RULE 9.2 COMMUNICATION
for the 1475th meeting of the Committee of Ministers
in the case of Akgün v. Turkey
by
ASSEDEL
(Association européenne pour la défense des droits et des libertés)

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DGI Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECtHR
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Rule 9.2 Communication from ASSEDEL in the Case of Akgün v. Turkey (19699/18)

1. This submission is prepared by ASSEDEL (Association européenne pour la défense des droits et des libertés) is a non-profit association governed by its statutes. Its objective is to disseminate, promote, and defend human rights and fundamental freedoms in the spirit of the European Convention on Human Rights, both within the Council of Europe system and at the local, national, and international levels.

2. ASSEDEL aims to inform the Committee of Ministers that the judicial practice and the well-established case law concerning the evidentiary value of Bylock, as presented by the Turkish Government in the context of the execution of the Akgün v. Turkey judgment[1] are inconsistent with the findings and standards of the ECtHR as set out in the Akgün judgment.

3. The submission will first provide a brief summary of the background to the Akgün judgment. It will then present the ECtHR's highlights regarding the violation judgment to more clearly express the Government's failure to fulfill the ECtHR's findings with regard to the enforcement of the Akgün judgment. Finally, it will address the inadequacy of the judicial practice and the jurisprudence of the high courts to fulfill the findings of the ECtHR's violation judgment, which are presented on the basis of the general measures included in the action reports submitted by the Government regarding the enforcement of the judgment.

[1] Akgün v. Turkey, application no.19699/18, 20.07.2021.

The Background of the Judgment

4. The applicant, Tekin Akgün, is a police officer who was dismissed from his position after the coup attempt of 15 July 2016 on charges of being a member of an armed terrorist organization. Following his dismissal, on October 17, 2016, the applicant was detained by the Ankara Criminal Judgeship of Peace on the allegation of being a Bylock user. The one-page Bylock identification report issued by the Directorate General of Security Affairs and therefore the allegation that the applicant was a Bylock user was the sole and only evidence for the detention.

5. The application filed by the individual applicant before the Constitutional Court on the unlawfulness of his detention was found inadmissible on the basis of the Constitutional Court's Aydın Yavuz and others judgment[2] which ruled that the sole allegation of Bylock use by itself would constitute sufficient reason for detention .

6. The Akgün judgment is the first judgment in which the ECtHR examined whether the alleged use of Bylock constituted reasonable suspicion, within the meaning of Article 5 of the ECHR, that the applicant had committed the alleged crime at the time of his initial detention on October 17, 2016. The applicant's main claim is that he was detained in the absence of evidence showing the existence of strong suspicions that the alleged crime had been committed, namely that he was a member of an illegal organization.

7. The Turkish Government submitted the following judgments and reports to the ECtHR in this case, which examines whether the alleged use of Bylock, which is the only evidence for the detention measure, constitutes reasonable suspicion in the contentious stage of the ECtHR application procedure, and stated that only the use of Bylock constitutes reasonable suspicion that the crime of membership of an armed terrorist organization has been committed in the Turkish judicial system:

- Decisions issued on August 24 and 31, 2016 by the High Council of Judges and Prosecutors

- The report of the Parliamentary Commission of Inquiry (May 2017)

- The decisions of the National Security Council (30 April 2014)

[2] The Turkish Constitutional Court, Aydin Yavuz and others judgment [Plenary], application no. 2016/22169, 20 June 2017.

- The expert reports on ByLock

  ➢ The "ByLock technical report", by National Intelligence Service (MIT) (undated).

  ➢ The "Analysis report on the ByLock intra-organizational communication application", dated April 2, 2020.

  ➢ The "expert opinion on the ByLock application", dated July 10, 2020.

  ➢ The IntaForensics " Technical Report ", dated August 21, 2020.

- The Relevant Judicial Decisions

  ➢ The decision of the 16th Criminal Chamber of the Court of Cassation dated 24.04.2017

  ➢ The decision of the Turkish Constitutional Court
    - Aydin Yavuz and others judgment [Plenary], application no. 2016/22169, 20 June 2017
    - M.T. decision [Plenary], application no. 2018/10424, 4 June 2020
    - Ferhat Kara judgment [Plenary], application no. 2018/15231, 4 June 2020

8. The ECtHR has stated that it considers the facts and information available at the time of detention to determine whether there are sufficient objective elements to convince an objective observer at the time of a person's detention[3]. Accordingly, in this respect, the ECtHR underlined that it is obvious that there is no reasonable suspicion if the facts or circumstances attributed to a person in detention did not constitute a criminal offense at the time of their occurrence[4].

The ECtHR's Findings

9. The ECtHR has carried out a three-step examination in order to verify whether the use of the Bylock messaging application, which is the sole and only evidence for the

[3] Akgün v. Turkey, para.154.
[4] Ibid, para.157.

detention on charges of membership of an armed terrorist organization, is sufficient evidence to convince an objective observer that this crime has been committed.

10. In the first place, it examined whether the sole basis for the detention was the alleged use of Bylock, as it was undisputed between the applicant and the Government that the applicant was detained solely on the basis of his alleged use of Bylock.

11. Secondly, the Court examined whether the use of Bylock constituted a reasonable suspicion for the commission of the crime of membership of an armed terrorist organization. The findings of the ECtHR under this heading are important for the execution of the violation judgment in question, as will be explained in detail below. In the second stage, the ECtHR examined in particular whether the national judge had sufficient information about the nature of the Bylock messaging application at the time of the detention order. At this stage, the Court concluded that the applicant's allegation that he was a user of the messaging application at the time of his detention, based on a one-page Bylock detection report, did not constitute a reasonable suspicion for membership of an armed terrorist organization.

12. Thirdly, the Court stated that the examination of whether there was sufficient evidence to reasonably suspect that the applicant was using Bylock had already been answered as the second step of the examination had concluded negatively.

13. As a result of all these examinations, the Court held that there had been a violation of Article 5(1) of the Convention. It was also held that there had been a violation of Article 5, paragraphs 3 and 4 of the Convention on the grounds that the detention order did not contain sufficient grounds and that the applicant and his lawyer had not received sufficient information about the evidentiary situation of the case.

14. At the second stage of the three-stage examination, which was the main point of the Court's decision of violation based on the lack of any reasonable suspicion in the applicant's detention, the Court examined whether the national judge had sufficient information about the nature of the Bylock messaging application at the time of the applicant's detention. At this point, two matters that the ECtHR drew attention to in its examination of the case are important; firstly, it was stated that the facts and information presented at the time of detention order would be taken into account to determine whether a person had sufficient facts to convince an objective observer at the time of detention[5]; secondly, it was stated that the acts or facts attributed to a person under

[5] Ibid, para.154.

detention would not constitute reasonable suspicion if they did not constitute a crime at the time of their occurrence[6].

15. The ECtHR has therefore based its examination solely on the HSYK decisions dated 24 - 31 August 2016, among the decisions and reports referred to in paragraph 7 above submitted by the Turkish Government at the contentious stage. Accordingly, the ECtHR found that these decisions failed to provide the national judge at the time of the applicant's detention with sufficient information that Bylock had been used exclusively and allegedly for terrorist activity by an armed terrorist organization and its members, as contrary to the claimed by the Government, and held that the mere allegation of Bylock use did not constitute reasonable suspicion.

16. Although it does not make any specific analysis of the other reports and judgments due to the scope of the examination of the application, the following observations of the ECtHR are important for the assessment of the execution of the Akgün judgment in general and of the Government's submissions and the execution of the judgment in particular. The Court emphasized that the mere fact of downloading or using an encrypted means of communication, or of resorting to a different means of protection to safeguard the private nature of the messages transmitted, would not in itself constitute an element to convince an objective observer of illegal or criminal activity. Moreover, the use of an encrypted means of communication can only be reasonable grounds if it is supported by other elements related to its use which are capable of convincing the user that he or she is a member of a criminal organization. In determining the other elements, as the Court emphasizes, it is necessary to examine the content of the messages transmitted and the context in which they were exchanged.

17. Furthermore, the Court underlined that the use of electronic evidence as a basis for a criminal charge in order to justify a suspicion can be complex by its very nature and may therefore reduce the ability of national judges to determine the authenticity, accuracy and integrity of evidence because of the procedural requirements involved[7].

The Action Reports of the Government and their deficiencies regarding the full execution of the Akgün judgment

18. The Turkish Government submitted two action reports regarding the execution of the Akgün judgment.

[6] Ibid, para.157.
[7] Ibid, para.167.

19. In its Action Report dated 14 October 2022[8], the Turkish Government stated that the compensation awarded to the applicant as an individual measure had been compensated. It also informed that the applicant had been released under judicial control on 11 January 2018.

20. As for the general measures, the Turkish government presented the steps taken with respect to the general measures under 3 headings in response to the violation of Article 5(1) of the Convention, as the Bylock evidence in the applicant's file did not constitute reasonable suspicion.

21. Firstly, under the heading "Established practice on the evidentiary role of Bylock application", it is stated that there is now an established case law in domestic law regarding the evidentiary value of Bylock. On the basis of this, the Turkish Government merely repeated the judgment of the Court of Cassation 16th Chamber dated 24.04.2017, which it submitted to the ECtHR during the contentious phase of the Akgün case, and the Constitutional Court's judgments in Aydın Yavuz and others, M.T. and Ferhat Kara. In other words, the judgments that the Government presented as a subsequent development after the Akgün judgment are not actually new judgments issued after the Akgün judgment and taking into account the violation findings in the judgment.

22. The Government also claimed that the domestic courts used the Bylock jurisprudence established by these decisions and that the Bylock-related decisions were supported by detailed technical reports. However, these reports were not attached to the action reports, and the names of the reports, which experts prepared them and for what purpose were not even included in the reports.

23. While acknowledging that the finding of the Court stated in the Akgün judgment that the national judge did not have sufficient information about the nature of Bylock at the time of the applicant's detention, the Government indicated that domestic courts are now sufficiently informed by a large number of judicial decisions and reports, it provided neither a specific report nor any information on this issue other than the judicial decisions repeated above.

24. The high court judgments in paragraph 20, presented by the Government as established case law in the context of the enforcement of the Akgün judgment, are decisions that confirm or even defend the unlawfulness of Bylock. This should be considered in conjunction with the ECtHR's remarks in paragraph 167 of the Akgün

[8] See DH-DD(2022)1087

judgment (see paragraph 17 above) that the use of electronic evidence as a basis for a criminal charge in order to justify a suspicion may be inherently complex and therefore, due to the procedures applied, may reduce the ability of national judges to determine the authenticity, accuracy and integrity of the evidence. As such, Bylock evidence is digital evidence that requires complex procedures to establish its authenticity and accuracy, yet, as explained in detail below, it has been used in the Gülen movement trials in violation of the most basic rules of criminal law from the outset. These unlawfulnesses have been blatantly recognized by the Constitutional Court and the Court of Cassation and have been covered up by procedures that do not exist in Turkish law. In such a situation, a national judge cannot be expected to be sure of the legal evidentiary value of Bylock beyond all doubt and to make detention decisions in this manner due to the so-called established jurisprudence of high court decisions that ignore the most basic principles of criminal legislation.

25. Prior to discussing the Bylock jurisprudence set out in these decisions, it should be noted that Bylock is evidence that was obtained through intelligence gathering, contrary to Turkish criminal procedural law, although it should have been seized upon a search and seizure warrant issued in the context of an ongoing judicial investigation pursuant to Article 134 of the Code of Criminal Procedure. Indeed, the Bylock evidence was delivered to the Ankara Chief Public Prosecutor's Office by National Intelligence Service (MIT) on 9.12.2016, when there was no judicial investigation as required by Article 134 of the Code of Criminal Procedure. The search/seizure warrant for Bylock, which should have been issued earlier pursuant to Article 134 of the Code of Criminal Procedure, was issued after the evidence was delivered to the prosecutor's office.

26. The 16th Criminal Chamber of the Court of Cassation confirmed this in its decision dated 24.04.2017[9], stating that *"the judicial process was initiated after the digital materials, which were deemed to have been legally obtained by MIT, were delivered to the Ankara Chief Public Prosecutor's Office and a decision for examination, copying and analysis of the digital materials was taken and implemented by the Ankara Ankara 4th Magistrate Judgeship in accordance with Article 134 of the Criminal Procedure Code"*.

27. The General Criminal Assembly of the Court of Cassation, which upheld the decision of the 16th Criminal Chamber of the Court of Cassation, recognized the illegality in the decision and tried to justify this situation with another illegality[10]. The

[9] The decision of the 16th Criminal Chamber of the Court of Cassation, File no.2015/3 Decision No.2017/3, dated 24.04.2017.
[10] The decision of the General Assembly of the Criminal Court of Cassation, File No. 2017/956 Decision.No. 2017/370, dated 26/9/2017.

General Criminal Chamber of the Court of Cassation, in a way that has never been encountered in Turkish criminal law before, stated that the search warrant issued by the Ankara Chief Public Prosecutor's Office for Bylock after the evidence was delivered to the Chief Public Prosecutor's Office in violation of Article 134 of the Criminal Procedure Code was a "retrospective search". However, neither in the Criminal Procedure Code legislation nor in Turkish criminal law practice, there is no concept or procedure called retrospective search.

28. Another prominent finding of the decision dated 24.04.2017 of the 16th Criminal Chamber of the Court of Cassation is the acceptance of Bylock usage alone as sufficient evidence of the defendants' membership of an armed terrorist organization, without the need for any additional evidence.

29. In Aydın Yavuz and others judgment, the Constitutional Court ruled that the mere finding of Bylock is sufficient for the existence of strong criminal suspicion. Furthermore, in this judgment, the Constitutional Court characterized the Gülen movement as an armed terrorist organization[11]; however, as of the date of the judgment, there was no final Court of Cassation decision on the Gülen movement being an armed terrorist organization. The individual application filed by the applicant Tekin Akgün to the Constitutional Court was also found inadmissible on the grounds cited in this judgment. In the M.T. judgment, the decision was reinforced by referring to these findings made in the Aydın Yavuz and others judgment.

30. Aydın Yavuz and others judgment and the M.T. judgment have developed a jurisprudence contrary to the main point of infringement of the ECtHR's Akgün judgment, namely that only the alleged use of Bylock cannot constitute a reasonable suspicion that the crime of membership of an armed terrorist organization has been committed, and that other subsidiary evidence must also be taken into account. Besides, at the time of delivering these judgments, there was no judicially established armed terrorist organization and these acts should not constitute a crime[12].

31. In Ferhat Kara judgment, which is one of the decisions of the Constitutional Court and included in action reports as established case law, it was confirmed that the judicial process started after the Bylock data was transmitted to the Ankara Chief Public Prosecutor's Office[13]. This was explained as the obtaining and transmitting of Bylock data was not unlawful as it was not a judicial law enforcement activity but an intelligence activity. However, in the same decision, the Constitutional Court

[11] Aydin Yavuz and others judgment, para.22.
[12] See Akgün judgment para.157.
[13] Ferhat Kara judgment para.139.

contradicted this argument and stated that the updating of the Bylock list, which is a law enforcement activity, was also carried out by MİT[14]. Therefore, it is obvious that the Constitutional Court contradicts itself on the main point where the Constitutional Court justifies the illegality of Article 134 of the Criminal Procedure Code and determines the evidentiary value of Bylock.

32. Yet in Ferhat kara judgment, the Constitutional Court stated that there was an examination/investigation on the Bylock data. This examination/investigation activity referred to by the Constitutional Court[15] was the expert report[16] requested by the Ankara Chief Public Prosecutor's Office on Bylock, which found that the Bylock data had been manipulated and altered for months before it was submitted to the prosecutor's office.

33. These findings, which are highlighted in the Ferhat Kara judgment, show that the user lists were generated by MİT before and after the data was delivered to the prosecutor's office, that the process of obtaining evidence was not carried out in accordance with the Criminal Procedure Code, and that the Bylock lists are continuously updated lists that are open to all kinds of manipulation.

34. All these high court decisions, which are introduced as established jurisprudence, show that these decisions have developed a domestic jurisprudence that does not meet and even contradicts the standards set out by the ECtHR in the Akgün judgment regarding the evidentiary nature of Bylock.

35. Secondly, under the heading "Judicial practice concerning the examination of the Bylock evidence", the Turkish Government stated that the Bylock evidence constituted a strong suspicion in relation to the Gülen Movement trials. It claims that according to current Turkish judicial practice, when a defendant is suspected of being a Bylock user, a report containing all relevant data is prepared. According to the Government, this report covers all relevant information, especially usernames, message contents, frequency of use, signal information, CGNAT, message contents, inclusion of the statements of the persons on the list into the file.

36. It is stated that after all these investigations have been carried out, the relevant Magistrates' Court decides whether the person should be detained by taking into account the above-mentioned established high judicial decisions.

[14] Ibid, para.33.
[15] Ibid, para.135.
[16] For the mentioned expert report, available at https://www.drgokhangunes.com/wp-content/uploads/2021/09/ANKARA-CBS-BILIRKISI-RAPORU.pdf page 24-25-39.

37. However, it is sufficient to review the judicial processes of local courts included in the Constitutional Court's judgment database on Bylock trials to see that the practice in domestic judicial proceedings does not substantiate this system. The recent decisions of the Constitutional Court in the Yusuf Çoban[17] and İbrahim Halil Güner[18] cases are an example of the current situation. Although the applications concern the judicial trial for membership of an armed terrorist organization due to Bylock and are not related to the detention measure due to Bylock, the approach of the domestic courts towards Bylock evidence in a long process such as a trial is indicative as to the current judicial practice when a decision such as detention is made in a more limited time with fewer examination opportunities.

38. In the Yusuf Çoban judgment, the domestic court ruled against the applicant based on Bylock, without bringing the Bylock assessment report to the file, despite the fact that the main evidence taken as the basis of the verdict was the allegation that the applicant used Bylock. All requests submitted by the applicant to the domestic court in this regard were rejected, and he was not provided with reports indicating that he was a Bylock user during the whole trial. Similarly, in the İbrahim Halil Güner judgment, the Bylock identification report and the related CGNAT records were not presented to the applicant throughout the trial and the conviction was based on this evidence. In both applications, the Constitutional Court ruled that there was no violation.

39. Thirdly, under the heading of other measures of the Turkish Government, the relevant provisions of the Criminal Procedure Code, in particular Article 100 paragraph 3 of the Code of Criminal Procedure, which regulate the measure of detention under Turkish law, are explained. In addition, the additional safeguards introduced to the detention legislation by the 4th Judicial Package are mentioned.

40. At this point, it should first be noted that Article 100 paragraph 3 of the Criminal Procedure Code, which establishes the existence of strong suspicion and a presumption for detention for certain crimes, was contradicted by the ECtHR's landmark Buzadji judgment. Moreover, the Government's statements remained purely abstract and theoretical. Although 2 years have passed since the 4th Judicial Package, the Turkish

[17] The Turkish Constitutional Court, Yusuf Çoban [Plenary] judgment, application no. 2019/11417, 8 March 2023, available at https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/11417.

[18] The Turkish Constitutional Court, İbrahim Halil Güner judgment, application no. 2019/11810, 8 Februaruy 2023, available at https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/11810 .

Government has not been able to show concrete steps taken in relation to it, which should be taken into account especially in detention orders related to Bylock evidence.

41. As regards the ECtHR's finding of a violation on the grounds that the domestic court had failed to provide sufficient grounds for the applicant's detention, the Government reiterated the arguments it had presented in relation to the violation under Article 5(1).

42. In this action report dated October 14, 2022, the Government requested the Committee of Ministers to close the supervision of the execution of the Akgün judgment, stating that all necessary individual and general measures had been taken to enforce the ECtHR's finding regarding the Akgün judgment.

43. On 7 July 2023, the Turkish Government submitted a revised Action Report[19]. This report, which contains the same arguments as the action report of 14 October 2022, differs only in that the Turkish Government requested the Committee of Ministers to examine the issue of detention without reasonable suspicion under the Nedim Şener group of cases.

ASSEDEL's Observations and Recommendations for the Enforcement of the Akgun judgment

- The only concrete developments in the Government's action reports are not the judicial decisions of the high courts, which were rendered after the Akgün judgment and therefore do not take into account the violation findings in the Akgün judgment.

  These decisions, which are presented as well-established case law, are decisions that confirm and support the unlawful and suspicious nature of Bylock evidence. In addition, these decisions state that the Bylock evidence does not need to be supported by other evidence, contrary to what is required in the Akgün judgment.

  Therefore, there has not been a jurisprudence established by the high courts by taking into account the points of violation identified in the Akgün judgment. **The Turkish Government should submit to the Committee of Ministers all decisions delivered by high judicial bodies which take into account the findings of the Akgün judgment itself.**

[19] See DH-DD(2023)840.

➢ These decisions, which are presented as well established case law, include the concept of "retrospective search", a concept and procedure that does not exist in Turkish criminal procedure. The unlawfulness of Bylock is being tried to be legalized with a concept that does not exist in criminal procedure.

Moreover, these decisions confirm that the Bylock data is manipulated data by referring to the expert report commissioned by the Ankara Chief Public Prosecutor's Office.

Against these last two findings, it cannot be expected that an detention order issued by a national judge taking into account the alleged Bylock jurisprudence would be a legal decision with absolute certainty as to the evidentiary nature of Bylock.

➢ **The Turkish Government,** which claims that the obtaining and analyzing of Bylock evidence, which is a highly technical matter, is supported by numerous reports and expert opinions that it was used exclusively by an armed terrorist organization for organizational activities, **should submit all these documents to the Committee of Ministers.**

➢ **Furthermore, the Committee of Ministers should be informed with concrete data on how domestic courts and members of the judiciary have been informed about these findings on technical electronic evidence, how judges have been trained on the technical aspects to be taken into account when issuing detention orders when Bylock is involved, and what steps have been taken to ensure that detention measures are in line with the findings in the Akgün judgment.**

➢ Finally, the Government requested that the execution of the Akgün judgment be supervised under the Nedim Şener group. However, the Government's request is misplaced, as the Akgün judgment is a leading case in itself due to the Gülen movement investigations and the Bylock evidence used in these investigations. **Due to the phrase " subsidiary evidence" as referred to in the Akgün judgment, it should be examined in a separate group with the ECtHR judgments such as Taner Kılıç and Nazlı Ilıcak, which have examined the subsidiary evidence in these investigations.**

Conclusion Remarks

ASSEDEL considers that the Turkish authorities have not developed an established case law and judicial practice in relation to Bylock evidence, in line with the ECtHR's findings in Akgün v. Turkey.

In light of the foregoing, ASSEDEL is of the opinion that the Turkish Government should provide the Committee of Ministers with more concrete data, in accordance with the findings and requests presented above, with the aim of supervising the execution of the Akgün judgment by the domestic judicial authorities.

Finally, ASSEDEL strongly recommends that the Committee continue to monitor the execution of the Akgün judgment together with other cases in which subsidiary evidences are being examined in relation to the Gülen Movement investigations.

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