SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

COMMITTEE OF MINISTERS
COMITÉ DES MINISTRES

COUNCIL OF EUROPE
1949 - 2024
CONSEIL DE L'EUROPE

Contact: Ireneusz Kondak
Tel: 03.90.21.59.86

Date: 17/09/2024

DH-DD(2024)1052

Meeting: 1507th meeting (September 2024) (DH)

Communication from an NGO (Broken Chalk) (09/09/2024) concerning the case of Yuksel Yalcinkaya v. Türkiye (Application No. 15669/20).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

* * * * * * * * * * * *

Réunion : 1507e réunion (septembre 2024) (DH)

Communication d'une ONG (Broken Chalk) (09/09/2024) relative à l'affaire Yuksel Yalcinkaya c. Türkiye (requête n° 15669/20) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

BROKEN CHALK

Harmonielaan 63,
1111 PE, Diemen
Netherlands

r.ince@brokenchalk.org
+31 6 87406567

RULE 9.2 SUBMISSION

by

BROKEN CHALK

on the general measures required for the implementation of Yüksel Yalçınkaya v. Türkiye Grand Chamber judgment for the 1507th meeting of the Committee of Ministers.

6 September 2024

BROKEN CHALK

Harmonielaan 63,
1111 PE, Diemen
Netherlands

r.ince@brokenchalk.org
+31 6 87406567

Council of Europe
DGI Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECtHR
F-67075 Strasbourg Cedex FRANCE
dgi-execution@coe.int

Amsterdam, 6 September 2024

Rule 9.2 Submission from Broken Chalk in the Case of Yüksel Yalçınkaya v. Türkiye [GC] (15669/20)

1. Introduction

Broken Chalk hereby respectfully submits its observations under Rule 9.2. of the 'Rules of the Committee of Ministers for the supervision of the execution of judgements and of the terms of friendly settlements' regarding the execution of the judgement of the European Court of Human Rights in the case of Yüksel Yalçınkaya v. Türkiye Grand Chamber Judgment for the 1501st meeting of the Committee of Ministers.

Broken Chalk is a non-governmental organisation (NGO) committed to addressing human rights violations in the education sector. We help people across the globe, who have faced human rights abuses in the educational field.

2. Case Summary

The case is based on the events that took place in Turkey following the failed coup in 2016. Yüksel Yalçınkaya, the applicant, a teacher at a public school, was arrested and convicted of being a member of the armed terrorist organization; "Fetullahist Terror Organisation/Parallel State Structure" (FETÖ/PDY) His conviction was primarily based on the fact that he had used the encrypted messaging application "ByLock" which was seized by Turkey's National Intelligence Agency (MİT) during its operations on FETÖ/PDY. The domestic courts held that

BROKEN CHALK
Harmonielaan 63,
1111 PE, Diemen
Netherlands
r.ince@brokenchalk.org
+31 6 87406567

the app was developed to be used only by the FETÖ/PDY members and was presented as a global application. Consequently, the applicant was sentenced to six years and three months in prison, and his appeal was unsuccessful. On May 3, 2022, the Court's Chamber transferred the case to the Grand Chamber for further consideration.[1]

The ECtHR therefore decided in Yalçınkaya's favour, arguing that the use of ByLock as the only evidence was a violation of legal certainty. According to the Court, the retroactive application of the anti-terrorism legislation is against the principle of legality, and it urged Turkey to remove such legal and procedural problems.[2]

3. The Issues at Hand

In the Yüksel Yalçınkaya v. Türkiye case, several issues related to Turkey's post-2016 coup judicial system were exposed, particularly the mishandling of digital evidence in terrorism-related prosecutions.

Violation of Article 7.1 ECHR

The European Court of Human Rights (ECtHR) found that Turkey has violated Article 7(1) - nullum crimen sine lege- of the ECHR by sentencing Yüksel Yalçınkaya on the basis of imprecise and uncertain legal arguments, thus ignoring the principle of legality (ECHR, Article 7-1). The use of the ByLock instant messaging application -allegedly linked to the Gülen movement- as the only evidence for the prosecution of terrorism has been criticized as insufficient by the European Court of Human Rights.[3]As stated in the Judgement:

[1] European Court of Human Rights, Yüksel Yalçınkaya v. Türkiye [GC] - 15669/20 Judgment (26 September 2023).
[2] European Court of Human Rights, Yüksel Yalçınkaya v. Türkiye Grand Chamber, Application no. 15669/20, (26 September 2023), para 238.
[3] Id, para. 384.

BROKEN CHALK

Harmonielaan 63,
1111 PE, Diemen
Netherlands

r.ince@brokenchalk.org
+31 6 87406567

"Conviction for membership of an armed terrorist organisation based decisively on use of encrypted messaging application ByLock, without establishing offence's constituent material and mental elements in an individualised manner: violation".[4]

The ECtHR stressed that according to Article 7 of the ECHR personal liability must be proved by a mental connection between a measure and an offence for a measure to be punitive in nature. The applicant was convicted for being a member of the terrorist organization under article 314 § 2 of the Turkish Criminal Code mainly because he used ByLock as messenger application which was considered enough evidence in Turkey for qualifying as a member of the terrorist organization. According to the Court, while Turkey's legal system was sufficiently clear, the application and interpretation of the domestic law by the Turkish courts did not satisfy the foreseeability standard under Article 7. Alone the usage of ByLock did not serve the purpose of establishing the membership in a terrorist organization as per the objective and subjective standards. The domestic courts equated the use of the application with the intention of committing terrorism, thereby omitting the proper individual assessment of the intent. This broad interpretation of the law has brought about objective liability, which contravenes Article 7's protection against arbitrary prosecution. The Court recognized the challenges faced by states in their attempt to combat terrorism, but held that even in the highly exceptional circumstances, such as post-coup Turkey, the minimum standards provided under Article 7, a non-derogable right, must be strictly observed.[5]

Violation of Article 6.1 ECHR

Moreover, the Court found that Turkey has violated article 6(1) of the ECHR, stating in its Judgement:

"Prejudice to the defense on account of non-disclosure of raw data obtained from ByLock server not counterbalanced by adequate procedural safeguards: violation."[6]

[4] European Court of Human Rights, Yüksel Yalçınkaya v. Türkiye [GC] - 15669/20 Judgment (26 September 2023).
[5] Ibid.
[6] Ibid.

BROKEN CHALK

Harmonielaan 63,
1111 PE, Diemen
Netherlands

r.ince@brokenchalk.org
+31 6 87406567

The ECtHR recognized the increasing role of electronic evidence in criminal proceedings but noted certain risks associated with it such as its volatility, loss, alteration, or manipulation. Regarding the ByLock messaging application, which the Turkish authorities associated with a specific terrorist organization, the Court stated that although the use of electronic evidence is useful in fighting organized crime, it cannot be done at the cost of Article 6 § 1 of the Convention on fair trial. Although the ByLock data suggested that there is a link to the Gülen movement, the Turkish courts did not provide the applicant an effective opportunity to challenge the evidence by withholding raw data and failing to address his concerns in an adequate manner. This meant that the applicant was deprived of the chance to defend himself effectively, thus undermining the fairness of the trial. As a result, the ECtHR found that the domestic courts failed to sufficiently assess the reliability of the ByLock data and the existence of other possibilities and thus violated the right to a fair trial. In addition, Turkey's derogation under Article 15 in the aftermath of the coup did not justify these violations since the right to a fair trial cannot be denied even under the state of emergency. The Court held that the proceedings violated the applicant's right to a fair trial.[7]

Violation of Article 11 ECHR

Nonetheless, the Court unanimously held that Turkey has violated Article 11 of the ECHR, stating in its Judgement:

"*the domestic courts have deprived the applicant of the minimum protection against arbitrariness*".[8]

The ECtHR highlighted that Turkey had overly extended the scope of Article 314 § 2 – in an unforeseeable manner – in an attempt to support the applicant's conviction based on his membership in a trade union and association linked to FETÖ/PDY, despite both organizations having been operating lawfully at the time. Furthermore, the Government failed to show that

[7] Ibid.
[8] Ibid.

BROKEN CHALK
Harmonielaan 63,
1111 PE, Diemen
Netherlands
r.ince@brokenchalk.org
+31 6 87406567

this interference with the applicant's rights under this provision was necessary (or strictly required) by the exigencies of the situation under Article 15.[9]

The Court, under Article 46, recommended that the applicant's criminal proceedings should be reopened and called for broader measures to solve the systemic problem affecting the cases related to ByLock. The Court provided that there were approximately 8,000 similar cases pending before the Court and recommended that the Turkish authorities act in consonance with the Convention norms.[10]

Lastly, in accordance with the Article 41 of the Convention the Court stated that the finding of the violation itself would sufficiently compensate for non-pecuniary damage and thus rejected the claim on pecuniary damage.[11]

4. General Measures

Overview and Legal Context

In its latest communication the European Court of Human Rights (ECtHR) reiterated its previous findings regarding Turkey's use of ByLock as evidence in terrorism-related cases.

This approach has resulted in systematic breaches of Article 7 and Article 6 of the Convention, as established by the Court. The Court determined that the extensive use of ByLock as evidence, without adequate legal safeguards, did not meet the 'strictly required' standard under Article 15, despite acknowledging the situation as a public emergency.

The Court emphasized that the breaches identified in the judgment must be addressed on a larger scale, beyond the specific case at hand, due to the widespread impact of the issue.

Analysis and Critiques of Governmental Measures

[9] Ibid.
[10] Ibid.
[11] European Court of Human Rights, Yüksel Yalçınkaya v. Türkiye Grand Chamber, Application no. 15669/20 (26 September 2023) para 425.

BROKEN CHALK
Harmonielaan 63,
1111 PE, Diemen
Netherlands
r.ince@brokenchalk.org
+31 6 87406567

The Turkish government's response to the case has been entirely focused on justifying its practices in the name of national security. In fact, it has been claimed that a state of emergency justified all actions adopted following the attempted military coup. As a result, Türkiye's representatives argued in their defence that the authorities had not breached any of the applicants' ECHR rights. This is because the government held to have used the derogation clause provided by Article 15 ECHR, which allows temporary derogation of certain articles of the Convention in situations of emergency for national security.

The same perspective was then held following the judgment, as some 611 individuals were detained across 77 provinces for using the ByLock application or facing charges similar to those of Mr. Yalçınkaya.[12]

This approach highlights a systematic refusal to take positive actions regarding the re-opening of criminal cases of people convicted for similar ByLock trials. Such a refusal raises critiques regarding the active recognition of ECtHR's judgments, which as the President of the Constitutional Court stated, there is no ground for the reopening of cases with similar circumstances even after the ECtHR's judgment.

However, according to Turkish Criminal law, the acquittal of the defendant who has been convicted due to participation in the criminal organization must be conducted considering multiple elements. As such, it is necessary to prove that the defendant intentionally took part in the association, and secondly, it must be shown that the use of ByLock has practically contributed to enacting the activities conducted by the terrorist group. It has been shown that such grounds have not been considered in the conviction of Mr. Yalçınkaya: as prescribed by Article 314(2) of the Turkish Criminal Code. The Turkish Court has failed to prove the knowledge and intent to be a part of the terrorist group, therefore disregarding the application of domestic law, as well as principles of the ECHR, highlighting the need for a consistent and coherent application of the judgment of Mr. Yalçınkaya as well as all the other similar cases.

[12] ASSEDEL, "Rule 9.2 submission by ASSEDEL on the implementation of Yüksek Yalçınkaya v. Türkiye (15669/20)" (7 May 2024) https://hudoc.exec.coe.int/eng?i=DH-DD(2024)583E para 15. And Justice Square, "Rule 9.2 submission by Justice Square on the implementation of Yüksek Yalçınkaya v. Türkiye (15669/20)" (13 February 2024) https://hudoc.exec.coe.int/eng?i=DH-DD(2024)217E paras.13-14.

BROKEN CHALK

Harmonielaan 63,
1111 PE, Diemen
Netherlands

r.ince@brokenchalk.org
+31 6 87406567

Expert Opinions and Recommendations

The *Yüksel Yalçınkaya v. Türkiye* case has highlighted several critical areas requiring reform to address systemic issues and ensure compliance with the European Court of Human Rights (ECtHR) judgment. Expert analyses have generated key recommendations, which can be grouped into three main categories: legislative reforms, procedural changes, and broader application of judicial findings.

To address systemic problems related to digital evidence handling and align with international human rights standards, legislative changes are imperative. This involves revising laws and procedures to better safeguard defendants' rights and meet ECtHR requirements.[13] The case underscores the prevalence of similar issues, emphasizing the need for systemic reforms to prevent recurring violations.[14]

Establishing clear procedures for the reliability and fairness of electronic evidence is crucial. This includes disclosing reasons for data gaps and ensuring transparency in the chain of custody. Procedural reforms are necessary to maintain the integrity of digital evidence handling and to uphold due process.[15]

It is essential to apply the judgment's findings to similar cases and introduce effective oversight mechanisms. This will help address systemic issues and align national practices with human rights obligations.[16]

Experts agree that comprehensive legal and procedural reforms are needed to address the deficiencies highlighted by the Yalçınkaya judgment. The Turkish judicial system must undertake substantial changes, including revising legislation, reopening flawed cases, and

[13] Turkut E. & Yıldız A., "ByLock Prosecutions and the Right to Fair Trial in Turkey: The ECtHR Grand Chamber's Ruling in Yüksel Yalçınkaya v. Türkiye. Statewatch." (2024) https://www.statewatch.org/media/4200/sw-echr-yalcinkaya-bylock-report.pdf

[14] Kaplankaya H., "Yüksel Yalçınkaya v. Türkiye: Systemic Violations of the Nullum Crimen Principle by a Founding Member of the CoE." (2023) http://opiniojuris.org/2023/12/19/yuksel-yalcinkaya-v-turkiye-systemic-violations-of-the-nullum-crimen-nulla-poena-sine-lege-principle-in-a-founding-member-of-the-council-of-europe/

[15] Elfving S., "Yalçınkaya v. Türkiye: Terror convictions must yield to human rights." Human Rights in Context. (2024) https://www.humanrightsincontext.be/post/yalçınkaya-v-türkiye-terror-convictions-must-yield-to-human-rights

[16] Dr. Serkan Cengiz., "AVRUPA İNSAN HAKLARI MAHKEMESİNİN YÜKSEL YALÇINKAYA/TÜRKİYE KARARINA İLİŞKİN DEĞERLENDİRME." (2024) https://tbbyayinlari.barobirlik.org.tr/TBBBooks/679.pdf

BROKEN CHALK
Harmonielaan 63,
1111 PE, Diemen
Netherlands
r.ince@brokenchalk.org
+31 6 87406567

ensuring all judicial processes adhere to ECtHR principles. Implementing these recommendations will help rectify past injustices and bring Turkey into compliance with international human rights standards.

5. Conclusions and recommendations to the Committee of Ministers

Turkey has failed to implement the final, binding court decision related to the *Yüksel Yalçınkaya v. Türkiye* judgment, despite the application of Article 46 of the Convention by the Court. The *Yaçinkaya* decision should have triggered the re-opening of ByLock proceedings in which defendants were convicted, yet Turkey's domestic courts continue to misinterpret the ECtHR judgment.[17] Turkey cannot continue disregarding the binding decision of the ECtHR's Grand Chamber, as numerous criminal cases in Turkey involve the same violations of the European Convention of Human Rights.

To conclude, Broken Chalk can only suggest that the Committee of Ministers, at its earliest convenience, consider the following recommendations:

- The Committee of Ministers should address Turkey's reluctance to fulfil its obligations by considering new measures to ensure Turkey fully complies with Article 46 of the Convention.
- Legal and procedural reforms are necessary in Turkey's criminal procedure to address the deficiencies highlighted by the *Yüksel Yalçınkaya v. Türkiye* judgment. Including revising legislation, reopening flawed cases, and ensuring all ByLock proceedings adhere to ECtHR principles.

[17] ASSEDEL, "Rule 9.2 submission by ASSEDEL on the implementation of Yüksek Yalçınkaya v. Türkiye (15669/20)" (7 May 2024) https://hudoc.exec.coe.int/eng?i=DH-DD(2024)583E para 36