Interim Resolution CM/ResDH(2022)21
Execution of the judgment of the European Court of Human Rights
Kavala against Turkey

(Adopted by the Committee of Ministers on 2 February 2022
at the 1423rd meeting of the Ministers' Deputies)

Application	Case	Judgment of	Final on
28749/18	KAVALA	10/12/2019	11/05/2020

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that the Committee supervises the execution of final judgments of the European Court of Human Rights (hereinafter "the Convention" and "the Court"),

Recalling its Interim Resolution CM/ResDH(2021)432 serving formal notice on Turkey of its intention, at its 1423rd meeting on 2 February 2022, to refer to the Court, in accordance with Article 46, paragraph 4, of the Convention, the question whether Turkey has failed to fulfil its obligation under Article 46, paragraph 1, to abide by the Court's judgment of 10 December 2019 in the *Kavala* case, and inviting Turkey to submit in concise form its view on this question by 19 January 2022 at the latest;

Recalling anew

a. that in its above-mentioned judgment, the Court found that the applicant's arrest and pre-trial detention took place in the absence of evidence to support a reasonable suspicion he had committed an offence (violation of Article 5, paragraph 1, of the Convention) and pursued an ulterior purpose, namely to silence him and dissuade other human rights defenders (violation of Article 18 taken in conjunction with Article 5, paragraph 1); and that the one year and nearly five months taken by the Constitutional Court to review his complaint was insufficiently "speedy", given that his personal liberty was at stake (violation of Article 5, paragraph 4);

b. the Court's indication under Article 46, made with regard to the particular circumstances of the case and the grounds on which it based its findings of a violation, that the government must take every measure to put an end to the applicant's detention and to secure his immediate release (§ 240 of the judgment);

c. the respondent State's obligation, under Article 46, paragraph 1, of the Convention, to abide by all final judgments in cases to which it has been a party and that this obligation entails, in addition to the payment of the just satisfaction awarded by the Court, the adoption by the authorities of the respondent State, where required, of individual measures to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*;

d. the Committee's subsequent decisions and interim resolution (CM/ResDH(2020)361) strongly urging the authorities to ensure the applicant's immediate release;

e. that, since 11 May 2020, when the Court's judgment became final, the applicant has remained in detention on the basis of proceedings criticised by the European Court or based on evidence which it found insufficient to justify his detention;

Considers that, in these circumstances, by not having ensured the applicant's immediate release, Turkey refuses to abide by the final judgment of the Court;

Decides to refer to the Court, in accordance with Article 46, paragraph 4, of the Convention, the question whether Turkey has failed to fulfil its obligation under Article 46, paragraph 1, of the Convention, with particular regard to the Court's indication under Article 46 and the individual measures required.

The concise views of Turkey on the question raised before the Court are appended hereto.

Appendix: Views of the Republic of Turkey

VIEWS OF THE GOVERNMENT OF THE REPUBLIC OF TÜRKİYE ON THE EXECUTION OF THE JUDGMENT OF

Kavala v. Türkiye (Appl. No. 28749/18)

Judgment of 10 December 2019, Final on 11 May 2020

1. The Committee of Ministers, at its 1419th meeting on 2 December 2021 adopted Interim Resolution CM/ResDH(2021)432, in which the Committee served formal notice on Türkiye of its intention, at its 1423rd meeting (DH) on 2 February 2022, to refer to the Court, in accordance with Article 46 § 4 of the Convention, the question whether Türkiye has failed to fulfil its obligation under Article 46 § 1 of the Convention with particular regard to the Court's indication under Article 46 and the individual measures required.

2. The Committee also invited the Government of Türkiye to submit in concise form its view on this question by 19 January 2022 at the latest.

3. The Government of Türkiye would like to submit here-below the views on the question as requested by the Committee of Ministers:

I. FACTS

The Scope of the Judgment

4. The European Court, with a judgment that became final on 11 May 2020, held that there has been a violation of Article 5 § 1 (right to liberty and security), a violation of Article 5 § 4 and a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1.

5. The European Court found that the applicant could not reasonably be suspected of having committed the offences charged with (Article 5 § 1). As to the violation of Article 5 § 4, the Court highlighted the lack of a speedy judicial review by the Constitutional Court. Lastly there has been a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1 on account of the fact that the restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence.

6. The Court, under Article 46 of the Convention, considered that "*any continuation of the applicant's pre-trial detention **in the present case** [emphasis added] will entail a prolongation of the violation*" and further considered "*that the government must take every measure to put end to the applicant's detention and secure his immediate release*".

7. The Court's judgment relates mainly to the pre-trial detention of the applicant based on charges under Article 312 (attempting to overthrow the Government- Gezi events - "first accusation") and Article 309 (attempting to overthrow the constitutional order- coup attempt of July 15 events - "second accusation") of the Turkish Criminal Code (TCC).

Criminal Proceedings

8. Detailed information on the ongoing judicial proceedings has been provided by the government in their previous submissions to the Committee of Ministers.

9. The applicant was arrested on 18 October 2017 within the scope of a criminal investigation instituted against the applicant involving two accusations regarding Gezi events and coup attempt of 15 July. On 5 February 2019, the Istanbul Chief Public Prosecutor's Office decided to disjoin the investigations with a view to conduct the investigation in a more effective way.

10. As regards the investigation concerning the Gezi Events, the Istanbul Chief Public Prosecutor's Office filed an indictment with the Istanbul Assize Court, charging the applicant with attempting to overthrow the government under Article 312 of the Criminal Code. The Istanbul 30th Assize Court conducted the trial in respect of the applicant, ruled on the acquittal and release of the applicant on 18/02/2020. Accordingly, the applicant was released from detention based on the charge of attempting to overthrow the government (Art. 312 of the TCC) on 18 February 2020.

11. As regards the other investigation concerning coup attempt of July 15 conducted with respect to the offence of attempting to overthrow the constitutional order (Art. 309 of the TCC), the applicant detention has also come to an end when he was released ex officio by the Istanbul Assize Court on 20 March 2020. Since then, the applicant has not been detained from any charge examined by the ECtHR.

12. The applicant's current detention has started on 9 March 2020 on account of a different charge that has never been examined by the European Court, notably the offence of Political or Military Espionage (Art. 328 of the TCC).

13. The proceedings concerning all accusations against the applicant are still pending before the Istanbul 13th Assize Court.

The Constitutional Court's Judgment

14. Subsequent to the ECtHR judgment, on 4 May 2020 the applicant's lawyer lodged an individual application with the Constitutional Court on the ground that his detention on account of the charge of the Political or Military Espionage is unlawful. The Constitutional Court has promptly started to examine the applicant's individual application in question.

15. On 29 December 2020, the Constitutional Court -as Grand Chamber- delivered its judgment with respect to this application. The Constitutional Court held by the majority vote (8-7) that:

- Regarding the allegation that the applicant's detention is unlawful, the right to liberty and security of the applicant guaranteed under the third paragraph of Article 19 of the Constitution is not violated,
- Regarding the allegation that the detention period of the applicant exceeded the reasonable time, the right to liberty and security of the applicant within the context of the seventh paragraph of Article 19 of the Constitution was not violated.

16. The government has not received any communication from the Strasbourg Court whether the applicant file any complaint as regards the unlawfulness of his current detention so far.

The Applicant's Current Detention

17. As mentioned above, the government would like to note that the European Court found violation of Article 5 on account of the charges stemming from the offences envisaged under Article 312 (attempting to overthrow the government) and Article 309 (attempting to overthrow the constitutional order) of the Criminal Code.

18. The applicant is currently being detained for another offence, namely "Obtaining Classified Information for Purposes of Political or Military Espionage (Article 328 of the Turkish Criminal Code)" since 9 March 2020. It has to be emphasised that this current detention has not been brought before the European Court and has not been examined by the same Court.

19. The authorities would like to note that the criminal proceedings, concerning the charges of "Obtaining Classified Information for Purposes of Political or Military Espionage (Article 328 of the Turkish Criminal Code)", "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), are pending before the İstanbul 13th Assize Court.

20. The Assize Court held the last hearing on 17 January 2022, deciding by a majority (2-1) that his detention be continued. It has been decided that the applicant's detention will be examined on the case file on 10 February 2022 and, the next hearing will be held on 21 February 2022.

21. In its decision, the Assize Court stressed that; "*Having regard to the fact that, in the present case, by taking into consideration the quality and nature of the offence imputed to the accused Mehmet Osman KAVALA, the current stage of the trial, the examination on HTS records and the base station data in the file, the reports drawn up as a result of the examination on digital materials, the existence of the concrete evidence demonstrating strong suspicion for the imputed offences in view of the MASAK report, the upper limit of the sentence prescribed for the imputed offences by the law, it has been understood that the judicial supervision measures will remain insufficient (…)*"

II. THE APPLICABILITY OF ARTICLE 46§4 PROCEEDINGS

A) Legal Framework

22. At the outset, the Turkish authorities would like to recall the legal framework outlining the conditions as to the applicability of Article 46§4 proceedings.

23. Article 46 § 4 of the Convention reads as follows:

"*If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph."*

24. Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention:
Article 16 of the amending protocol
Article 46 – Binding force and execution of judgments
"…
"100. The Committee of Ministers should bring infringement proceedings only in exceptional circumstances."

25. Rule 11 § 2 of the "Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of The Terms of Friendly Settlements" reads as follows: "*Infringement proceedings should be brought only in exceptional circumstances...*"

B) Conditions for Article 46§4 Proceedings

26. The authorities would like to recall that the Article 46§4 procedure was introduced by amendments brought on with Protocol No. 14 to the Convention which entered into force in 2010. Since then, the procedure has only been used once.

27. The above provisions suggest that there are two conditions required for initiating Article 46 § 4 proceedings. These are:

1) Refusal by the High Contracting Party to abide by a final judgment
2) Existence of exceptional circumstances

28. The authorities are of the opinion that neither of these two conditions has been met.

1. Türkiye abides by the Kavala judgment

29. Türkiye has never refused to implement any judgment of the European Court of Human Rights and certainly does not refuse to abide by the Kavala judgment. Türkiye continues to fulfill its treaty-based obligations in good faith. In this scope, Türkiye has engaged in a constructive dialogue with the Committee of Ministers and provided the Committee with detailed, up-to-date information on developments in the process of executing judgments. (Rule 6 of the Committee of Ministers' Rules for the supervision of the execution of judgments and of the terms of friendly settlements). In the action plans and communications submitted to the Committee detailed information was provided on measures taken to execute the judgment at hand.

(i) Individual Measures

30. The applicant is currently detained for the offence of spying on political or military affairs under TCC 328. This detention started on 9 March 2020.

31. This is a judicial process based on a different charge that has not been brought before the European Court. It is currently being examined by the İstanbul Assize Court since 8 October 2020 when the indictment was admitted.

32. At the hearing of 21 May 2021, the Istanbul 30th Assize Court evaluated the European Court's judgment and stressed that the European Court's violation stemmed from the applicant's detention for the offense of Article 309 and 312 of the TCC and these detentions were ended (on 18 February 2020 and 20 March 2020 respectively, as mentioned above). The Court also emphasised that the present detention stemmed from the offence of spying on political and military affairs under TCC 328 and there is no European Court's judgment about this issue.

33. The Committee's decisions in this regard read that "*the information available to it raises a strong presumption that the applicant's current detention is a continuation of the violations found by the Court*". Basing its assessment upon a strong "presumption", the Committee passed judgment upon a judicial process that could only be assessed by the Strasbourg Court.

34. Accordingly, it is beyond the Committee's authority and mandate to make an assessment of evidence that is examined within the context of a pending case before the domestic courts.

35. The authorities would like to state that the Kavala judgment was translated into Turkish, published and circulated together with an explanatory note on the European Court's findings to the relevant courts. In addition to this, all the decisions of the Committee of Ministers regarding the Kavala judgment were translated and communicated to the relevant judicial authorities in due time.

36. The authorities kept the Committee informed immediately on every development. Information on the legal grounds for the applicant's current detention was presented in a timely manner.

(ii) General Measures

37. The authorities would like to reiterate that detailed explanations on general measures have been made in their previous submissions to the Committee of Ministers, however the Committee of Ministers' considerations on these measures have so far not revealed any conclusion.

38. Hereby, the Turkish authorities would like to underline that general measures taken following the judgment at hand reveals that Türkiye does not refuse to abide by the Kavala judgment.

39. In this respect, the authorities would like to indicate that significant legislative measures have been taken to prevent similar violations stemming from pre-trial detention. In particular, in line with the Human Rights Action Plan, which was introduced on 2 March 2021, the Fourth Judicial Package adopted on 8 July 2021. These amendments introduced additional safeguards for detention, including a similar requirement for more serious offences listed under Article 100 of the CCP, also referred to as "catalogue crimes". Concrete evidence justifying a strong suspicion will be required to place any individual charged with one of these offences in detention.

40. Furthermore, the 4th Judicial Package had also included significant change with regard to objection procedure to the decisions of detention and conditional bail rendered by Magistrates

Judgeships. Previously, a Magistrate Judgeship's decision of detention (or conditional bail) was objected to the next Magistrate's Judgeship or other Magistrate's Judgeship. However, due to the amendment in legislation by the 4th Judicial Package, Criminal Court of First Instance was determined as objection authority for the decisions of Magistrate's Judgeships. With this amendment a vertical objection procedure was introduced. Thus, a more effective appeal mechanism was put in effect.

41. Regarding the violation of Article 5 § 4, the Turkish authorities took immediate actions to reduce the workload of the Constitutional Court. As a result of these measures, there has been a constant decrease in the number of applications to the Constitutional Court since 2017. Moreover, the increase in the number of applications it concludes every year despite its growing workload indicates that the Constitutional Court works diligently and devotedly.

42. On 29 December 2020, the Constitutional Court delivered its judgment with respect to the applicant's concerned individual application dated 4 May 2020. When it is considered that the period before the Constitutional Court lasted less than 8 months, it can be concluded that measures taken with respect to violation at hand are capable of providing an effective redress.

43. According to the statistics published by the Constitutional Court, the number of applications submitted since 2015 and the number of applications concluded are shown in the table below:

	2015	2016	2017	2018	2019	2020	2021
Applications Submitted	20,376	80,756	40,530	38,186	42,971	40,402	66.121
Applications Decided	15,368	16,089	89,651	35,356	39,385	45,414	45.321

44. Lastly, in response to the Committee's findings concerning the violation of Article 18 in conjunction with Article 5 § 1 the authorities would like to underline that the Court highlighted certain case-specific facts with respect to this application. The European Court, in its judgment, did not point to the existence of a systemic problem.

45. The authorities would further like to highlight that the Council of Judges and Prosecutors took significant steps to achieve a more Convention compliant judicial practice. On 15 January 2020 an amendment to Article 6 entitled "Principles of Promotion" of the "Principle Decision on the Grade Promotion of Judges and Prosecutors" was promulgated in the Official Gazette. According to this amendment, in the promotion of judges and prosecutors, on the basis of the principles of independence of the judiciary and security of tenure of judges, account will be taken of whether the persons concerned caused a finding of violation by the European Court of Human Rights or the Constitutional Court, as well as the nature and gravity of the violation, and the efforts of the persons concerned to safeguard the rights enshrined in the European Convention on Human Rights and the Constitution.

46. Moreover, the Justice Academy of Türkiye maintained its intensified pre-service and in-service training activities addressing the judges and public prosecutors, in spite of the Covid- 19 pandemic. Türkiye is in the first place among other member States in respect of the number of users in the HELP learning platform.

47. The proceedings against the applicant are carried out by independent and impartial courts and the applicant's detention is reviewed at regular intervals.

(iii) Türkiye does not refuse to execute individual and general measures

48. As a conclusion, Türkiye has not refused to abide by the Court's judgment at hand. The government have fully co-operated with the Committee of Ministers and the Secretariat of the Council of Europe to enable the execution of the judgment.

49. The Committee's findings were transmitted to the concerned judicial authorities in a timely manner. The domestic courts found that the applicant's current detention did not fall within the scope of European Court's judgment. In particular, the Assize Court in İstanbul on several occasions

examined the Strasbourg Court's judgment and held that the facts of the current case are different from the ones examined by the ECtHR. On this basis, the Assize Court found that the applicant's detention is a new one based on different facts and charges that have been examined by the Court.

50. In the same vein, the Constitutional Court has also found that there was no violation of applicant's right to liberty.

51. At this junction, the government would like to highlight a controversial issue concerning the Committee's mandate of supervision.

52. A number of judges in Ilgar Mammadov judgment stressed "*the necessity of putting in place adequate safeguards ensuring that the supervisory powers of the Committee of Ministers within the execution process do not interfere with pending proceedings before the domestic courts as well as before the European Court of Human Rights*" [1]. In the same line, it is further asserted that, "*the instant case shows that execution proceedings before the Committee of Ministers may interfere with cases pending before the domestic courts*" and that *"[t]here are insufficient guarantees protecting the independence of the domestic courts in such situations*".[2]

53. This is a very specific point relevant to the Kavala judgment. Indeed, the Court, in its Kavala judgment, considered that any continuation of the applicant's detention in **the present case** will entail a prolongation of the violation.

54. The government have informed the Committee that the national court has already released the applicant from the charges subject to the Strasbourg Court's judgment and that he is currently detained on account of a different charge that is currently being examined by the court in İstanbul and may yet be examined by the Strasbourg Court.

55. Hence, by initiating the procedure under Article 46/4 for the Kavala case, the Committee does not only interfere with ongoing domestic proceedings, but also takes a position on a matter that could be brought before the Strasbourg Court in a separate application.

56. The Committee, with the guidance of the Secretariat, decided that "*the information available to it raises a strong presumption that the applicant's current detention is a continuation of the violations found by the Court*". Relying upon a presumption, the Committee passed judgment upon a judicial process that could only be assessed by the Strasbourg Court.

57. Accordingly, it is beyond the Committee's authority and mandate to make an assessment of evidence that is examined within the context of a pending case before the domestic courts.

58. On the other hand, it is obvious that a holistic analysis should be made as far as the refusal to abide by a final judgment is concerned. On this ground, the authorities would like to note that no conclusion has been asserted by the Committee of Ministers with regard to the general measures already taken during the supervision process. As it has been submitted above, many legislative measures have been introduced to improve the legislative framework concerning the issue of unlawful detention. The Constitutional Court has taken significant measures to prevent similar violations of Article 5§4. Likewise, the Council of Judges and Prosecutors amended its practice to reinforce the independence and impartiality of the judiciary. Under these circumstances, it cannot be concluded that Türkiye has refused to abide by the Kavala judgment.

59. All in all, the government would like to reiterate that, under the current circumstances, initiating Article 46§4 proceedings would amount to a contravention of the Convention system, which is based on the principles of subsidiarity and margin of appreciation, as affirmed by the Protocol No. 15.

60. The authorities underline that such an exceptional measure cannot be initiated on the basis of presumptions. In the absence of any consideration by the Committee whether general measures are

[1] Grand Chamber Judgment of 29 May 2019, Proceedings under Article 46/4 in the Case of Ilgar Mammadov v. Azerbaijan, Application No. 15172/13, Joint Concurring-Separate Opinion of Judges Yudkivska, Pinto De Albuquerque, Wojtyczek, Dedov, Motoc, Poláčková and Hüseynov, page 59, para 22.

[2] *ibid,* Concurring Separate Opinion of Judge Woityczek, page 64, para 11.

executed or not, it is also not possible to conclude that the execution of the judgment is refused in its entirety.

2. Exceptional circumstances do not exist

61. The exceptional nature of the procedure adopted under Article 46§4 was explicitly indicated in Explanatory Report to Protocol No. 14 as well as in the Rules of the Committee. The fact that there has only been a single instance throughout its existence of more than a decade reaffirms the exceptional nature of the procedure.

62. As explained by the former Director General of Human Rights and the Rule of Law (DG- I), Philippe Boillat, "*it is considered to be an ultima ratio: it is only when you consider [that] all the means at your disposal have been ineffective…*"[3]

63. The authorities would like to mention that all available tools to the Committee of Ministers under the supervision process should have been exhausted in an effective manner before initiating Article 46§4 proceedings.

64. As a part of these efforts, the German Minister of Foreign Affairs, Heiko Mass, the then Chair of the Committee of Ministers addressed a letter to his Turkish counterpart, Minister Mevlüt Çavuşoğlu on 16 March 2021. Only two days later, on 18 March 2021 and before any reply could possibly be given to the said letter by the Turkish authorities, the Secretary General Marija Pejčinović Burić engaged in a telephone conversation with Minister Çavuşoğlu, raising the very same issue.

65. It should also be taken into consideration that no more than 26 days elapsed between the two DH meetings held in September 2020 where the Kavala case was consecutively discussed at both meetings, without leaving an appropriate period of time to national authorities.

66. The Kavala judgment was finalised on 11 May 2020. It has been only a year and half since the judgment became final. It can hardly be argued that an adequate period of time has been provided to Türkiye to react to the means used by the Committee of Ministers during the supervision process as outlined above. Hence, exceptional circumstances in the instant supervision process have not materialized.

III. CONCLUSION

67. In light of the foregoing, it should be considered that Türkiye is taking all necessary measures, including individual measures within the scope of its duties. The authorities would like to reiterate that there is a different offense and different proceedings against the applicant and there is no judgment of the European Court regarding the applicant's current detention.

68. Moreover, the domestic courts examined this issue and have ruled along similar lines that there were two accusations against the applicant which the European Court considered and both of the detentions were ended. The current detention of the applicant is based on a different offense under a new judicial proceeding that has been initiated against him. His current detention has been neither the subject of an application before the European Court of Human Rights, nor has it been examined by the same.

69. Therefore, it cannot be considered that Türkiye is refusing to abide by the Kavala judgment. It is also not possible to consider the existence of exceptional circumstances. Hence, it cannot be accepted that conditions for initiating Article 46§4 proceedings have been satisfied.

[3] DD(2016)1321.