



Turkish civil servants dismissed after attempted *coup d'état* must challenge the measure before the commission set up under Legislative Decree no. 685

In its decision in the case of [Köksal v. Turkey](#) (application no. 70478/16) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerns Mr Köksal's dismissal by legislative decree in the context of measures taken after the attempted *coup d'état* in Turkey.

The Court dismissed the application for failure to exhaust domestic remedies, finding that Mr Köksal had to use the remedy provided for under Legislative Decree no. 685. That legislation provided for the setting-up of a commission with the task, in particular, of adjudicating upon appeals against measures adopted directly by Legislative Decrees issued in the context of the state of emergency, including the dismissals of civil servants. The decisions taken by the commission could then be appealed against before the administrative courts, whose decisions in turn could be challenged before the Constitutional Court by individual petition. When that highest court had examined a case and given judgment, any individual could submit a complaint under the Convention to the European Court.

Civil servants affected by the relevant measures thus had the possibility of referring their cases to the commission within 60 days from a date to be announced by the Prime Minister by 23 July 2017 at the latest (six months after the entry into force of the Legislative Decree). The burden of proof as to the effectiveness of this remedy would then be on the respondent State.

Principal facts

The applicant, Gökhan Köksal, is a Turkish national who was born in 1978 and lives in Ankara. He was a teacher at the "1071 Malazgirt" primary school in Erzurum (Turkey). On 25 July 2016 he was suspended from his duties in the context of measures taken after a state of emergency had been declared on 21 July 2016.

On 1 September 2016 he was dismissed from his post, pursuant to Legislative Decree no. 672 concerning the dismissal of 50,875 civil servants who were regarded as belonging, affiliated or related to terrorist organisations or to organisations, structures or groups which had been found by the National Security Council to engage in activities harmful to the State. The Legislative Decree provided that those dismissed could never be reinstated as civil servants and their passports were cancelled. On 28 September 2016 Mr Köksal lodged an individual appeal with the Constitutional Court to challenge his dismissal. The appeal is still pending. In the meantime, Legislative Decree no. 685 on the establishment of the commission for the review of measures taken in connection with the state of emergency has been enacted on 2 January 2017 by the Cabinet and published on 23 January 2017 in the Official Gazette.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 4 November 2016.

Relying on Article 6 §§ 1, 2 and 3 (a) of the European Convention on Human Rights, Mr Köksal complained of a violation of his right of access to a court, his right to be presumed innocent and his right to be informed promptly of the accusation against him. Relying on Article 7 (no punishment without law), he complained that he had been dismissed on the basis of acts which did not

constitute an offence at the time they were committed. Mr Köksal also argued that he sustained breaches of his rights and freedoms under Articles 8 (right to respect for private and family life), 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination).

The decision was given by a Chamber of seven, composed as follows:

Robert **Spano** (Iceland), *President*,
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Valeriu **Griţco** (the Republic of Moldova),
Jon Fridrik **Kjølbro** (Denmark),
Stéphanie **Mourou-Vikström** (Monaco), *Judges*,

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

After the lodging of the application, Legislative Decree no. 685, adopted on 2 January 2017 and published in the Official Gazette on 23 January 2017, provided for the setting-up of a commission which would have the task, in particular, of adjudicating upon appeals against measures adopted directly by Legislative Decrees issued in the context of the state of emergency, including the dismissals of civil servants. Civil servants affected by the relevant measures thus had the possibility of referring their cases to the commission within 60 days from the date to be fixed by the Prime Minister by 23 July 2017 at the latest (six months after the entry into force of the Legislative Decree)¹. The commission's decisions could then be appealed against before the administrative courts². The executive had thus put an end to the controversy about the jurisdiction of the national courts as regards the judicial review of measures taken under Legislative Decrees issued during a state of emergency and had designated the administrative courts to hear administrative appeals against the commission's decisions. The administrative courts' decisions in turn could be challenged before the Constitutional Court by individual petition. When that highest court had examined a case and given judgment, any individual could also, if need be, submit a complaint under the Convention to the European Court. Mr Köksal thus had a new remedy which would enable him to give the domestic authorities an opportunity to provide redress for the alleged violation of the Convention provisions at national level.

The Legislative Decree had thus been adopted with the aim of remedying a large-scale problematic situation resulting, not only from shortcomings in the decision-making process in respect of the impugned measures, as indicated by the Venice Commission in its opinion no. 865/2016³, but also from the uncertainty about judicial review of those measures. In those circumstances, the Court found that it was justified to make an exception to the general principle that the condition of exhaustion of domestic remedies must be assessed at the time when the application is lodged. It was therefore for the victim of an alleged Convention violation to test the limits of this new remedy.

The remedy introduced by Legislative Decree no. 685 constituted in principle an accessible remedy and the Court had no reason to believe that it was not capable of providing appropriate redress for Mr Köksal's Convention complaints or that it did not offer a reasonable chance of success. Even though the commission in question was, strictly speaking, a non-judicial organ, its decisions

¹ Article 7 § 3 of Legislative Decree no. 685 and Article 1 of its transitional provisions

² Article 11 § 1 of Legislative Decree no. 685

³ Opinion no. 865/2016 of the European Commission for Democracy and Law (the "Venice Commission") on Legislative Decrees nos. 667-676 issued during the state of emergency after the attempted *coup d'état* of 15 July 2016

nevertheless remained subject to judicial review. The Court emphasised, however, that this conclusion did not prejudice, if necessary, a possible re-examination of the question of the effectiveness and reality of the remedy introduced by Legislative Decree no. 685, both in theory and in practice, in the light of the decisions to be given by the commission and domestic courts, subject to the effective enforcement of those decisions.

The date on which the commission would start to receive appeals from civil servants affected by the measures complained of was to be announced by the Prime Minister by 23 July 2017 at the latest⁴. In any event, the burden of proof concerning the effectiveness of this remedy would then be on the respondent State. In addition, the Court retained its jurisdiction for the ultimate review of any complaint by applicants, who, in accordance with the subsidiarity principle, had exhausted the available domestic remedies.

In conclusion, as Mr Köksal had complained of a violation of his Convention rights as a result of his dismissal, he should have used that remedy in accordance with Article 35 § 1 of the Convention. The application was thus dismissed for failure to exhaust domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

The decision is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

⁴ Article 7 § 3 of Legislative Decree no. 685 and Article 1 of its transitional provisions.