved in the investigations against members of the ruling party was not used as an argument. There is the widespread view in Turkey that the former friend and partner of Erdogan, Fethulla Gülen, after he had broken with Erdogan and had gone to the United States in 1999 established a network in Turkey, which sometimes is addressed as "parallel state". This is obviously interpreted as terrorist organisation. My question why it is an armed terrorist organisation although at least in the media outside Turkey no attacks of this group have been reported, was answered, that some members are police officers and they are armed because of their profession. I guess due to the fact that the two judges wanted to release persons, who were seen as members of this organisation, they themselves are labeled being members. So far any other argumentation did not show up.

I could not discover how the argumentation of the prosecution regarding the other offenses is. The defense lawyers said that the accusations are totally unfounded, especially the accusation of disclosure of information contradicts clear facts, they argue.

After checking the personal data and before entering in the merits of the case the defense lawyers raised a number of objections. They argued that the whole pre-trial procedure was against the law, that there is no valid indictment and that therefore a new investigation procedure by a competent body has to take place. Without remedy of the investigation procedure there cannot be a trial. Several arguments were put forward, the most important once were that the court, which arrested the judges and did the investigation had no jurisdiction to do so and that the indictment was not correctly forwarded to the defense lawyers, which previously had been excluded from information, because the Judicial Council, which was investigating the case prepared the indictment and sent it to the prosecutor, which immediately passed it on to the 2. Bakıröy Criminal Court, which issued the arrest order with in unusual short time. Quickly and before the defense lawyers got either to know at all or at least were able to react the case file was forwarded to the 16 Chamber of the Court of Cassation, which accepted the indictment. After that some of the lawyers but not all got the indictments. In any case the lawyers claimed that they did not get information before the Court of Cassation accepted the indictment, which infringed the possibility of defense.

The chair of the panel when the lawyers put forward this argument in the hearing argued that even if it would be the case as the lawyers claim this does not matter and could be substituted in the following hearing. For me the most interesting part of this argumentation was the lack of jurisdiction of the court, which conducted the investigation stage of the procedure. In Turkey special courts have been established, which among other crimes are competent for trials regarding terrorism. The lawyers argue that the clear text of the law limits the jurisdiction of these special courts to the trial stage of the procedure. During the investigation stage as far as interventions of a judge are necessary these have to be exercised by the ordinary criminal courts, for organized crime cases the on-duty court of serious crime and not the specialized court, which is competent for the trial stage only. At the other courts an on-duty system is established, which guarantees that at every time a judge is available. The competent judge changes every day, which makes it more difficult to determine who will be in charge if an unexpected case shows up. In our case not this court but the special court ran the investigation stage of the procedure. Due to the fact that among the offences there are terror crime related ones not the 2. Bakıröy Court, but the on-duty court of serious crimes would have been competent for the issue of an arrest warrant and other decisions in the investigation stage. This is the position the defense lawyers took.

Colleagues told me that this is really an exception, which did not happen before. The corresponding special court in Ankara always acts along this practice that only the trial stage and not the investigation is exercised by the special court.

Due to the fact that they had not been properly informed about the indictment the lawyers also claimed that the possibility to prepare a defense on the merits had been infringed.

After a 20 to 30 minutes break to deliberate on the objections all of them were rejected. In my eyes the oral motivation which was given was more like it is rejected because the law says it has to be rejected without really dealing with the arguments which were put forward in the objections. When the chair of the panel announced that possible shortcomings in the investigation stage will be solved in the trial itself, one of the two accused judges asked how the illegal detention for more ten months could be remedied in the trial.

Most interesting was that Judge Baser himself wanted to insist that the court gives a clear statement which court is competent for decisions in the investigation stage in cases like theirs, respectively that not only the motion to declare the investigative procedure as void is rejected but also to give a clear reason for that. But the panel resisted doing so. I guess there is the problem that if there is such a statement of the Court of Cassation either this case or other similar sensitive cases e.g. at the Ankara Court may be seen as void, because there seems to be the general practice that such procedure is done by on-duty courts in the investigative stage and not like in this case by the special court competent for the trial of terroristic criminal offences.

After this debate and after some argumentation regarding the correctness of the minutes (-I appreciated very much that the minutes are directly put on a screen which everybody in the room can follow. This gives the possibility to correct it if there are some failures or a misunderstanding wording. I noticed that several times the lawyers made remarks and that the chair of the panel then ordered a change in the text. I thought that this is a very transparent and efficient way to record the correct content of the hearing. -) But to underline the following motion the lawyers also claimed that the court did not consider all their wishes of correction of the minutes so that the minutes are not correct in every respect. Of course for me, who is not familiar with the Turkish language it is not possible to give a judgment here) the defense lawyers put in the motion that the five judges should step down from the case, because they seem to be biased. They claimed that the panel was reluctant to fully protocol the motions and objections of the lawyers, it does not give clear answers and they avoided to give reasons for their decisions.

After a lunch break the hearing was postponed. The motion of the lawyers to state that there is a disqualification of the five judges was rejected. The remedy against this decision will be in the competence of the 17<sup>th</sup> Chamber of the Court of Cassation.

Regarding the wording and the completeness of the minutes regarding this objection there was again a dispute between the panel and the defense lawyers which led to a decision to exclude one of the lawyers from the hearing and the threat of the panel also to exclude the accused judges. Both were not exercised.

The motion to release the judges was rejected. The reasons what is the legal basis for the ongoing detention was not given and are unclear. The wife of Metin ÖZCELİK suffered a breakdown.

This breakdown and the decision to exclude the lawyer happened after I left the hearing to catch my plane in time. I was informed by a colleague about this final phase of the hearing.

My presence and the interest of the international judges community at large general was recognized by the panel, by the Turkish colleagues, who attended the hearing, by the few journalists, who were present, and by the families of the accused judges. I had the opportunity to speak with them. They suffer quite remarkable. The wife of one of the judges lost her job as a medical specialist some days after her husband had been imprisoned.

Due to the fact that only preliminary questions had been object of this hearing it remains still totally unclear in how far the argumentation that the accused judges committed the offences, which are listed in the indictment against them will be argued and proofed.

Astonishing enough and against the perception of innocence on the day of the hearing the decision of the High Council was published that the two accused judges were expelled from their profession.

Gerhard Reissner