Telek and others v. Turkey

Applications nos. 66763/17, 66767/17 and 15891/18

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENER

pursuant to the Section Registrar's notification dated 29 January 2019 that the President of the Section had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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19 February 2019

I. Introduction

In this intervention, the ICJ will address the issue of whether effective remedies for alleged violations of Convention rights, pursuant to articles 13 and 35 ECHR, are available and accessible for people in Turkey subject to professional dismissal under emergency decrees and whose passport have been cancelled.

In Turkey, academicians and public servants dismissed under emergency decrees enacted during the state of emergency in force between July 2016 and July 2018 cannot work at either public or at private universities, all of which are considered as part of the public administration. Furthermore, since the cancellation of passports is one of the consequences of the dismissal by emergency decree, they cannot work at or travel to engage in professional activities abroad, for instance at foreign academic institutions.[1] With regard to the complaints concerning dismissals under the emergency decrees, this Court has held that the exhaustion of domestic remedies prior to application to the Court requires exhaustion of proceedings before the newly established Inquiry Commission on the State of Emergency Measures (hereinafter "State of Emergency Commission") and of subsequent judicial remedies.[2]

The ICJ submits that, in considering the effectiveness of domestic remedies concerning passport cancellation as a consequence of dismissal under emergency decrees, two questions need to be addressed:

a. Whether the State of Emergency Commission and/or judicial remedies subsequent to the decision of the Commission might constitute an effective remedy;
b. Whether separate remedies for passport cancellation can provide effective relief for the applicants' claims.

II. Exhaustion and adequacy of domestic remedies under articles 35 and 13 ECHR[3]

Under article 35 ECHR, applicants to the Court must exhaust all effective domestic remedies, according to the generally rules of international law, before submitting their case at the international level. A determination as to the effectiveness of a remedy depends on the individual case and must be assessed both in law and in practice.[4][5] Furthermore the rule of exhaustion of domestic remedies "must be applied with some degree of flexibility and without excessive formalism ... .the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed, it is essential to have regard to the particular circumstances of each individual case ... . *This means, amongst other things, that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant's case ... ."*[6] *(emphasis added)*

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[1] Rights Violations Against "Academics for Peace", available at https://barisicinakademisyenler.net/node/314
[2] See *Köksal v. Turkey,* Application no. 70478/16, 6 June 2017.
[3] See for the latest references on the right to an effective remedy the latest edition of the ICJ Practitioners Guide no. 2 , *The Right to a Remedy and Reparation for Gross Human Rights Violations*, 2019, available at https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/ .
[4] Neshkov and others v. Bulgaria, ECtHR, Applications nos. 36925/10 21487/12 72893/12, 27 January 2015, para. 178, 179-181; Akdivar and others v. Turkey, ECtHR, Application no. 21893/93, 1 April 1998, paras. 66-73.
[5] Nikitin and other v Estonia, 23226/16 , para. 119, as more recent ruling.
[6] Nikitin and other v Estonia, *op. cit.* , para. 121 (emphasis added).

The ICJ notes that in the seminal *Greek Case*, the European Commission on Human Rights held that, even if the applicants had not exhausted domestic remedies, "having regard to the measures taken by the respondent Government with respect to the status and functioning of courts of law, did not find that in the particular situation prevailing in Greece, the domestic remedies indicated by the respondent Government could be considered as effective and sufficient."[7] The Commission reached this conclusion "having particular regard to the dismissal of thirty judicial officers in May 1968".[8] It attached particular importance to the independence of courts, both ordinary and special.[9]

In accordance with the jurisprudence of this Court, a remedy, irrespective of whether it has a preventive or reparative purpose, must respect the following requirements:

i. **Independence and impartiality of the adjudicatory authority**.[10]
ii. **Accessibility and respect of due process**:[11] procedural guarantees afforded for a remedy against human rights violations must "make it simple to use,"[12] accessible,, for example by desisting from imposing onerous legal costs,[13] and must "not place an undue evidential burden"[14] on the applicant. They must provide the possibility of a public hearing in the complainant's presence and with his or her "effective presence"[15] in adversarial proceedings.[1617]
iii. **Timeliness:** the remedy must not be excessively slow in providing redress.[18] Indeed, this Court has stressed " the importance of administering justice without delays which might jeopardise its effectiveness and credibility".[19]
iv. **Scope of the assessment:** the remedy must allow for the adjudicative authority to consider the substance of the complaint including in light of the relevant State's obligations under international human rights law[20] and be able to declare the existence such violation, if established.[21]
v. **Capacity to provide redress:** redress, including reparation, "can be considered as appropriate and sufficient"[22] if the violation is ascertained

[7] The Greek Case, ECommHR, Applications nos.3321/67 - 3322/67 - 3323/67 - 3344/67, Admissibility Decision of 31 May 1968, p. 8, para. 11.
[8] Ibid., p. 121, para. 231.
[9] Ibid., p. 122, para. 322.
[10] Atanasov and Apostolov v. Bulgaria, ECtHR, Applications nos. 65540/16 22368/17, para 49, 59; Neshkov and others v. Bulgaria, op. cit., para. 183; Demopoulos and others v. Turkey, Applicatons nos. 46113/99 3843/02 13751/02, para. 120. See, Campbell and Fell v. the United Kingdom, ECtHR, Application No. 7819/77, 28 June 1984, para. 78. See also, UN Human Rights Committee, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19. International standards on the independence and accountability of the judiciary, prosecutors and lawyers, including the UN Basic Principles on the Independence of the Judiciary, the European Charter on the Statute for Judges and the Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities also provide authoritative standards.
[11] Neshkov and others v. Bulgaria, op. cit., para.184; Valada Matos das Neves v. Portugal, Application no. 73798/13, para. 73(c).
[12] Atanasov and Apostolov v. Bulgaria, op. cit., paras. 50, 61.
[13] Scordino v. Italy (No. 1), Application no. 36813/97, para. 201 ("unreasonable restriction on the right to lodge such an application"); Valada Matos das Neves v. Portugal, op. cit., para. 73(d).
[14] Atanasov and Apostolov v. Bulgaria, op. cit., para 50, 61; Neshkov and others v. Bulgaria, op. cit., para. 184; Valada Matos das Neves v. Portugal, op. cit.
[15] Ibid., para 51, Neshkov and others v. Bulgaria, op. cit., paras. 183, 212, 283.
[16] Ibid., paras. 49, 59.
[17] Scordino v. Italy (No. 1), op. cit., para. 192.
[18] Atanasov and Apostolov v. Bulgaria, op. cit., paras. 52, 63; Neshkov and others v. Bulgaria, op. cit., para. 183-184, 281 ("swift redress" for preventive remedies), 283. Scordino v. Italy (No. 1), op. cit., para. 195: "it cannot be ruled out that excessive delays in an action for compensation will render the remedy inadequate ... ". In Parizov v. "the former Yugoslav Republic of Macedonia", ECtHR, Application no. 14258/03, the Court found the newly introduced remedy ineffective because "the fact remains that no court decision has been taken although more than twelve months have elapsed after the introduction of the remedy" (para. 44). See in 2015, Valada Matos das Neves v. Portugal, op. cit., paras. 73 (a) and (b) and 93.
[19] Scordino v. Italy (No. 1), op. cit., para. 224.
[20] Neshkov and others v. Bulgaria, op. cit., paras. 185, 203.
[21] Scordino v. Italy (No. 1), op. cit., para. 193.
[22] Ibid., para. 193.

by a binding and enforceable decision.[23] Remedies with mere declaratory effect, even before constitutional courts, cannot be considered effective.[24] Furthermore, a remedy must not be exhausted if "the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents."[25]

The adequacy of the reparation provided pursuant to the remedy is crucial to assess the effectiveness of the remedy itself.[26] In the case *Çölgeçen and others v. Turkey,* this Court, with regard to the assessment of the status of victim of the applicants, held that it was important to consider that the fact that the applicant missed an entire semester at the University as a consequence of the State's unlawful action warranted not only rectification of the situation, but monetary compensation as well and that the remedy provided on that occasion was not sufficient as it did not include such compensation.[27]

The overall attitude of the authorities is relevant to the effectiveness of the remedy mechanism itself is also important. In the still landmark case of *Aksoy v. Turkey*, this Court found that the remedy in question did not have to be exhausted because the authority in question (the prosecutor) should have seen the applicants indicia of torture and ill-treatment but did not take any action. The Court accepted that "it is understandable if the applicant **formed the belief** that he could not hope to secure concern and satisfaction through national legal channels."[28]

Finally, the then European Commission on Human Rights has held that a remedy need not be exhausted if there exists a consistent practice, such as by means of domestic jurisprudence, denying any possibility of success to the applicant. In the case *L.E. v Germany,* the Commission exempted the applicant from going to the Berlin Administrative Court of Appeal to avoid deportation to Lebanon because "according to [its] established case law ..., it was accepted that only stateless male Palestinians of an age liable for military dangers were exposed to such dangers that they should not be deported to Lebanon."[29]

III. Inquiry Commission on the State of Emergency Measures

Under Turkish law, when withdrawal or refusal to grant a passport is linked to a dismissal under an emergency decree, important factors in assessing the effectiveness of the remedy include (a) the functioning of the State of Emergency Commission and the courts and (b) the way in which the authorities, including the Commission and the courts, interpret the grounds for dismissal.

a) *International reactions to the Commission and its work*

The State of Emergency Commission was established by Legislative Decree no. 685 dated 23 January 2017 and amended by Legislative Decree no. 690 dated 29 April 2017, following the recommendations of the Venice Commission and the Secretary General of the Council of Europe. Although the Decree was

[23] Neshkov and others v. Bulgaria, op. cit., paras. 183, 212, 283.
[24] Puchstein v. Austria, ECtHR, Application no. 20089/06, para. 31.
[25] *Selami and others v. the Former Yugoslav Republic of Macedonia*, Application 78241/13, para. 74.
[26] *Çölgeçen and others v Turkey,* Applications nos. 50124/07 and others, paras. 38-40.
[27] This same principle was recognised in *Nikitin and other v Estonia*, *op. cit* , para. 129.
[28] *Aksoy v Turkey*, Application no. 21987/93, para. 56., Emphasis added.
[29] *L.E. v Germany*, Application 14312/88.

published in the Official Gazette on 23 January 2017, five months after the first dismissals, its members were only be appointed on 22 May 2017. The Commission started to receive applications on 17 July 2017 and delivered its first rulings in December 2017. During the State of Emergency 131.922 measures were imposed including 125,678 dismissal decisions. The Commission received 125,600 applications.[30]

The introduction of the Commission was initially welcomed by the Venice Commission[31] and the PACE.[32] Nonetheless, in March 2017, the Venice Commission identified some points of concern:

- the lack of requirement for the Commission's decisions to "be supported with evidence, reasoned and/or published", which makes it difficult in practice to challenge them before the designated administrative courts in Ankara. In this connection, the Venice Commission pointed out that, "if the Commission is not capable of issuing reasoned and individualized decisions, it is unclear what would be the role of the administrative courts and of the Constitutional Court in this scheme."[33]
- Lack of clarity in the remedies and reparation the Commission has the power to provide, for instance whether it includes restitution, returning of assets, compensation.

The UN Special Rapporteur on freedom of expression, the first UN Human Rights Council independent human rights expert to visit Turkey after the establishment of the Commission, expressed concern "about the narrow scope of the Commission's mandate and its lack of independence and impartiality."[34] The UN Special Rapporteur on torture expressed the view that "the composition of the Commission may raise legitimate questions regarding its independence and impartiality, given that the majority of its members will be appointed by the Government. ... Concerns have also been raised that the Commission may be considered as an additional domestic remedy that has to be exhausted before individuals or institutions can have their cases reviewed by the Constitutional Court (and possibly later by the European Court of Human Rights)."[35]

The Parliamentary Assembly of the Council of Europe[36] and the Office of the UN High Commissioner for Human Rights[37] have expressed concern at the lack of independence and impartiality of the Commission. They have also underscored that the very basis of the Commission's decisions are not clear, that there is a lack of hearings and adversarial proceedings and other conditions that would allow the Commission to give genuinely individualized decisions. The European Commission, in its 2018 Progress Report on Turkey, determined that the Commission "still needs to develop into an effective and transparent remedy for

[30] Action Report of the Commission, p. 3. Available at: https://ohalkomisyonu.tccb.gov.tr/docs/OHAL_FaaliyetRaporu_2018.pdf
[31] Venice Commission, Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, adopted at its 110th plenary session, 10-11 March 2017, para. 84.
[32] *State of emergency: proportionality issues concerning derogations under article 15 of the European Convention on Human Rights*, PACE report, Doc. No. 14506, 27 February 2018.
[33] Venice Commission, Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, adopted at its 110th plenary session, 10-11 March 2017, para. 88, other reasons listed here are in paras. 86-87.
[34] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Turkey, UN Doc. A/HRC/35/22/Add.3, 21 June 2017, para. 30.
[35] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Turkey, UN Doc. A/HRC/37/50/Add.1, 18 December 2017, para. 84.
[36] PACE Report, op. cit., para. 92.
[37] Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East - January - December 2017, March 2018 paras. 106- 108.

those unjustly affected by measures under the state of emergency."[38] The structure of the Commission and the procedure before it have also been criticised by academic observers.[39]

b) *The functioning of the Commission in practice*

In practice, the Commission has failed to address the array of concerns voiced by independent experts, including as reflected in the ICJ report *Justice Suspended*, the findings of which are summarised below.[40]

The ICJ submits that the State of Emergency Commission has clear shortcomings related to its independence from the executive that disqualify it as an effective judicial remedy. The duration of its members' mandate is neither open-ended nor clearly defined, as the Council of Ministers, i.e. the Executive, can extend them yearly at discretion. Furthermore, its appointment system clearly reveals undue executive influence, since the executive appoints directly five of its members, while the other two are nominated by the Council of Judges and Prosecutors which themselves are also appointed by the executive and legislature.

Furthermore, the membership of the Commission is modified or renewed by these bodies whenever the Council of Minister renews the term of the Commission's mandate. This means that, from the beginning of 2019, the professional tenure of the Commission's members has been at the discretion of the political authorities, the executive and legislature. An additional condition undermining the body's independence is the possibility members can be dismissed when the President initiates administrative investigations against them or authorises the carrying out of criminal investigations.

Although, at the beginning, it was envisaged that the Commission would decide all applications within two years of the enactment of the Decree, this target could not be met. By Presidential Decree, the term of the Commission was extended for one year on 23 January 2019. The Commission, as of 31 December 2018, had decided in 50,500 cases. Some 75,100 cases were pending during that time. At that speed, the Commission estimates that another year-and-a-half will be needed to finalise all applications.[41]

The Commission is composed of seven members and employs 250 staff, according to its own activity report. The Commission has said to be delivering an average of 1,200 decisions per week. Considering that decisions are taken with at least four members of the Commission,[42] a member is expected to examine roughly a minimum of 700 cases per week. Although the regulation governing the working methods of the Commission require all decisions to be taken by the Commission itself,[43] with these figures it is hard to see how all the decisions are in practice taken by the members of the Commission and not by other supporting staff. Bearing in mind that there are serious concerns even

[38] European Commission, Turkey 2018 Report, Doc. No. SWD(2018) 153 final, 17 April 2018, p. 3.
[39] See, Kerem Altiparmak, *Is the State of Emergency Commission, established by emergency decree 685, an effective remedy*, IHOP, available at http://www.ihop.org.tr/en/2017/03/15/is-the-state-of-emergency-inquiry-commission-established-by-emergency-decree-685-an-effective-remedy/ .
[40] ICJ, *Justice Suspended: Access to Justice and the State of Emergency in Turkey*, July 2018, relevant chapter and references at pp. 24-34, available at https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf .
[41] Action Report of the Commission, *op. cit.,* p. 3.
[42] Article 1 (3) of Law no. 7075.
[43] Procedural Rules Relating to Working Methods of Inquiry Commission on the State of Emergency Measures, Official Gazette 12.7.2017, no. 30122, Article 13 and 14.

about the Commission members' independence and impartiality, this exacerbates existing concerns as to the quality of the Commission's decisions. The ICJ is concerned that the speed of examination of cases by the Commission at a rate of 1,200 cases per week may seriously jeopardize the quality of the assessment with serious repercussions on the later appeal stages. Furthermore, the success rate before the Commission is excessively low. Out of 50,500 cases decided so far, only 3,750 applications have been successful (7.43 percent).[44]

The excessive burden of work on the Commission might be diminished if the principles on which the decisions are based were clear and publicly available, but this is not currently the case. Public servants have been dismissed "on grounds of membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State."[45] However, concepts of "association", "connection" and "contact" are new to the Turkish law. The Commission has yet to inform the public about the definition of these concepts and difference between them, and they raise significant concerns as to comportment with the principle of legality. It is still not known what constitutes association or connection. Decisions of the Commission are not published. A person cannot detect whether the jurisprudence of the Commission is consistent or not. Therefore, it is highly likely that different decisions as to the same conditions might be delivered without notice.

As the purged civil servants do not know the reasons for their dismissal until they receive a decision from the Commission, this ambiguity concerning the grounds for dismissal is exacerbated. According to article 9 of the *Law no 7075 on the Inquiry Commission on the State of Emergency Measures*, '[t]he Commission shall perform its examinations on the basis of the documents in the files'. This makes the setting up of a defence effectively impossible, since no information has been given to persons dismissed by emergency decree as to which bodies, entities or groups they are alleged to be involved in or which behaviour is alleged to have constituted connection or contact. As a result, there is a unacceptable degree of uncertainty as to the standards that might justify the dismissal.

Furthermore, it is not clear whether the order in which applications are examined is random or objective. For example, some of the 406 peace petitioners had already been dismissed during state of emergency in 2016.[46] Up to now, not a single decision about peace petitioners has been issued by the Commission, despite the case not being of particular complexity.

Judicial review of the decisions of the Commission does not eliminate the shortcomings in the procedure before the Commission. First, rather than allowing for appeal to an ordinary judge, judicial review is provided by four administrative courts 'determined' by the Council of Judges and Prosecutors. Under the current constitutional framework, the Council of Judges and Prosecutors cannot be considered fully structurally independent due to the excessive degree of political control of appointment of its members. In particular, this arrangement does not comply with the Recommendation of the *Council of Europe on judges: independence, efficiency and responsibility.*[47]

[44] Action Report of the Commission, *op. cit.,* p. 26.
[45] Law Decree no. 667.
[46] Decree no. 672, published on 1 September 2016.
[47] Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para 27.

Without strong structural independence, it is difficult to see how judges, including those of the administrative courts designated by the CJP to hear appeals from the Commissions, can carry out their duties independently in politically sensitive cases such as those arising under the state of emergency.

This situation has been partly recognised by this Court in *Demirtas (2),* without making a general finding, when it noted that "it appears from the reports and opinions by international observers, in particular the observations by the Commissioner for Human Rights, that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency."[48]

Statistics about the work of those courts are not published. However, bearing in mind that the Commission delivered 50,500 cases in a year with 7.43 percent success rate, an administrative court received 12,000 cases last year. This number will rise to at least 25,000 cases per court when the Commission finalises its work. Even if with extraordinary performance a court could adjudicate 2500 cases per year, it might take up to ten years before all cases at the first instance court would be examined.

As with the decisions of the Commission, decisions of the administrative courts in cases of appeal from the Commission's decisions are not published. Therefore standards for the definition of concepts of "association", "connection" and "contact" have not been clarified even at that stage.
Article 11 of the Law Decree designated the Council of State as a court of first instance for the purpose of examining the merits of appeals against dismissals of judges and prosecutors by the then High Council of Judges and Prosecutors. The Council of State is the highest administrative judicial body in the country. Had it taken decisions concerning the standards, guidance might have been available for the Commission and administrative courts. However, although 4,268 judges and prosecutors were dismissed during State of Emergency, this court has not issued a single ruling on the appeals of judges and prosecutors against their dismissal. This omission has deprived administrative courts, the State of Emergency Complaints Commission, and all public administration institutions of the necessary guidance and precedent for due process compliant decisions on dismissals and their appeals.

IV. Separate Remedies for Passport Cancellation

Since the State of Emergency Commission cannot be considered an effective remedy for the sole complaint on passport cancellation, as demonstrated above, it is necessary to assess whether the decision cancelling the passport might be separately challenged through other judicial procedures.

All State of Emergency Decrees that envisage the dismissal of civil servants include separate provision relating to cancellation of passports.[49] Pursuant to this standard provision, passports of civil servants are cancelled once their dismissal decision is notified to the relevant administrative bodies. The rule does not make it clear, however, whether a new passport might be obtained afterwards.

[48] *Selahattin Demirtaş v. Turkey (No. 2)*, Application no. 14305/17, para. 271: The Court stressed that "the Government have not put forward any serious argument that could satisfy it that such allegations might be unfounded."
[49] For instance see, Article 1(2) of the State of Emergency Decree no. 686, 07.02.2017.

Following the dismissals, some civil servants applied to renew their passports. A routine answer has been given to those requests by Security Directorates in Sub-Provinces, stating that "your request could not be accepted and it could not be responded to pursuant to Articles 16-19 and 20 of the Law on Right to Information 4982."[50] As their requests were unrelated to the right to information, some applicants challenged these decisions before administrative courts. In all but one of the cases assessed by the ICJ, petitioners were dismissed academics that signed the peace petition.

In the case of peace petitioners O. T. and U.B., and in the case of M.A., respectively the Ankara Tenth Administrative Court, Ankara Third Administrative Court and the Ankara Fifteenth Administrative Court rejected claims for the renewal of passports on the grounds that the applicants had been dismissed by a state of emergency decree. These decisions were approved by the Ankara Tenth Chamber of Administrative Court of Appeal.[51] The individual complaint by O.T. and U.B. are pending before the Constitutional Court.

In the case of peace petitioner K. İ. L, the İstanbul Fourth Administrative Court rejected the claim for the renewal of the passport on the grounds that the applicant had been dismissed by a state of emergency decree.[52] In its decision, the İstanbul Court stated that the administration was bound to cancel the passport and has no discretion about renewal (*bağlı yetki*), as the Decree obliges the administration to cancel passports of purged civil servants. In the case of peace petitioner C.K, Eskişehir Second Administrative Court rejected the claim for the same reasons.[53] His case is pending before the Ankara Tenth Chamber of Administrative Court of Appeal.

The situation regarding the passports of dismissed civil servants has not changed since the end of state of emergency. A group of academics applied to the Ankara Security Directorate to renew their passports on 19 December 2018.[54] Their requests have been rejected on the same grounds indicated above. Another peace petitioner, A.R.G., applied to Samsun Governorship for a new passport. His request was rejected on the grounds that the applicant had been dismissed by a state of emergency decree. He brought an annulment action against this decision. However, his request for a stay of execution was rejected by the Samsun 2nd Administrative Court on 02.01.2019.[55]

Finally, Mr. Ömer Faruk Gergerlioğlu, an MP for Kocaeli and another dismissed civil servant, applied to the Presidency under the Right to Information Act and requested the total number of people whose passports had been cancelled by State of Emergency Decrees. His request was rejected under Article 7 of the Right to Information Act.

It is therefore clear that the administrative courts and Court of Appeal have systematically dismissed complaints in respect of passport denials on grounds that they are ordered based on a provision that entered into law through state

[50] For example see the Ankara Governorship Decision in the Case of peace petitioner D.D., No. 35042198-146.99-E.77313, 31.12.2018
[51] Ankara 10. Administrative Court, Case no. 2017/820, Decision no. 2018/710. Ankara 10th Chamber of Court of Appeal Case no. 2018-790, Decision no. 2018/850. Ankara 15. Administrative Court, Case no. 2017/2533, Decision no. 2018/503. Ankara 10th Chamber of Court of Appeal Case no. 2018-1247, Decision no. 2018/1158. Ankara 3. Administrative Court, Case no. 2017/739, Decision no. 2018/737. Ankara 10th Chamber of Court of Appeal Case no. 2018-1584, Decision no. 2018/1554.
[52] İstanbul 4. Administrative Court, Case no. 2017/2294, Decision no. 2018/2084.
[53] Eskişehir 2. Administrative Court based on these provisions, Case No. 2017/913, Decision No. 2018/326.
[54] https://www.gazeteduvar.com.tr/gundem/2018/12/19/khkli-akademisyenlerden-pasaport-basvurusu/
[55] Samsun 2. Administrative Court, Case no. 2018/1535.

of emergency decrees, and that such decrees cannot be challenged before them. These passport measures have affected thousands of persons. The ICJ is not aware of any decision by administrative courts that upheld the request for renewal of passports of purged civil servants. In the absence of an such decisions and in light of the other factors analysed above, it appears that administrative courts are not effective remedies for request of renewal of passports for civil servants dismissed by emergency decree.

IV. Constitutional Court

Since there is no effective remedy available regarding the cancellation of passports before the administrative courts, this leaves the availability of remedies before the Constitutional Court as the only further domestic avenue.

The question of the validity of the State of Emergency decrees was brought to the Constitutional Court firstly on the grounds that the content of these decrees had exceeded the powers given to the Committee of Ministers. Departing from its own jurisprudence, the Constitutional Court refused to examine this claim.[56] After the decrees were passed from the Parliament as law, the main opposition party, the Republican People's Party (CHP), once again applied to the Constitutional Court requesting the annulment of these laws arguing that the drafting of these laws breached the procedures provided in the Constitution for law-making. This request was also rejected.[57] The CHP also applied to the Constitutional Court for the annulment of most of the provisions of the Decrees which became Law after Parliamentary approval. However, considering that more than 1,000 provisions in different laws have been amended with State of Emergency Decrees,[58] it may reasonably be expected to take many years before the Constitutional Court examines the claims for the annulment of these provisions including those concerning the cancellation of passports. Furthermore, although the individual complaint mechanism to the Constitutional Court remains in principle available, the ICJ notes that the Constitutional Court has yet to find a violation deriving from a state of emergency measures.

Notably, in the Case of Emrah Gürsel[59] the applicant, before the Constitutional Court, claimed that, cancellation of the passport of the applicant violated his rights protected under article 8 of the Convention. The applicant, citing the *Paşaoğlu v. Turkey* judgment of this Court,[60] argued that the applicant's private and family life had been affected by the measure. The First Commission of the Second Section of the Constitutional concluded that the applicant's claim relating to right to movement was not among the rights protected under additional protocols that had been ratified by the Turkish government and found the application inadmissible for reasons of absence of *ratione materiae* jurisdiction. Therefore, it appears not to be possible to resort to the Constitutional Court as a remedy for such cases.

The ICJ has, furthermore, serious concerns regarding the capacity of the remedy before the Constitutional Court to be effective in cases of persons

[56] E.2016/166, K. 2016/159, 12.10. 2016; E. 2016/167, K.2016/160, 12.10. 2016; E. 2016/171 K. 2016/164, 2.11.2016; E. 2016/172 K. 2016/165, 2.11. 2016
[57] Amongst others see. E. 2018/45, K. 2018/51, 31.5.2018.
[58] İsmet Akça et al., When State of Emergency Becomes the Norm: The Impact of Executive Decrees on Turkish Legislation, (Heinrich Böll Foundation: İstanbul).
[59] No. 2018/13499, 22.1.2019.
[60] Pasaoglu v. Turkey, Application no. 8932/03, 8 July 2008.

dismissed by emergency decrees in light of the developments on the implementation of this Court's judgments in the cases of Mehmet Altan and Şahin Alpay. Indeed, despite this welcome clarification within the Turkish legal system concerning the binding force of the Constitutional Court's judgments,[61] it appears that no disciplinary action of any kind has been activated by the Council of Judges and Prosecutors for what appears to be a deliberate misapplication of the law by four different Assize Courts that did not apply the first judgment of the Constitutional Court in their cases.

V. Conclusions

Based on the assessment of the law and jurisprudence of remedies theoretically available to civil servants that have lost their passports and on the ICJ's findings made by the ICJ in its report of July 2018 on the situation of access to justice for human rights violations in Turkey, the ICJ considers that, at present, no effective remedy is available in practice in the country for applicants in this group of cases.

Referring to the standards set out in this Court's jurisprudence, the State of Emergency Commission cannot be considered an independent nor an effective remedy for challenging the dismissal decision by emergency decree that is underlying the withdrawal of passports.

In terms of appeal from the Commission's decision, the effectiveness of administrative courts is tainted by the lack of structural independence in the judiciary, as established in *The Greek* case, and the difficulties to set up a case due to the lack of clarity of the very grounds for dismissal and the increasing workload. Furthermore administrative courts do not appear to be effective remedies even for the issuance of new passports for dismissed civil servants.

Finally, the avenue of the Constitutional Court appears to be foreclosed as demonstrated by recent jurisprudence on inadmissibility of this kind of cases, its jurisprudence on the validity of the emergency legislation itself as well as insufficient response by the justice system to the defiance the Court's rulings.

[61] Constitutional Court, Sahin Alpay (2), Application 2018/3007, para. 63.