

An explanatory Note on the Case of Osman Kavala v Turkey and the Infringement Proceedings before the Grand Chamber of the European Court of Human Rights

1. Who is Osman Kavala?

Osman Kavala is a Turkish businessperson, philanthropist, civil society activist and human rights defender. He has been involved in setting up a number of civil-society initiatives which are active in the areas of human rights, arts, culture, social studies, memory, historical reconciliation and environmental protection. In 2002 he set up [Anadolu Kültür](#), which works to promote peace, reconciliation and human rights by supporting artistic and cultural initiatives across Turkey. Several of *Anadolu Kültür*'s projects have received support from many internationally known foundations and from the European Union.

Mr Kavala was arrested in Istanbul on 18 October 2017 and was placed in pre-trial detention on 1 November 2017. He has been locked up ever since.

2. Why was he detained and prosecuted?

Mr Kavala has been accused, released and reaccused of different offences at different times throughout his detention. Initially, he was accused of attempting to overthrow the Government (Article 312 of the Turkish Criminal Code) and attempting to overthrow the constitutional order (Article 309 of the Turkish Criminal Code). These charges were mounted against him with reference to mass social gatherings and protests across Turkey (known as the Gezi events) which occurred from 27 May 2013 until early July 2013, and the attempted coup of 15 July 2016. He was released from detention for attempting the overthrow the constitutional order under Article 309 on 18 October 2019. On 18 February 2020, Mr. Kavala was acquitted of overthrowing the government under Article 312, only to be arrested and detained once again for attempting to overthrow the constitutional order under Article 309.

Whilst in detention under Article 309, Mr. Kavala was also detained under Article 328 of the Criminal Code (political and military espionage) with reference to his alleged activities on 9 March 2020. On 20 March 2020, he was released from detention for the second time under Article 309 of the Criminal Code, making Article 328 the only *formal* ground for his detention.

All this time, Mr. Kavala repeatedly asked for his release, arguing strenuously that he has not committed any of these crimes and that there is no evidence whatsoever that can reasonably raise any suspicion that he did. Domestic courts have repeatedly refused to release Mr. Kavala, relying on repetitive, unsubstantiated, and formulaic reasons.

On 25 April 2022, Mr Kavala was convicted of attempting to overthrow the government, under Article 312 of the Criminal Code and was sentenced to aggravated life

imprisonment (see 12 below). On the same date, the Court also released and acquitted him of the charges under Article 328. This decision is not final under Turkish law. Mr. Kavala will first appeal to the regional court of appeal and, if unsuccessful, to the Court of Cassation. Only a judgment by the Court of Cassation can make a conviction judgment final.

3. What did the European Court of Human Rights decide in Mr Kavala's case in 2019?

In its [judgment](#) of 10 December 2019, the European Court of Human Rights found that Mr Kavala's detention with reference to charges under Article 312 of the Criminal Code (attempt to overthrow the government) and Article 309 (attempt to overthrow the constitutional order) was arbitrary (in violation of both Article 5(1)(c) and Article 5(3) of the European Convention on Human Rights (ECHR)), with the Court underlining that Mr. Kavala had been detained for exercising his rights under the European Convention. The Court concluded that the Turkish authorities failed to establish that Mr Kavala was deprived of his liberty on the basis of a "reasonable suspicion" that he had committed a criminal offence.

Having reviewed the totality of the criminal proceedings brought against Mr. Kavala up to the date of the 2019 judgment (a vast amount of alleged facts and evidence), the Court also found that in prosecuting Mr Kavala, the Turkish authorities had pursued the ulterior purpose of seeking to silence him as a human rights defender (in violation of Article 18 ECHR in conjunction with Article 5(1) ECHR). As Mr Kavala's detention was found to be arbitrary and in bad faith, the Court also held that any continuation of his pretrial detention would further breach his ECHR rights, and that it would violate Turkey's legal obligation to comply with the judgment of the Court (under Article 46(1) ECHR). As a result, the Court ordered the Turkish authorities to put an end to Osman Kavala's detention and to secure his immediate release. However, Mr Kavala was not released.

4. What are infringement proceedings?

In the European human rights system, the Committee of Ministers of the Council of Europe monitors the execution of all judgments of the European Court of Human Rights (under Article 46 ECHR).

In exceptional situations, if the Committee of Ministers considers that one of the Council of Europe states has failed to execute a judgment of the Court, it can refer the case back to the European Court of Human Rights. The role of the Court is then to decide whether or not the state in question has complied with the judgment. The case is considered by the Grand Chamber of the European Court (comprising 17 judges) which will issue its decision by way of another judgment.

Prior to Mr Kavala's case, infringement proceedings have only ever been invoked once before – in the case of [Ilgar Mammadov v Azerbaijan](#), which concerned the ongoing imprisonment of the Azerbaijani opposition politician, Ilgar Mammadov. Following these proceedings, Mr Mammadov was released from custody.

5. What procedures govern infringement proceedings?

The proceedings have to comply with Article 46(4) ECHR, as well as Rule 100 of the [Court's Rules](#) and Rule 11 of the [Committee of Ministers' Rules](#). In summary, these provisions require that the Committee of Ministers must make its decision by at least a two-thirds majority and that it must serve formal notice on the state in question. In addition, the Committee of Ministers must provide reasons for its decision, as well as information about the execution proceedings before the Committee of Ministers in respect of the judgment concerned, and the views of both the applicant and the state.

6. Why were infringement proceedings initiated in Osman Kavala's case?

In an [Interim Resolution](#) adopted on 2 February 2022, the Committee of Ministers decided that 'by not having ensured the applicant's immediate release', Turkey was refusing to comply with the European Court judgment.

7. What are Osman Kavala's core arguments in the infringement proceedings?

Mr Kavala argues that Turkey has failed to execute the European Court's judgment by continuously detaining him without any evidence that could justify his detention and by failing to restore all of his Convention rights. He also submits that by prosecuting and convicting him on charges that do not even evidence any reasonable suspicion of the commission of a criminal offence, the domestic judicial authorities have failed to implement the European Court's decision of 10 December 2019.

8. What does Mr Kavala seek from the European Court?

First and foremost, Mr Kavala seeks a finding by the Court that, by not releasing him from detention and restoring all of his Convention rights, Turkey has failed to comply with the European Court judgment of 10 December 2019 (in breach of Article 46(1) ECHR), and he therefore seeks a further order for his immediate and unconditional release.

In addition, Mr Kavala has requested the Court to make the following findings: that since the first European Court judgment, there has been a continuing violation of his rights under Article 5(1) ECHR and of Article 18 ECHR in conjunction with Article 5(1); that the Turkish authorities, including the courts, have failed to take into account the findings by the European Court and the obligation to secure Mr Kavala's Convention rights; and that the Turkish courts (including the Constitutional Court) have systematically failed to

provide any genuine judicial oversight or to protect Mr Kavala against his arbitrary arrest and continued pre-trial detention.

In view of the effects on Mr Kavala of his detention for the last four and a half years, he has also requested an order by the Court that he be permitted by the Turkish authorities to restore his professional activities to the full, especially his activities as a human rights defender, and that he must not be subjected to any future risk of arbitrary deprivation of liberty due to his activities in the fields of human rights and minority rights.

Finally, Osman Kavala has asked the Court to order the Turkish authorities to take other wider measures of implementation which the Court deems appropriate, in view of the fact that the authorities' treatment of him, as a civil society activist and human rights defender, is far from an isolated incident and that his case will have had a severely dissuasive effect on human rights defenders in Turkey, given that his case represents the criminalisation of lawful and public human rights activities and peaceful protest.

9. What are the Turkish Government's arguments?

The Turkish Government argues that two conditions are required in order to initiate infringement proceedings: (i) the state's refusal to comply with a Court judgment; and (ii) the existence of 'exceptional circumstances', and it contends that these conditions have not been met. The Government also argues that the infringement proceedings constitute an interference with the independence of the Turkish judiciary and that they are not in accordance with the principle of subsidiarity.

The heart of the Government's argument is that Mr Kavala's detention since the European Court judgment has been for different offences and arise in new proceedings brought against him. Therefore, his current detention, and now conviction, were not considered by the 2019 European Court judgment.

10. How has Mr Kavala replied to the Government?

Mr Kavala argues that neither of the Government's points about pre-conditions are valid. Firstly, the Committee of Ministers has formally declared that it considers that Turkey refuses to abide by the final judgment in this case, which is the requirement for infringement proceedings to be instigated.

Secondly, he submits that the detailed, comprehensive reasoning set out in the many decisions and resolutions of the Committee of Ministers make it very clear that this case does indeed concern 'exceptional circumstances', given that Mr Kavala has languished in prison in Istanbul for more than four years and six months, in spite of the European Court judgment ordering his immediate release. He notes that the gravity, urgency, and indeed exceptionality, of this case has been underlined repeatedly by the Committee of Ministers. For example, in June 2021, it stated that

‘...the continuing arbitrary detention of the applicant, on the basis of proceedings which constitute a misuse of the criminal justice system, undertaken for the purpose of reducing him to silence, constitutes a flagrant breach of Turkey’s obligation under Article 46 § 1 of the Convention to abide by the Court’s judgment and is unacceptable in a State subject to the rule of law’.

As for the position of the Turkish judiciary, Mr Kavala has pointed out that the domestic courts in Turkey are clearly bound by the judgments of the European Court by virtue of the state party’s obligations under Article 46 ECHR, by virtue of Article 90 of the Turkish Constitution, which provides that all international treaties duly ratified by the Turkish state are binding, and also by virtue of the Turkish Constitutional Court’s case law which provides that the individual measures required by judgments of the European Court of Human Rights are binding on domestic courts.

His fundamental point is that the proceedings against him represent a continuation of the original proceedings, because no new evidence whatsoever has been adduced against him since his first arrest and detention in 2017, and that the Turkish authorities are still pursuing their ulterior purpose of silencing him by continuously detaining him and subsequently by convicting him of bogus charges. He underlines that there is not a single piece of new evidence that has been discovered following the review by the ECtHR that would satisfy the Court’s tests of sufficient and relevant evidence for reasonable suspicion to commit a crime, let alone evidence that would be sufficient to secure a conviction.

Furthermore, Mr Kavala has drawn attention to the role of the President of Turkey, who has made a number of public statements accusing him of being guilty of serious criminal offences (violating his presumption of innocence), in terms that are highly defamatory and inflammatory. A number of the President’s statements incite the Turkish courts to ignore the European Court judgment and they are explicit in directly putting pressure on the judiciary.

11. How is the Council of Europe Commissioner for Human Rights involved in the case?

The Commissioner for Human Rights, Dunja Mijatović, has intervened as a third party both in the original proceedings before the European Court, and in the infringement proceedings.

In her [original submissions](#) to the Court, the Commissioner explained that Mr Kavala had been a long-standing and trusted partner of many international bodies working on human rights in Turkey, including her office. She indicated that, like all four Commissioners since the inception of the Office, she had been in contact with many of the NGOs he helped to found, or with him personally. In her view, he and these NGOs have been reliable and objective sources of information about the human rights situation in Turkey, always displaying the highest level of professionalism, dedication

and respect for human rights. She added that during their numerous dealings with them, neither she nor her predecessors had received any indication of any incitement to violence or crime, or justification and trivialisation of violence on their part.

Her [intervention](#) in the infringement proceedings stated, inter alia, that:

‘The Commissioner considers that the authorities have taken steps to circumvent the applicant’s right to liberty, having as priority to keep him in detention, and that they have therefore not acted in good faith and in a manner incompatible with the “conclusions and spirit” of the [European Court] judgment’.

The Commissioner also noted that:

‘the prosecutor has continued to ignore Turkey’s obligations under the Convention, by pursuing criminal proceedings against the applicant based on the same evidence and facts that the Court’s judgment found to be insufficient to show a reasonable suspicion that the applicant committed a criminal offence’.

12. Osman Kavala was convicted on 25 April 2022 – does that have any bearing on the infringement proceedings?

On 25 April 2022, the 13th Istanbul Assize Court convicted and detained Mr. Kavala under Article 312 of the Turkish Criminal Code (attempting to overthrow the government) and sentenced him to aggravated life imprisonment (which is the severest penalty in the Turkish criminal justice system, following the abolition of the death penalty in 2004).

The Government argues that as he has now been convicted of a criminal offence, the infringement proceedings should be stopped, because the European Court judgment only ruled on Mr Kavala’s pre-trial detention. However, the authorities have produced no new evidence and his conviction was based on evidence that was collected during the investigative and the indictment phase of his trial, both of which were extensively reviewed by the European Court in its judgment of 10 December 2019. Therefore, his conviction is based on exactly the same ‘evidence’ which the European Court has already found does not even establish a reasonable suspicion of the commission of a crime. Accordingly, Mr Kavala’s conviction amounts to the continuation of the authorities’ strategy of silencing him and the criminalisation of the exercise of his Convention rights. It is arbitrary and represents a flagrant denial of justice.

13. What was the reaction in Turkey to Mr Kavala’s conviction?

There was a significant public response decrying Mr Kavala’s conviction - from bar associations, civil society organisations and opposition party leaders across Turkey. For example, Necdet Sezer (President of Turkey between 2000 and 2007) [said](#): ‘I shed my tears for the massacre of the justice system (in this trial)’. Abdullah Gül (President of Turkey between 2007 and 2014 – including during the Gezi events of 2013), [said](#):

‘The judgment concerning Kavala and his friends has wounded the public conscience deeply. I too am very saddened by this.

‘...’

‘The fact that the case law of the ECtHR was not taken into account throughout this process is both very upsetting and unacceptable’.

14. What was the international reaction to Mr Kavala’s conviction?

The judgment was condemned ‘in the strongest possible terms’ by the European Parliament in its [resolution](#) of 5 May 2022 which stated that Mr Kavala had ‘been convicted on unjustified charges, for the ulterior purpose of silencing him as a human rights defender and deterring critical voices in Turkey’. The EU High Representative for Foreign Affairs [said](#) this:

‘Turkey, as a Member of the Council of Europe, has the obligation to implement the decisions of the Court. Its continued refusal to implement these rulings increases the EU’s concerns regarding the Turkish judiciary’s adherence to international and European standards. We call on Turkey to abide by its international commitments. We call on Turkey to release Osman Kavala’.

15. What will happen next and when?

The Grand Chamber of the European Court will issue its judgment in the infringement proceedings. The judgment is expected in the coming weeks or months in 2022.

16. What will be the legal consequences of the infringement proceedings before the Grand Chamber of the European Court of Human Rights?

The judgment of the Grand Chamber of the European Court will take effect immediately and is legally binding on Turkey, including the court of appeal and the Court of Cassation handling Mr Kavala’s appeal against his conviction (which is based on evidence that does not even meet the test of reasonable suspicion to commit a crime). These domestic courts will be required to implement this judgment. The Committee of Ministers of the Council of Europe will supervise the implementation of the judgment.

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