Access to Justice for Dismissed Public Servants in Türkiye

Volume II

An Analysis of Judicial Review of Decisions of the State of Emergency Inquiry Commission

| By Turkey Human Rights Litigation Support Project |

August 2023

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INTRODUCTION

On 21 July 2016, following the attempted coup of 15 July 2016, the Turkish government declared a state of emergency for three months, which was extended seven times and ended on 19 July 2018.[1] During this two-year state of emergency period, the Council of Ministers, meeting under the chairmanship of the President of the Republic of Türkiye, adopted 37 emergency legislative decrees (nos. 667-703).[2] Through these legislative decrees, the government adopted a total of 131,922 measures,[3] 125,678 of which concerned the dismissal of public servants[4] on grounds of their alleged links to "terrorist organisations".[5]

125,678 public servants whose names were mentioned in the lists appended to the emergency legislative decrees were dismissed with immediate effect. Their professions vary from one public sector to another, including experts and employees in several different organs of the executive, judiciary and military; teachers, police officers, governors, medical experts and academics.[6]

Legislative Decree no. 685[7] - which entered into force on 23 January 2017 and was later enacted by Law no. 7075[8] - established the Inquiry Commission on the State of Emergency Measures ("the Commission") which was tasked with assessing applications related to measures directly established by the emergency legislative decrees, including dismissal from public service.[9]

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[1] Council of Ministers, decision no. 2016/9064, 20/07/2016 in Official Gazette no. 29777, 21/07/2016.

[2] For a list of emergency legislative decrees concerning the dismissal from public service and the lists attached to these decrees, see the website of the Inquiry Commission on the State of Emergency Measures on legislative decrees. For a collection of available resources relating to the State of Emergency in Türkiye, see Turkey Human Rights Litigation Support Project, University of Middlesex School of Law, "State of Emergency in Turkey: A Collection of Available Resources, Reports, Case Law, and other Relevant Materials", 21 August 2018.

[3] The Inquiry Commission on the State of Emergency Measures, Activity Report, 2017-2022 (hereinafter, "Commission's Activity Report (2017-2022)"), pp. 1, 25-28. The previous activity reports of the Commission are available at the following links: 2018 Report; 2019 Report; 2020 Report; and 2021 Report. The Commission's website in English can be accessed at https://soe.tccb.gov.tr/.

[4] Remaining measures concerned the annulment of ranks of retired personnel (3,213); closure of institutions and organisations such as schools and higher education institutions, associations, foundations, media outlets, trade unions, publishing houses (2,761); and dismissal from studentship (270). See Commission's Activity Report (2017-2022), p. 25.

[5] Emergency Legislative Decrees, in general, refer to: "membership of, belonging, affiliation or link to *(üyeliği, mensubiyeti, iltisakı veya irtibatı)* terrorist organisations or to organisations, structures or groups which the National Security Council had established as being involved in activities prejudicial to the State's national security". See Article 2 of Emergency Legislative Decree no. 672; Articles 1 of Emergency Legislative Decree nos. 675, 677, 679, 683, 686, 689, 692, 693, 695, 697, and 701. The first four emergency legislative decrees concerning the dismissal from public service (nos. 667, 668, 669, and 670) state instead, "belonging, affiliation or link to the Fethullahist Terrorist Organisation (FETÖ/PDY), which is determined to pose a threat to national security".

[6] For a detailed table showing the number of dismissals from each institution, see Commission's Activity Report (2017-2022), p. 9. Dismissed public servants include but not limited to the followings: teachers in different public schools; police officers; engineers; governors of certain provinces of Türkiye; experts in the Turkish Banking Regulation and Supervision Agency; imams, preachers, and muezzins in the Directorate of Religious Affairs *(Diyanet)*; soldiers, lieutenants, and colonels in the Ministry of National Defence; cooks and guardians working in different prisons; judges, prosecutors, court ushers, or court clerks working in different courts; doctors, nurses, midwifes, physiotherapists, or dentists in public hospitals; pedagogues, psychologists, or drivers working in courthouses; drivers; inspectors in the Ministry of Labour and Social Security; legal advisers in the Ministry of Foreign Affairs; technicians in different Ministries; academics at various public universities; IT specialists; so on and so forth.

[7] For the English translation of Legislative Decree no. 685, see https://soe.tccb.gov.tr/decree-law-no-685.

[8] For English version of Law No. 7075, see Commission's Activity Report (2017-2022), pp. 73-83.

[9] Legislative Decree no. 685, Article 1.

In June 2017, in its decision in *Köksal v. Turkey*, the European Court of Human Rights ("ECtHR" or "the Court") recognised the Commission as *a priori* providing an accessible, effective domestic remedy and that it offered appropriate redress for complaints by dismissed public servants and concluded that it must be exhausted for the purposes of Article 35(1) of the European Convention on Human Rights ("ECHR" or "the Convention").[10] However, the Court left open the door for a re-examination of the effectiveness of this new domestic remedy (namely, the Commission), as well as subsequent judicial review proceedings in administrative courts. The Court emphasised that this re-examination would be done "in the light of the decisions handed down by the commission in question and the national courts, as well as the effective execution of these decisions".[11]

In June 2021, in one of the cases communicated to Türkiye (*Kamuran Akin v. Turkey*), the Court expressly raised the question of whether "the remedy established by Legislative Decree no. 685 constitutes (a) a remedy to be exhausted, for the purposes of Article 35 § 1 of the Convention, and (b) an effective remedy, within the meaning of Article 13 capable of remedying the applicants' complaints under Articles 8, 10 and 11 of the Convention".[12] This development indicates that the Court may be ready to review its approach as to the potential effectiveness of this remedy should the practice of the Commission and administrative courts show that the remedy has not been applied in a manner that is in conformity with Convention standards.[13]

In that vein, the Turkey Human Rights Litigation Support Project's ("TLSP") first report entitled "Access to Justice in Turkey? A Review of the State of Emergency Inquiry Commission", published in October 2019, analysed the functioning and decisions of the Commission concerning the dismissals of public servants.[14] The report reviewed 193 Commission decisions and 71 pending applications and found that the Commission could not be considered as providing a fair and effective procedure "in view of the lack of legal certainty, the clear violation of the presumption of innocence, the violation of the right to a fair hearing, the criminalization of everyday life practices, the evaluation of the applicants' acts which occurred before they were appointed as a public official, and the lack of any effort to collect and evaluate evidence in favour of the applicants".[15] Therefore, the report concluded that the Commission had failed to meet the standards of the right to an effective remedy under international law.[16]

As was briefly explained in TLSP's 2019 Report,[17] Article 11 of Legislative Decree no. 685 (Law no. 7075) provides for a process of judicial review of the Commission's decisions before the Ankara Administrative Courts "designated" by the High Council of Judges and Prosecutors ("HCJP").[18] Neither

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[10] *Köksal v. Turkey* (dec.), no. 70478/16, § 29, 6 June 2017.
[11] *Köksal v. Turkey*, § 29.
[12] *Kamuran AKIN contre la Turquie et 42 autres requêtes*, no. 72796/16, communicated on 23 June 2021. See also the third-party intervention filed by the TLSP on 10 December 2021.
[13] Cf. *Muratovic v. Serbia* (dec.), no. 41698/06, § 19, 20 March 2017; *Beshiri and Others v. Albania* (dec.), no. 29026/06, § 222, 7 May 2020.
[14] Turkish Human Rights Litigation Support Project, "Access to Justice in Turkey? A Review of the State of Emergency Inquiry Commission", October 2019 (hereinafter "TLSP's 2019 Report").
[15] TLSP's 2019 Report, pp. 43-44.
[16] *Ibid.*
[17] *Ibid.*, pp. 22-23.
[18] As of September 2022, there are nine Ankara Administrative Courts specially designated by the HCJP: Ankara Administrative Courts nos. 19, 20, 21, 22, 24, 25, 26, 27 and 28. Hereinafter, references to "Ankara Administrative Courts" in this Report concern these nine administrative courts.

the decisions of the Commission, nor the specially designated Ankara Administrative Courts have been made public. Although many analyses have been conducted with respect to the (in)effectiveness of the Commission,[19] there is a lack of information about the judicial review process of the Commission's decisions before the Ankara Administrative Courts. The present report aims at supplementing TLSP's 2019 Report by filling this gap.

To this end, this report examines the functioning and effectiveness of the judicial review process before the administrative courts in Ankara: the Ankara Administrative Courts[20] (the first-instance court), the Ankara Regional Administrative Court[21] (the second-instance appeal court) and the Council of State[22] (the last-instance appeal court) and assesses whether these courts provide the dismissed public servants with an effective domestic remedy in Türkiye.[23]

The report consists of seven parts. Part I explains the scope of, and methodology used in, this report. Part II examines the right to an effective remedy in international human rights law. Part III provides background information about the period prior to the judicial review of the Commission's decisions before the Ankara Administrative Courts. Part IV discusses institutional and procedural aspects of the judicial review process. Part V, VI and VII provide a comprehensive analysis of decisions rendered by the Ankara Administrative Courts, the Ankara Regional Administrative Court and the Council of State, respectively.

I. SCOPE AND METHODOLOGY

There have been two types of dismissal from public service on the grounds of membership of, affiliation to, or link with, illegal organisations: *directly by* legislative decrees or *on the basis* of the legislative decrees.[24]

The first type of dismissal concerns public servants whose names were *directly* mentioned in long lists appended to the emergency legislative decrees.[25] In order to challenge their dismissal, these public servants were first entitled to apply to the Commission and then to the designated Ankara Administrative

[19] See TLSP's 2019 Report; Amnesty International, Report "Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers", 2018; International Commission of Jurists, "Justice Suspended: Access to Justice and the State of Emergency in Turkey", 2018, pp. 27-33; Altiparmak, "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?", 23 February 2017; Tom Ruys and Emre Turkut, "Turkey's Post-Coup 'Purification Process' and the European Convention on Human Rights", Human Rights Law Review, Volume 18, Issue 3, September 2018, 539, at p. 557-562; Olcay, "Turkey - State of Emergency Acts Review Commission Used to Hold Off Proper Legal Review", January 30, 2017; Mağdurlar için Adalet Topluluğu, "2. Yılında OHAL'in Toplumsal Maliyetleri Araştırma Raporu" (Social Costs of State of Emergency in Its Second Year), pp. 547-567, January 2019; Mağdurlar için Adalet Topluluğu, "3. Yılında OHAL'in Toplumsal Maliyetleri Araştırma Raporu" (Social Costs of State of Emergency in Its Third Year), pp. 941-1006, June 2020.

[20] Hereinafter, either "the Ankara Administrative Court(s)" or "the administrative court(s)".

[21] Hereinafter, either "the Ankara Regional Administrative Court" or "Regional Court".

[22] Supreme Administrative Court in Türkiye.

[23] At the time of writing this report, the Turkish Constitutional Court has not decided on the merits of an individual application brought by a public servant directly dismissed by an emergency legislative decree. This report will be updated when the Constitutional Court issues a sufficient number of decisions to make an assessment.

[24] See European Commission for Democracy through Law (Venice Commission), Opinion No 865/2016 on Emergency Decree Law Nos 667 to 676 adopted following the failed coup of 15 July 2016, CDL-AD(2016)037, 9 - 10 December 2016, paras. 101-105 (hereinafter, "Venice Commission's 2016 Report").

[25] Their names, surnames, as well as their professions, the name of the public institutions where they used to work and the name of the city where the institutions are located were mentioned in the lists appended to the legislative decrees.

Courts, if their applications were rejected by the Commission. The scope of this report is limited to cases concerning direct dismissals by legislative decree.

The second kind of dismissal from public service have occurred (and still occur) *on the basis of* legislative decrees. Most of these dismissals are not limited to the period of the state of emergency between July 2016 and July 2018, and many public servants have been dismissed and continue to be dismissed through different channels in Türkiye.[26] Unlike people dismissed *directly by* legislative decrees these public servants appealed to different courts in various cities in Türkiye (not to the Commission). The present report aims to shed light on the judicial review process of the Commission's decisions before the Ankara Administrative Courts and, therefore, does not discuss this second type of dismissal.

In researching and writing this report, a total of 435 decisions of Ankara Administrative Courts[27] and 99 decisions of the Ankara Regional Administrative Court[28] were analysed. In addition, 31 interlocutory decisions of the Ankara Administrative Courts and nine stay of execution decisions of the Regional Court were also reviewed. These decisions were obtained from various sources, including lawyers, dismissed public servants and social media, *e.g.*, Twitter, between *24 September 2021* and *9 December 2021*. In addition, the decisions of the Council of State were obtained from its decision search engine[29] and were reviewed to the extent relevant to the scope of the report.

The plaintiff's submissions to the Ankara Administrative Courts and Ankara Regional Administrative Court were also reviewed to assess whether the courts properly reflected and examined their arguments in their decisions. Any details in the decisions that could reveal the plaintiffs' identities (*e.g.*, docket no., decision no., date of the decisions) are not disclosed in the Report, to ensure the confidentiality of the plaintiffs' personal information.

The Turkish authorities have denounced the Gülenists[30] as "a threat to national security" and "an armed terrorist organisation" called "FETÖ/PDY"[31] (hereinafter, "the Organisation") for allegedly staging the attempted coup of 15 July 2016.[32] In their decisions, the Ankara Administrative Courts refer to affiliation with the Organisation as the main reason for dismissal from public service. The present report mainly concentrates on the dismissal of public servants allegedly linked to the Gülenists, since the majority of decisions collected concern their situation. However, it should be borne in mind that there has been a considerable number of dismissals of public servants allegedly linked to the PKK (Kurdistan Workers'

[26] See Annex 2: Summary of different channels through which the dismissals from public service have occurred *on the basis of* the legislative decrees.
[27] The distribution of decisions reviewed is as follows: Ankara 19th Administrative Court (68 decisions); Ankara 20th Administrative Court (88 decisions); Ankara 21st Administrative Court (55 decisions); Ankara 22nd Administrative Court (93 decisions); Ankara 24th Administrative Court (61 decisions); Ankara 25th Administrative Court (56 decisions); Ankara 26th Administrative Court (9 decisions); and Ankara 28th Administrative Court (5 decisions). No decision of Ankara 27th Administrative Court was collected or reviewed.
[28] 13th Administrative Law Division (66 decisions) and 14th Administrative Law Division (33 decisions).
[29] https://karararama.danistay.gov.tr/.
[30] See Caroline Tee, "Chapter 4 The Gülen Movement: Between Turkey and International Exile" *in* Muhammad Afzal Upal and Carole M. Cusack (eds.), *Handbook of Islamic Sects and Movements*, Brill, 2021, pp. 92-93; Venice Commission's 2016 Report, p. 5.
[31] *"Fetullahçı Terör Örgütü/Paralel Devlet Yapılanması"* (Fetullahist Terrorist Organisation/Parallel State Structure).
[32] Republic of Türkiye, Ministry of Foreign Affairs, "An Informative Note of the Ministry of Foreign Affairs on the Failed Coup Attempt".

Party) and other proscribed groups.[33] This report contains an analysis of 13 decisions concerning such dismissals.[34]

II. RIGHT TO AN EFFECTIVE REMEDY IN THE ECHR SYSTEM

The right to an effective remedy is recognised in international treaties[35] and regional human rights protection systems.[36] In the context of the European human rights system, this right stems from two articles of the Convention, namely, Article 13 (right to an effective remedy) and Article 35(1) (the rule on exhaustion of domestic remedies). Article 35(1) has a "close affinity" with Article 13 and is based on an assumption reflected in Article 13 that "there is an effective remedy available in respect of the alleged breach [of an individual's Convention rights] in the domestic system".[37]

Article 13 has an ancillary character meaning that its violation can be claimed in conjunction with or in light of the substantive provisions of the Convention (Articles 2-12 and 14) and its Protocols. The domestic legal order must afford an effective remedy where an applicant submits an arguable claim of a violation of a Convention right.[38]

According to the established case law of the Court, the remedy must be timely, accessible and effective in law and practice.[39] An effective remedy must provide for the right to apply to an appropriate, independent and effective national authority with the power to deal with the substance of the complaint, order cessation of the violation and provide reparation.[40] Hence, the right to an effective remedy also relates to Article 6 (right to a fair trial) in which equality of arms is a fundamental principle.[41] A remedy is not considered effective if "the minimum conditions enabling an applicant to challenge a decision that restricts his or her rights under the Convention" are not provided.[42]

Although the remedy may not in all circumstances have to be judicial, "judicial remedies ... furnish strong guarantees of independence, access to the victim and family, and enforceability of awards in compliance with the requirements of Article 13".[43] Non-judicial remedies have to "offer sufficient procedural safeguards for Article 13,"[44] consistent with an effective challenge which offers "adequate

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[33] See Venice Commission's 2016 Report, p. 27, fn. 82.

[34] In a few of these decisions, the courts mention that the coup attempt orchestrated by FETÖ/PDY has "rendered easy" attempts by other organisations to destabilise the democratic order. This argument appears to explain the use of emergency decrees to dismiss the plaintiffs in question despite the absence of a link with FETÖ/PDY and the attempted coup.

[35] Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2(3).

[36] European Convention on Human Rights, Articles 13, 35(1) and 41; American Convention on Human Rights, Articles 25 and 63(1); African Charter on Human and Peoples' Rights, Article 7(1)(a); Charter of Fundamental Rights of the European Union, Article 47.

[37] *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V; *Kudla v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI.

[38] *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 138, ECHR 2003-VIII; *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 39, Series A no. 247-C.

[39] See *Kudla v. Poland* [GC] § 157; *Selmouni v. France* [GC], § 76; *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 205, 22 December 2020.

[40] *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 138, ECHR 2003-VIII.

[41] *Csüllög v. Hungary*, no. 30042/08, § 46, 7 June 2011.

[42] *Csüllög v. Hungary*, § 46.

[43] *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 109, ECHR 2001-V (extracts).

[44] *Chahal v. United Kingdom* [GC], 15 November 1996, § 154, Reports of Judgments and Decisions 1996-V.

guarantees of independence and impartiality".[45] The effectiveness of a remedy does not depend on the certainty of a favourable outcome, but it must offer a reasonable prospect of success.[46] To be considered effective, decisions of the independent decision-maker must, of course, be implemented.[47]

If a government claims non-exhaustion of domestic remedies, it bears the burden of proof to satisfy the Court that the applicant did not use a remedy which was "an effective one, available in theory and in practice at the relevant time".[48] Once the government satisfies this burden of proof, the applicant can establish that the remedy advanced by the government "was for some reason inadequate and ineffective in the particular circumstances of the case" in order to discharge the burden of proof.[49]

To answer the question whether an applicant has complied with the rule on exhaustion of domestic remedies, it is essential for the Court to have regard to the particular circumstances of the individual case[50] and "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 applicants".[51]

The report seeks to answer the question whether the remedy concerning the dismissals from public service before the administrative courts comply with the jurisprudence of the ECtHR on the effectiveness of remedies in light of the decisions of these courts.

III. BACKGROUND: THE PERIOD BEFORE AND AFTER THE ESTABLISHMENT OF THE COMMISSION

A. The Period Prior to the Establishment of the Commission

As Judge Koskelo put it in her concurring opinion to the *Pişkin* judgment of the ECtHR, the victims of arbitrary dismissals by emergency legislative decrees "[were] not in a position to know exactly what [they were] being charged with, or on what grounds and on the basis of what evidence".[52] This is because the dismissal of public servants "had not been preceded by any disciplinary or criminal proceedings, which meant that the persons concerned had been unable to defend themselves and that the dismissals had not been accompanied by any individualised decisions".[53]

For these reasons, the dismissed public servants did not know exactly what to do in the face of the obscurity of the situation in which they found themselves, and they tried to use, separately or simultaneously, all possible legal avenues to challenge the dismissal decision. They sought restitution before the administrative courts, the Council of State, the TCC and the ECtHR, none of which yielded an effective remedy for their complaints.[54]

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[45] *Al-Nashif v. Bulgaria*, 50963/99, § 133, 20 June 2002.
[46] *Selmouni v. France* [GC], § 76.
[47] *Wille v. Liechtenstein* [GC], no. 28396/95, § 75, ECHR 1999-VII.
[48] *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 225, ECHR 2014 (extracts).
[49] *Selmouni v. France* [GC], § 76.
[50] *Van Oosterwijck v. Belgium*, 6 November 1980, § 35, Series A no. 40.
[51] *Selmouni v. France* [GC], § 77.
[52] *Pişkin v. Turkey*, no. 33399/18, 15 December 2020, Concurring Opinion of Judge Koskelo, § 2.
[53] *Pişkin v. Turkey*, § 90.
[54] For a detailed explanation about dismissed public servants' efforts before different judicial and administrative bodies, see TLSP's 2019 Report pp. 5-7.

B. The Period After the Establishment of the Commission[55]

At the point of the establishment of the Commission by Legislative Decree no. 685 on 23 January 2017, there were a number of ongoing cases concerning the dismissals from public service still pending before various domestic courts.[56] Provisional Article 1(2) of that Legislative Decree[57] provided that these courts are not required to make any decision in these ongoing cases. Instead, the case files were to be sent to the Commission for examination (without requiring a new application). Accordingly, as a result of an executive legislative decree, tens of thousands of cases were dismissed by various courts, which cast doubt on the independence and impartiality of those courts.[58] In addition, as noted in TLSP's 2019 Report, both the appointment of the members of the Commission by the executive, and its functioning, raised questions about its independence and impartiality, which are fundamental tenets of a fair trial, the rule of law and democracy.[59]

The Commission started to function on 22 May 2017, received its first applications on 17 July 2017 and started to issue decisions on 22 December 2017.[60] Its term of office ended on 22 January 2023.[61] By 31 December 2022, it had issued a total of 127,292 decisions in respect of all the applications. Of these decisions, 123,467 concerned applications lodged by dismissed public servants,[62] and the Commission rejected 86% of these applications (105,755 rejection decisions and 17,712 acceptance decisions).[63] Therefore, in order to take the matter any further, 105,755 dismissed public servants were required to bring an action for annulment of the Commission's decisions before the Ankara Administrative Courts.

As discussed above, TLSP's 2019 report found that the Commission could not be considered as providing a fair and effective process to the dismissed public servants and failed to provide the right to an effective remedy as required under international law.[64] Furthermore, the March 2018 Report of the United Nations Office of the High Commissioner for Human Rights (OHCHR) analysed the dismissal of public servants in Türkiye and the Commission's shortcomings,[65] finding a failure to observe the principles of the right to a fair trial in the Commission's procedures, notably the equality of arms. It emphasised that the Commission did not provide the applicants with "an opportunity to testify or present witnesses", that Article

[55] For a detailed analysis of decisions of the Commission and its shortcomings, see TLSP's 2019 Report, pp. 23-44.
[56] For a detailed explanation as to the establishment, structure and functioning of the Commission, see TLSP's 2019 Report, pp. 5-23.
[57] This provision was added by Article 56 of Decree Law no. 690, which entered into force on 29 April 2017. This is also reflected in Provisional Article 1 of Law no. 7075, which enacted Legislative Decree no. 685.
[58] Mesut Can Tarım, "Olağanüstü Hal Kanun Hükmünde Kararnameleri ile ihraç edilen kamu personelinin görevlerine iadesine yönelik hukuki rapor" (Report on an Analysis of Criteria Used in Dismissing Public Officials during State of Emergency), 27 September 2021, p. 71 (hereinafter "Tarım's 2021 Report").
[59] TLSP's 2019 Report, pp. 11-13.
[60] Commission's Activity Report (2017-2022), pp. 8 and 26.
[61] Commission's Activity Report (2017-2022), pp. 1, 25-28.
[62] Out of 125,678 dismissed public servants, 123,467 applied to the Commission. See Annex 1: detailed statistics about the Commission's decisions and type of measures taken by emergency legislative decrees; Commission's Activity Report (2017-2022), p. 28.
[63] See Annex 1.
[64] TLSP's 2019 Report.
[65] It "is based on information received, verified, corroborated and analyzed by OHCHR staff members based in Geneva, in accordance with the standard human rights monitoring methodology of the Office", see 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 (hereinafter, "OHCHR Report"), p. 5, para. 22; see also pp. 14-18, paras. 58-76 and pp. 23-25, paras. 101-108.

6(1) of Legislative Decree no. 685 "restrict[ed] members of the Commission from providing confidential information to the applicants"[66] and that its decisions were not required "to be supported with evidence, reasoned and/or published".[67] The OHCHR concluded that the Commission "cannot be considered as an independent body that will guarantee full respect of due process" and that Türkiye lacks "appropriate remedies to address thousands of dismissals of employees".[68]

In addition to the OHCHR's findings, it should be noted that the Commission's decisions did not include any examination as to possible human rights violations because of the dismissals.[69] Nor did the Commission award any compensation for material or moral damage suffered as a result of wrongful and arbitrary dismissal, as Legislative Decree no. 685 did not provide the Commission with such a mandate.

The OHCHR recommended that the Government of Türkiye should "ensure that all individuals who were dismissed from civil service … have the right to have their cases reviewed by an independent judicial and administrative body in accordance with international standards; and to compensation for the material and moral damage caused by their arbitrary dismissal".[70] The present report aims to assess whether such international standards have been met in the administrative proceedings.

IV. OVERVIEW OF THE JUDICIAL REVIEW PROCESS

This section explains (1) the establishment of, (2) the procedure before, and (3) the type of decisions of, (A) the Ankara Administrative Courts, (B) the Ankara Regional Administrative Court, and (C) the Council of State.

A. Ankara Administrative Courts

1. Establishment of "Specially Authorised" Ankara Administrative Courts

Dismissed public servants whose applications were rejected by the Commission can bring "an action for annulment" of the Commission's decision before the Ankara Administrative Courts (as designated by the HCJP).[71] The HCJP designated the Ankara 19th and 20th Administrative Courts to review actions for annulment, and they started carrying out these functions on 28 November 2017.[72]

Due to the large number of cases being rejected by the Commission, the HCJP also designated the following courts to deal with the backlog of the Commission's decisions: Ankara 21st and 22nd

[66] See Legislative Decree no. 685, Article 6(1): "Members and those, who are assigned with respect to the functioning of the Commission, cannot disclose to anyone, except for organs that are legally authorised on that subject, any confidential information, personal data, trade secrets and related documents that belong to the public, to those concerned or to third parties, that they obtain during their performance of their duties, and they cannot use them for their own interests or for the interests of third parties. This obligation shall continue to exist after the expiry of their terms of office".
[67] OHCHR Report, p. 24, paras. 105-106
[68] OHCHR Report, p. 25, para. 108.
[69] See *e.g.*, sample decision of rejection in Commission's Activity Report (2017-2022), pp. 29-35.
[70] OHCHR Report, p. 28, para. 122(f).
[71] Law no. 7075, Article 11.
[72] HCJP's 1st Chamber, Decision no. 1652 Annex, 28/11/2017, p. 1 *("Bazı Ankara İdarî Mahkemeleri üyelerinin müstemir yetkilerinin yeniden belirlenmesine ilişkin 28/11/2017 tarih ve 1652 sayılı karar ekidir")*.

Administrative Courts (which started functioning on 24 September 2018);[73] Ankara 24th Administrative Court (which started functioning on 4 March 2019);[74] Ankara 25th Administrative Court (which started functioning on 2 September 2019);[75] and Ankara 26th, 27th and 28th Administrative Courts (which started functioning on 17 July 2020).[76]

These courts are designated "specially authorised" *(özel yetkili)* Ankara Administrative Courts (nos. 19-22 and 24-28) which do not receive cases from general distribution *(genel tevzi)* and exclusively examine cases arising from the Commission's decisions.[77] They review the Commission's decisions but do not have any authority to review the legality of the emergency legislative decrees by which public servants were dismissed or to annul provisions of these decrees.[78] Therefore, the judicial review carried out by these courts is limited in that it does no review the initial act of dismissal.

Turkish judiciary is structured in such a way that a limited number of specially authorised administrative courts in a single city, instead of courts of general competence in various cities of Türkiye, are exclusively responsible for judicial review of the Commission's decisions. Only nine administrative courts can hear actions for annulment brought by thousands of plaintiffs, which increase the backlog in these courts and thus may eliminate the possibility of the dismissed public servants being tried within a reasonable time.

2. Procedure

a) Time-limit

The dismissed public servants can bring actions for annulment of the Commission's decision within 60 days from the notification date of the decision.[79]

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[73] HCJP's 1st Chamber, Decision no. 1265 Annex, 07/09/2018, p. 2 *("Bazı yer idari yargı hâkimlerinin müstemir yetkilerinin belirlenmesi ve yeniden inceleme taleplerinin değerlendirilmesine ilişkin 07/09/2018 tarihli ve 1265 sayılı kararın ekidir").*

[74] HCJP's 1st Chamber, Decision no. 159 Annex, 14/02/2019, p. 1 *(Bazı yer idari yargı hâkimlerinin müstemir yetkilerinin yeniden belirlenmesine ilişkin Hâkimler ve Savcılar Kurulu Birinci Dairesinin 14/02/2019 tarihli ve 159 sayılı kararının ekidir").*

[75] HCJP's 1st Chamber, Decision no. 787 Annex, 10/07/2019, p. 2 *("Bazı yer idari yargı hâkimlerinin müstemir yetkilerinin belirlenmesi ve taleplerinin değerlendirilmesine ilişkin 10/07/2019 tarihli ve 787 sayılı kararın ekidir")*.

[76] HCJP's 1st Chamber, Decision no. 672 Annex, 14/07/2020, p. 6 *("İdari Yargı İlk Derece Mahkemesi Hâkimlerinin Müstemir Yetkilerinin Belirlenmesine İlişkin Hâkimler ve Savcılar Kurulu Birinci Dairesinin 14/07/2020 Tarihli ve 672 Sayılı Kararının Ekidir")*. For the Ankara Regional Administrative Court's Justice Commission's opinion on the need for additional courts to be established, see Ministry of Justice, "Ankara Bölge İdare Mahkemesi ile Bağlı İdare ve Vergi Mahkemeleri 2019 Yılı Faaliyet Raporu" (2019 Activities Report of Ankara Regional Administrative Court and Associated Administrative and Tax Courts), p. 127.

[77] The term "specially authorised" is used by the HCJP itself to describe these newly established Ankara Administrative Courts, see for example, HCJP's 1st Chamber, Decision no. 432 Annex 2: Decision on Division of Work of Ankara Regional Administrative Court, 02/06/2021, p. 7. HCJP's 1st Chamber, Decision no. 672 Annex, 14/07/2020, p. 6 (stating "Ankara 19, 20, 21, 22, 24, 25, 26, 27 ve 28. İdare Mahkemelerine genel tevziden iş verilmemesine").

[78] See Kerem Altiparmak, "Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?", Human Rights Joint Platform, February 2017, pp. 16-17.

[79] Procedures and Principles regarding the Functioning of the Commission *(Olağanüstü Hal İşlemleri İnceleme Komisyonunun çalışmasına İlişkin Usul ve Esaslar)*, published in the Official Gazette on 12 July 2017, Article 16(1).

b) The identity of the respondent

Actions of annulment can only be brought against *"the last institution or establishment where the person concerned worked"* and "*no separate issue shall be raised against the Office of the President of the Republic or the Commission".*[80] Thus, the plaintiffs cannot bring any action against the Office of the President, under the chairmanship of which emergency legislative decrees were issued, or the Council of Ministers, which issued such decrees. Nor could they bring any action against the Commission, which rendered the decision rejecting their applications. They are required to bring action against the last institution where they used to work before their dismissals.

The relevant respondent institutions (listed under Additional Article 1(a)-(n)) include the Ministry of National Defence, Ministry of Education, Ministry of Interior, and Ministry of Health, among others. For example, a teacher who worked in a public primary school would bring their case against the Ministry of Education; a police officer would bring their case against the Ministry of Interior; or, a doctor would bring their case against the Ministry of Health.

As a result, although there were three institutions involved in the decisions which resulted in the dismissal of the public service workers, i.e., the Office of the President, the Council of Ministers, and the Commission, none of them could be named as respondent in the proceedings before the Ankara Administrative Courts.

c) Written and oral procedures

In principle, administrative courts, regional administrative courts, and the Council of State adjudicate cases in a written procedure and carry out examination based on documents.[81] The written procedure before the administrative courts consists of two rounds of written pleadings between the plaintiff and the respondent.[82] After its conclusion, there is an examination stage *(tahkikat aşaması)* in which the court may issue interlocutory decisions by which it requests from the parties and relevant institutions[83] documents and information about the plaintiffs within a designated period of time.[84]

In researching this report, 31 interlocutory court decisions were reviewed. Primarily, the court requests the respondent institution to submit the personnel information file which had already been created and submitted to the Commission by the respondent institution and which contains its analysis of the dismissed public servant's link with the Organisation. The court also asks the respondent institution to send any information and documents about the plaintiff, including any "confidential, top secret, private, information note, institutional opinion". If there is any "investigation" against, or "research" about, the plaintiff within the institution, the court also requests the defendant institution to submit any complaint

[80] Legislative Decree no. 685, Article 11.
[81] Law no. 2577, Administrative Procedure Law, Article 1(b).
[82] Law no. 2577, Administrative Procedure Law, Article 16.
[83] For example, the General Directorate of Security of the Ministry of Interior (Turkish police) and its Counter-Terrorism Department; the General Directorate of Relations with Civil Society of the Ministry of Interior; the Financial Crimes Investigation Board ("MASAK") of the Ministry of Treasury and Finance; the National Intelligence Organisation; the Savings Deposit Insurance Fund; the Banks Association of Türkiye; the Information and Communication Technologies Authority; the Office of Chief Public Prosecutor of relevant cities; and, the Office of the Governor of relevant cities.
[84] Law no. 2577, Administrative Procedure Law, Article 20(1).

petitions and "social environment research report"[85] prepared about the plaintiff. Finally, the court requests the defendant institution to complete the necessary research as to "whether the plaintiff has contact and affiliation with a terrorist organisation" and to submit the findings to the court.

In one interlocutory decision reviewed, the court sent to the plaintiff the witness testimonies obtained from the e-justice platform (UYAP)[86] and asked him to submit his statements regarding the witness testimonies concerning his contact and affiliation with the Organisation.

In certain cases, the courts ask General Directorate of Security (the police) whether the plaintiff used the mobile messaging application, ByLock. If so, the courts request the user ID; username and password; data of number of signals indicating that a connection was established to the relevant IP numbers such as Historical Traffic Search (HTS) and Carrier Grade Network Address Translation (CGNAT); and, the dates when the plaintiff used the application. However, the courts do not request the content of any communication that the plaintiff allegedly had on ByLock.

The courts may ask the General Directorate of Relations with Civil Society of the Ministry of Interior whether the plaintiff was a member of any civil society organisation such as trade union, association, federation and confederation. If so, what is the duration and period of this membership, and what role the plaintiff had in the organisation (*e.g.*, board member, audit committee member, coordinator, representative).

In some cases, the courts request the Financial Crimes Investigation Board ("MASAK") of the Ministry of Treasury and Finance to examine the plaintiff's bank account transactions at Bank Asya and to confirm whether the plaintiff has engaged in banking activities that would constitute support for the Organisation , by comparing the periods before and after 25 December 2013.[87] Some plaintiffs explain that the inflow and outflow of money into their account transactions occurred due to certain transactions, such as the sale of farmland, purchase of a car, credit card or invoice payment. In that case, the courts ask the MASAK's opinion about these claims and request the submission of the relevant account documents, if any.

Unlike the procedure before the Commission, the Ankara Administrative Courts may hold a hearing at the request of a party or at its own initiative *(proprio motu)*.[88] Therefore, the plaintiffs may have a chance to present their cases orally before three judges of the Ankara Administrative Courts.

3. Decisions

Each Ankara Administrative Court is composed of three judges who may take decisions either unanimously or by a majority. If a decision is taken by a majority, the judge in the minority may attach their dissenting opinion to the decision.

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[85] *"Sosyal çevre araştırması raporu"* (in Turkish). The Ankara Administrative Courts do not define or explain what they mean by "social environment research report". For the same approach taken by the Commission, see TLSP's 2019 Report, pp. 35, 36 and 43.

[86] UYAP is an eJustice platform administered by the Turkish Ministry of Justice whereby all judiciary processes and transactions are transmitted into an electronic environment. For more information, visit https://joinup.ec.europa.eu/collection/justice-law-and-security/document/turkeys-ejustice-system-uyap.

[87] 25 December 2013 is the date on which allegedly the leader of the Organisation instructed his supporters to deposit money into the Bank Asya to help it survive its financial crisis. See below, Section (V)(C)(1).

[88] Law no. 2577, Administrative Procedure Law, Article 17(1) and (4).

The legal issue in the action for annulment before the Ankara Administrative Courts is whether the Commission's decision rejecting the plaintiff's application for reinstatement to public service is lawful. In relation to this legal issue, the courts assess whether the dismissed public servant has any "affiliation" and "link" with a "terrorist organisation" so as to justify their dismissal. If the courts find such an affiliation and link, they reject the cases, holding that the Commission's decision not to reinstate the applicant to public service was lawful ("a rejection decision"). If they do not find any affiliation or link, the courts annul the Commission's decision ("an annulment decision"), and the plaintiff should be reinstated to their position within 30 days after the notification of the court decision to the administration (pursuant to Article 28(1) of the Administrative Procedure Law).

Of the 435 decisions of the Ankara Administrative Courts which were reviewed, 369 decisions were rejection decisions, 44 decisions were annulment decisions, and the remaining 22 decisions were rejected on procedural grounds.[89]

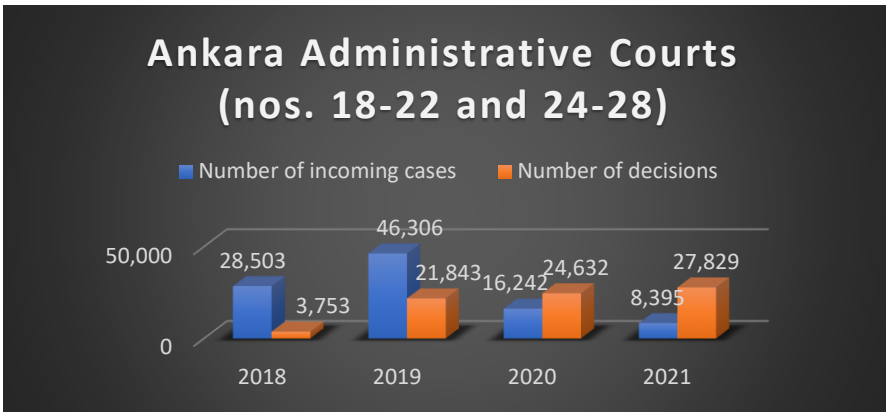
As discussed in Section V, the Ankara Administrative Courts apply various criteria to assess the dismissed public servant's affiliation or contact with an illegal organisation, and accordingly, decide whether or not the Commission's decision was lawful. Section V analyses these decisions and the criteria applied by the administrative courts in their assessment.

a) Official statistics as to the number of cases and decisions

In March each year, the Turkish Ministry of Justice publishes an Activity Report of the Ankara Regional Administrative Court and Associated Administrative and Tax Courts ("Administrative Courts Activity Report") for the previous year. It provides, among others, figures concerning new cases brought before these courts, decisions given by them and the average length of proceedings in each court according to the subject matter of the case. Between 2018 and 2021 the Ankara Administrative Courts (nos. 18-22 and 24-28) received a total of 99,446 cases and rendered a total of 78,057 decisions concerning dismissals.[90] As of 31 December 2021, there were 21,389 cases pending before these nine courts. The table below shows the official statistics concerning the number of cases and the number of decisions before the specially authorised Ankara Administrative Courts for each year.

[89] The plaintiffs were found to have failed to comply with the formal requirements of the petition, as set out in Article 3 of the Administrative Procedure Law).

[90] These numbers are calculated based on figures in the Activity Report of Ankara Regional Administrative Court and Associated Administrative and Tax Courts between 2018 and 2021 (hereinafter "Administrative Courts Activity Report"), 2019 Report, pp. 40, 41, 130; 2020 Report, p. 37; 2021 Report, p. 37.



b) <u>Official statistics as to the average length of proceedings</u>

According to the Administrative Courts Activity Report of 2021, the average length of proceedings in the cases concerning dismissal of public servants before each specially authorised Ankara Administrative Courts is shown in the table below.[91]

Average Length of the Proceedings before the Ankara Administrative Courts in 2021	
Court no.	**Days**
19	852 (2 years and 122 days)
20	755 (2 years and 25 days)
21	815 (2 years and 85 days)
22	647 (1 year and 282 days)
24	693 (1 year and 328 days)
25	170
26	86
27	276
28	69

The table shows that the Administrative Courts nos. 19, 20 and 21 – the oldest courts – had the highest average length of proceedings in 2021 due to their significant backlogs; while the more recently designated courts (nos. 25, 26, 27, 28) have the lowest averages. The plaintiffs whose cases were examined by the former courts, on average, waited for almost two and half years to receive a decision. The plaintiffs whose cases were examined by the courts nos. 22 and 24 also needed to wait for long periods of time, in some cases, almost two years before a decision was made.

[91] Administrative Courts Activity Report, 2021, pp. 55-56.

B. Ankara Regional Administrative Court

Regional administrative courts operate as second instance administrative courts, receiving appeals from associated first instance administrative and tax courts in Türkiye. They consist of administrative law divisions and tax law divisions, which examine the appeals based on a division of work determined by the HCJP. There are currently eight regional administrative courts in Türkiye, including the Ankara Regional Administrative Court.[92]

1. Establishment of New Administrative Law Divisions

The HCJP established the 13th, 14th, and 15th Administrative Law Divisions ("Divisions") for the Ankara Regional Administrative Court, which are exclusively responsible for examining appeals from "specially authorised" Ankara Administrative Courts.[93] Similar to the administrative courts, each division is composed of three judges, including the President. The 13th, 14th and 15th Divisions started functioning on 2 January 2019, 25 January 2021, and 1 September 2022, respectively.[94]

2. Procedure

Following the decisions by the Administrative Courts, the parties can appeal to the Ankara Regional Administrative Court within 30 days of the notification date of the decision.

3. Decisions

After examining the merits of the case, the Ankara Regional Administrative Court, in general, either rejects or accepts the appeal. Four different possible scenarios are explained below.

i. **The plaintiff** appeals against the rejection decision, and the Regional Court **rejects** the appeal. This means that the Regional Court finds the administrative court's decision lawful and upholds it.[95] This is the most common decision that the dismissed public servants who lost in the first instance courts face at the appeal stage **(a "lose-lose situation"**). This report examined 90 appeals made by the plaintiff which were decided by the 13th and 14th Divisions, of which 87 were rejected.

ii. **The plaintiff** appeals against the rejection decision, and the Regional Court **accepts** the appeal. This means that the Regional Court finds the lower court's rejection decision unlawful and decides to revoke the decision. The Regional Court then makes a new decision on the merits of the case,[96] this time annulling the Commission's decision. Along with this annulment decision, it may also order the reinstatement of the plaintiff's personal rights lost due to their dismissal and the reimbursement of unpaid salaries, together with interest (a **"lose-win situation"**). Out of 90 decisions of the 13th and 14th Divisions reviewed for this Report, in only three cases the plaintiff's appeal was successful.

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[92] HCJP 2020 Activity Report, p. 89, 85cd220e-566e-4b4f-8350-ced2d6709053.pdf (hsk.gov.tr).
[93] HCJP's 1st Chamber, Decision no. 1048 Annex 2: Decision on Division of Work of Ankara Regional Administrative Court, 01/07/2022, p. 9, see Announcement on Division of Work of Regional Administrative Courts.
[94] At the time of publishing this report, the 15th Division had only recently been established, to examine large number of appeals concerning dismissals of public servants. That is why no decisions of the 15th Division have been examined for this Report. HCJP's 1st Chamber, Decision no. 1945 Annex, 19/12/2018, p. 1; HCJP's 1st Chamber, Decision No. 51 Annex, 25/01/2021, p. 2; and, HCJP's 1st Chamber, Decision No. 1149 Annex, 26/07/2022, p. 2.
[95] Law no. 2577, Article 45(3).
[96] Law no. 2577, Article 45(4).

iii. **The respondent institution** appeals against the annulment decision, and the Regional Court **rejects** the appeal. This means that the Regional Court finds the lower court's annulment decision lawful and upholds it (a **"win-win situation" –** for the plaintiff). This report examined nine appeals made by the respondent institution which were decided by the 13th and 14th Divisions, and only one case was rejected.

iv. **The respondent institution** appeals against the annulment decision, and the Regional Court **accepts** the appeal. This means that the Regional Court finds the lower court's annulment decision unlawful and revokes it. The Regional Court then renders a new decision on the merits of the case in favour of the respondent administration.[97] In practice, this is the most common decision that the plaintiffs who win in the first instance courts face at the appeal stage (a **"win-lose situation"** – for the plaintiff). Out of nine such decisions examined, the respondent institution's appeal was accepted in eight cases.

Although "the effectiveness of a remedy for the purposes of Article 13 of the ECHR does not depend on the certainty of a favourable outcome", it must at least offer a reasonable prospect of success.[98] Out of 99 decisions examined, 95 decisions led to lose-lose and win-lose situations, meaning that the plaintiffs lost at the appeal stage. Only three decisions resulted in lose-win situations, and there was only one win-win situation. It follows that the appeal process before the Ankara Regional Administrative Court manifestly failed, and continues to fail, to offer a reasonable prospect of success for the dismissed public servants seeking a remedy.

a) Official statistics as to the number of cases and decisions

According to the Activity Reports, the number of cases introduced before, and decisions given, by the 13th and 14th Divisions, between 2019 and 2021 are shown in the table below.

Year	Number of cases introduced	Number of decisions	Division no.
2019[99]	7,443	2,679	13
2020[100]	18,500	4,046	13
2021[101]	14,643	15,654	13
2021[102]	23,411	6,632	14
Total	**63,997**	**29,011**	

[97] Law no. 2577, Article 45(4).
[98] *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V; *Costello-Roberts v. the United Kingdom*, 25 March 1993, 25 March 1993, § 40, Series A no. 247-C.
[99] Administrative Courts Activity Report, 2019, p. 39.
[100] Administrative Courts Activity Report, 2020, p. 36.
[101] Administrative Courts Activity Report, 2021, p. 36.
[102] *Ibid.*

b) Official statistics as to the average length of proceedings

The average length of proceedings before the 13th and 14th Divisions in 2021 was 535 days (1 year and 170 days) and 214 days respectively, in cases concerning dismissal from public service.[103]

The dismissed public servants, whose cases before the Ankara Administrative Courts took around two and a half years, were then required to wait for an average of one year before the Regional Court. If still unsuccessful, at the end of approximately three and a half years, they could take their cases to the Council of State, and then to the Constitutional Court. Considering that the process before the Commission already takes a considerable amount of time,[104] exhausting all these remedies starting from the Commission and pursuing appeals up to the Constitutional Court takes an excessive period of time for the plaintiffs.

C. Council of State *(Danıştay)*

The Council of State, which consists of thirteen Divisions, is the highest court in the administrative judicial system in Türkiye. Its 5th Division is responsible for resolving the appeals in the cases concerning the measures taken in relation to the state of emergency, including the dismissal of public servants directly by emergency legislative decrees.[105]

After the Regional Court gives its decision in the appeal concerning the action for annulment of the Commission's decision, the parties may further appeal the Regional Court's decision to the Council of State within 30 days of the notification date of that decision.

V. ANALYSIS OF THE DECISIONS OF THE ANKARA ADMINISTRATIVE COURTS

A total of 435 decisions made by the Ankara Administrative Courts were reviewed for this report, 413 of which were on the merits.[106] Of these 413 decisions, the Ankara Administrative Courts rejected the plaintiffs' cases in 369 decisions (89%) and annulled the Commission's decision in 44 decisions (11%). This section analyses the decisions of the Ankara Administrative Courts and is divided into four parts.

Part A provides an overview of the decisions of the Ankara Administrative Courts and explains the format generally used by the courts in drafting the decisions in the dismissal cases.[107] It provides an overview regarding the arguments submitted by (1) the plaintiffs and (2) the defendant public institutions, i.e., the Ministries, (3) the legal framework applicable to the case, (4) the Administrative Courts' findings and assessments concerning "the terrorist organisation" and (5) the nature of the loyalty obligation of public servants. It also analyses (6) the nature of the case before the Administrative Courts, including (a) dismissal from public service as an extraordinary measure and (b) the definition of the terms "affiliation" and "link" with illegal organisations, as adopted by the courts.

Part B discusses the administrative courts' approach to the relationship between the administrative case at hand and criminal proceedings in which the plaintiff was the accused. It explains how the administrative courts consider the outcome of, and findings in, the criminal proceedings.

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[103] *Ibid.*, p. 47.
[104] TLSP's 2019 Report, pp. 38-41, 43.
[105] Council of State Board of Presidency, Decision no. 2020/62, 18/12/2020.
[106] The remaining 22 decisions were rejected on procedural grounds, i.e., the plaintiffs failed to fulfil the formal requirements to be found in the petition as set forth in Article 3 of Administrative Procedure Law.
[107] See Annex 3: Decision format of the Ankara Administrative Courts.

Part C examines the criteria applied by the administrative courts in assessing the plaintiffs' affiliation or link with illegal organisations, such as banking transactions at Bank Asya, membership of a trade union or association, the use of the ByLock mobile messaging application, the opinion of the superior officer or the public institution about the plaintiff, witness statements, including anonymous witnesses, and payments made to certain media outlets, *e.g.*, *Cihan* Media and the *Zaman* newspaper.

Part D addresses the administrative courts' approach to allegations raised by the plaintiffs regarding violations of their rights and freedoms protected by the Constitution and the ECHR, including (1) the right to respect for private life, (2) the right to a fair trial, (3) the principle of the presumption of innocence, and (4) the right to freedom of assembly and association. It analyses the shortcomings of the courts' approaches in light of international human rights standards.

A. Overview of the Decisions

The majority of decisions by the administrative courts include the following sections.

1. Case Summary and Plaintiffs' Arguments

The decisions begin with a case summary that contains the plaintiffs' profession, the number of the emergency legislative decree by which they were dismissed, and the date and application number of the Commission's decision rejecting their application. The plaintiffs request the annulment of the Commission's decision, claiming that they do not have any link with any illegal organisation and that their dismissals were not justified. Their arguments include, but are not limited to, the following: they have no affiliation with terrorist organisations; they did not participate in the attempted coup; they were dismissed from public service without any concrete evidence or justification; the Commission evaluated their application based on non-objective criteria; no administrative investigation had been initiated against them before their dismissals; and they were acquitted by a criminal court decision.

They mainly argue they should not be responsible for ordinary, regular activities which were legal and permitted by the State at the time when they were carried out, such as working in legally established institutions, being a member of a trade union, making a donation to a legal organisation, conducting banking transactions with Bank Asya, sending children to certain private schools whose activities were permitted by the State, and subscribing to a certain newspaper or magazine. In some cases where the plaintiffs were alleged to be affiliated to "FETÖ/PDY", the plaintiffs raised the issue of timing of the designation of the Gülenists as a "terrorist organisation" by the Government, stating that they should not be held responsible for their actions before the attempted coup.

Some plaintiffs allege human rights violations resulting from their dismissal by legislative decree and from the procedure before the Commission, such as violations of the right to a fair trial, including the right to mount a defence (the right to equality of arms) and the principle of the presumption of innocence, the right to respect for private life, and the principle of no punishment without law.

2. Summary of the Respondents' Arguments

The decisions contain a summary of the respondents' arguments which usually consist of general statements about: "FETÖ/PDY" being "an armed terrorist organisation", as had been determined by the Court of Cassation in its judgment of 24 April 2017;[108] the attempted coup on 15 July 2016; the declaration

[108] Referring to Court of Cassation, 16th Criminal Division, docket no. 2015/3, decision no. 2017/3 (24 April 2017).

of the state of emergency; the dismissal from public service as an emergency measure described as necessary, urgent and proportionate; loyalty obligations of the public servants; the danger of having members of terrorist organisations in public institutions; and the lawfulness of the Commission's decision.

In most decisions reviewed, there were no individualised arguments made by the respondent institutions about the plaintiffs. In certain cases, they argue that using the mobile messaging application ByLock, depositing money into Bank Asya, subscribing to the Zaman Newspaper, and attending and organising religious meetings *(sohbet)* demonstrated the plaintiffs' "affiliation" with "a terrorist organisation". Thus, they argue that the Commission's decision was lawful and that the case should be rejected.

Even though the respondent institutions acknowledge that "FETÖ/PDY" was only designated by the Court of Cassation as "an armed terrorist organisation" on 24 April 2017, they rely on allegations about events which occurred before the 2017 decision. The administrative courts also rely on allegations about events prior to 24 April 2017 in most of the cases, as explained in subsection 4 below.

In cases in which the plaintiffs were alleged to be affiliated to the PKK/KCK, the respondent institutions' arguments were generally limited to stating that the Commission's decision relied on evidence showing a relationship between the plaintiff and the PKK/KCK, or that the Commission's decision was not unlawful. In a number of decisions reviewed, the respondent institution did not submit any arguments.

3. Legal Framework

The decisions set out the relevant legal framework by referring to certain provisions of the Constitution, including Article 2 (characteristics of the Republic); Article 5 (main purpose and duties of the State); Article 6 (sovereignty); Article 10 (equality before the law and prohibition on discrimination); Article 11 (bindingness and supremacy of the Constitution); Article 12 (inalienable fundamental rights and freedoms of everyone); Article 13 (restrictions on rights by law and for purposes laid out in the Constitution); Article 14 (prohibition on abuse of constitutional provisions and rights); Article 15 (derogation in time of emergency); Article 20 (protection of private life); Article 70 (right of every Turkish citizen to work in public service); Article 120 (extraordinary governance procedures);[109] Article 121 (the power of the Council of Ministers to issue legislative decrees on matters necessitated by the state of emergency);[110] and, Articles 128 and 129 (obligations of public servants to act in accordance with the Constitution and laws).

The decisions also refer to: Article 4 of Legislative Decree no. 667, which provides for the dismissal of public servants, to be implemented by decisions of relevant administrative entities, on grounds of membership of, affiliation or link with illegal organisations; other Legislative Decrees providing for the dismissal of designated public servants on these grounds, to which the plaintiffs' names were appended (including Legislative Decrees no. 677, no. 689, no. 692, etc); Article 1 (establishment of the Commission), Article 2 (tasks of the Commission) and Article 11 (judicial review of the Commission's decisions before the Ankara Administrative Courts of Legislative Decree no. 685 (ratified through Law no. 7075, published on 1 March 2018).

[109] This Article was repealed after the referendum on 16 April 2017. See Supreme Election Council, decision no. 663, 27/04/2017 published in the Official Gazette no. 30050, 27/04/2017.
[110] *Ibid.*

4. Findings and Assessments Concerning "FETÖ/PDY" or the PKK/KCK

In "FETÖ/PDY" cases, this section refers to the decision of the Council of National Security, the judgments of the Court of Cassation's 16th Criminal Division in which "FETÖ/PDY" was found to be "an armed terrorist organisation",[111] and the 26 September 2017 decision of the plenary criminal divisions of the Court of Cassation upholding the judgment of the 16th Criminal Division.[112]

The administrative courts summarise the findings and assessments of the Court of Cassation regarding the purpose, structure, and functioning of the Organisation and state that it attempted a *coup d'état* on the night of 15 July 2016.

The administrative courts go on to explain the standard of proof required to establish the affiliation of the plaintiff with the Organisation and the burden of proof. As for the former, the decisions relating to "FETÖ/PDY" state that:

> "[the courts] must evaluate the status of the plaintiff as a whole (including his or her education, profession, time spent in public service, etc.) and issues considered as the basis of affiliation and link by the administration. [The courts] must demonstrate that the plaintiff had a more intense relationship with FETÖ/PDY … than that would be expected from a normal citizen".[113]

However, the courts fall short of explaining whether this standard of proof has any basis in the domestic law, what is meant by "a relationship … that would be expected from a normal citizen", and how to evaluate a "more intense relationship" than that. There is no rational explanation as to why ordinary and legal actions such as opening an account in a state-authorised bank and depositing money in that bank, joining a legal trade union to exercise their trade union rights, or downloading an app from a commonly used app store and using it for messaging can be deemed to be evidence of "affiliation" with "a terrorist organisation".

In addition, the courts refer to another, different standard of proof: *having "at least the minimum level of contact with FETÖ/PDY".*[114] Yet they fail to explain or define what this phrase means. The administrative courts do not have any clear and principled approach to the standard of proof in the dismissal cases, and therefore this results in its arbitrary and vague application.

As for the burden of proof, the decisions first state that the burden of proof is on the respondent public institution.[115] However, after referring to the Commission's findings about the plaintiff, the courts then appear to shift the burden of proof to the plaintiff, contrary to the principles of administrative law, by stating that "[the plaintiff did not submit] any concrete information and documents that would leave [these] findings unfounded".[116] The courts do not rely on any concrete information or documents provided by the

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[111] Court of Cassation, 16th Criminal Division, docket no. 2015/3, decision no. 2017/3 (24 April 2017); Court of Cassation, 16th Criminal Division, docket no. 2016/7162, decision no. 2017/4786 (18 July 2017).

[112] Plenary criminal divisions of the Court of Cassation, docket no. 2017/16.MD-956, decision no. 2017/370 (26 September 2017).

[113] A uniform text included in almost all the decisions.

[114] *"FETÖ/PDY terör örgütü ile en az irtibat derecesinde bağının olduğu"* (in Turkish).

[115] For example, the courts state that "to apply the extraordinary measure of dismissal from public service … to public servants such as the plaintiff, the relevant [respondent] administrations must provide evidence, findings and reasons for the evaluation in this direction that reveal the membership, affiliation or link of the relevant persons with [illegal] organisations…" (Ankara 28th Administrative Court, 2021).

[116] A uniform statement included in almost all the decisions.

respondent to show that the Commission's findings were sufficient to establish the applicant's connection to an illegal organisation. Nevertheless, they require the plaintiffs to prove that they have no such connection, based on concrete information and documents.

Any assessment concerning "FETÖ/PDY" by the administrative courts should have been much more aligned with the fact that the final judgment by a court of law finding the Gülenists as an "armed terrorist organisation" was dated 26 September 2017.[117] The Venice Commission emphasised the importance of the establishment of "the moment when collaboration with the Gülenist network became incompatible with the public service"[118] and "the moment in time when this should have *become clear* to all public servants".[119] Otherwise, such a lack of clarity may result in "unjust dismissals" in the form of "retroactive punishment".[120]

Furthermore, in its judgement of *Yasin Özdemir v. Turkey*, the ECtHR found that "at the material time [in April 2015], there was no definitive conviction of members of the Fetullahist movement for being leaders or members of an illegal or terrorist organization, even if the group was considered dangerous by some executive bodies".[121] It also indicated that "the question whether the [Gülen] movement was a community of an educational and religious nature or whether it was an organization aimed at illegal infiltration into the organs of the State was the subject of heated debates in public opinion in April 2015".[122]

It follows that the activities of the plaintiffs carried out prior to 26 September 2017, such as those that occurred in 2014 or 2015, cannot *necessarily* be regarded as evidence establishing their affiliation with an illegal organisation. Nevertheless, both the administrative courts and the Commission constantly rely on such activities. They proceed on the assumption that an affiliation with the Gülenists at any point in the past is equivalent to an affiliation with "FETÖ/PDY" in the present day. By doing this, the administrative courts constantly fail to consider that being affiliated with the Organisation prior to 26 September 2017 is not *per se* an "affiliation" with "a terrorist organisation", rather it is an affiliation with a group that legitimately existed and functioned in Turkish society.

In cases where the plaintiffs were alleged to have a "link" with the PKK/KCK, the decisions analysed generally refer to the judgment of the Court of Cassation of 2011 classifying the PKK/KONGRA-GEL/KCK as a terrorist organisation.[123]

Concerning the standard of proof, the courts examine whether there is a tie between the individual and the organisation, consisting at least of an "affiliation" or "link". As in "FETÖ/PDY" cases, the courts look at whether there is "*at least the minimum level of contact*". In these cases too, there is no principle approach to defining and applying these concepts.

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[117] Plenary criminal divisions of the Court of Cassation, docket no. 2017/16.MD-956, decision no. 2017/370 (26 September 2017).
[118] Venice Commission's 2016 Report, p. 27, para. 119.
[119] *Ibid.*, p. 28, para. 127 (emphasis in original), highlighting that "it is important to define, on the basis of objective facts, the moment in time when, if ever, the Gülenist network as a whole (or any parts thereof) became an organisation 'meaningful connections' with which became incompatible with the obligation of loyalty required from public servants".
[120] *Ibid.*
[121] *Yasin Özdemir v. Turkey*, no. 14606/18, § 40, 7 December 2021.
[122] *Yasin Özdemir v. Turkey*, § 40.
[123] Court of Cassation, 9th Criminal Division, docket no. 2011/10371; decision no. 2011/30790 (28 December 2011).

5. Loyalty Obligations of Public Servants

On the question of public servants' loyalty to the state, the courts refer to Article 129 of the Constitution, and to Article 6 (loyalty)[124] and Article 7(2)[125] (impartiality and loyalty to the State) of Law no. 657 on Civil Servants dated 14 July 1965. These provisions oblige public servants to act in accordance with the Constitution and domestic law. The administrative courts also refer to the ECtHR jurisprudence, citing that "a democratic State ha[s] a legitimate interest in requiring civil servants to show loyalty to the constitutional principles".[126]

The courts conclude this section with a uniform statement: "if it is determined that those who violate the loyalty obligation have a membership of, affiliation or link with terrorist organisations, their dismissals from public service amounts to a foreseeable situation".[127] However, the courts do not provide any clear definition of the "loyalty" obligation or objective criteria to assess the plaintiff's alleged "affiliation" or "link" with "terrorist organisations".[128]

6. The Nature of the Case before the Administrative Court

In this section, the administrative courts provide information about the nature of the case, namely, the action for annulment of the Commission's decision. The courts explain that they carry out the judicial review of the Commission's decisions in terms of various elements of the administrative act: competence, form, motive, subject and purpose. The administrative act in dismissal cases is the Commission's decision itself. Therefore, the subject matter of the case before the administrative courts is the review of the lawfulness of the Commission's decision. In this regard, the courts do not deal with all the elements of the administrative act and focus solely on the element of motive of the Commission's decision as follows:

> "In examining the element of motive…, it is necessary to determine whether the plaintiff has membership of, affiliation, or link with [the terrorist organisation]. ... If such a relationship with the said organisation is established, the court cannot rule on the unlawfulness of the Commission's rejection decision".[129]

The courts then make a distinction between "membership of a terrorist organisation" and "affiliation or link with a terrorist organisation", explaining that while the former is a crime that can only be determined as a result of criminal proceedings, the latter is not subject to criminal jurisdiction. Therefore,

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[124] "Public servants must remain loyal to the Constitution of the Republic and its laws".
[125] "Civil servants are obliged to protect the interests of the State in all circumstances. They cannot engage in any activity that violates the Constitution and laws of the Republic of Türkiye, impairs the independence and integrity of the country, and jeopardises the security of the Republic of Türkiye. They cannot join or assist any movement, group, organisation or association operating in the same nature".
[126] *Sidabras and Dziautas v. Lithuania*, nos. 55480/00 and 59330/00, § 52, ECHR 2004-VIII; *Volkmer v. Germany*, no. 39799/98, 22 November 2001; *Petersen v. Germany* (dec.), no. 39793/98, ECHR 2001-XII.
[127] In the PKK/KCK cases, the formulation varies slightly from cases to case. The decisions affirm either that it is within the State's *competence* to dismiss those violating the loyalty obligation, or that it is the State's *duty* to do so.
[128] For an analysis of the application of loyalty obligation by the Commission and its failure to use objective criteria, see TLSP's 2019 Report, pp. 17-21; Av. Levent Maziligüney, "Ohal Khk'leri İle Meslekten Çıkarmalar ve Sadakat Yükümlülüğü" (Dismissals from Public Service by Emergency Legislative Decrees and Loyalty Obligation), hukukihaber.net, 4 January 2020.
[129] A uniform text included in almost all the decisions.

the administrative courts only examine the plaintiffs' alleged "affiliation" or "link" with "a terrorist organisation" as a justification for dismissal from public office.

The courts state that since measures of dismissal from public service directly by legislative decree have the force of law, it is not possible for administrative judicial authorities to review such measures and that only the Constitutional Court has jurisdiction to examine the constitutionality, in respect of both form and substance, of such decrees.

The courts go on to analyse (a) the dismissal from public service as an extraordinary measure; (b) the definition of the terms, "affiliation" and "link" with "terrorist organisations"; and the relationship of the administrative proceedings with criminal proceedings concerning the same plaintiff (the latter is separately explained in Part B below).

a) <u>Dismissal From Public Service as an "Extraordinary Measure"</u>

The administrative courts state that the dismissals from public service directly by legislative decree were permanent and final "extraordinary" measures rather than measures characterisable as criminal or administrative (referring to the Council of State's decision of 4 October 2016).[130] The administrative courts explain that:

> "[these] measures were not based on any disciplinary action. Thus, it is not possible to apply disciplinary procedures employed in imposing a disciplinary penalty to the case under consideration. In fact, it is not possible to apply the ordinary procedural safeguards at the time of dismissal from public service, such as opening a disciplinary investigation, assigning an investigator, taking a defence [of the public servant]".[131]

Thus, even the administrative courts themselves accept that ordinary procedural safeguards did not need to be complied with in dismissing thousands of public servants from public service directly by legislative decree. Nevertheless, the administrative courts find that the public servants have an effective remedy concerning their dismissals. In this regard, they refer to the findings of the TCC and ECtHR considering the Commission as an effective remedy and to the fact that its decisions are subject to judicial review. The administrative courts explain this in their decisions as follows:

> "Considering that the parties can defend themselves with all kinds of evidence at the [administrative] court stage and that rules of adversarial proceedings are applied, the plaintiff has an effective remedy regarding the [act of dismissal] and the plaintiff used [his or her] right of defence during this process".

As is considered in the following sections, the key question is whether, *in practice*, the administrative courts comply with the usual rules of adversarial proceedings and "conduct a proper examination of the submissions, arguments and evidence adduced by the parties", in particular, by the dismissed public servant.[132]

[130] Council of State, E:2016/8196, K:2016/4066, 04/10/2016.
[131] A uniform text included in almost all the decisions.
[132] *Van de Hurk v. the Netherlands*, no. 16034/90, 19 April 1994, § 59, Series A no. 288.

b) Definition of the terms of "Affiliation" and "Link" with "Terrorist Organisations"

Novel concepts

The concepts of "affiliation" and "link" with "terrorist organisations" were introduced into the Turkish legal order through emergency legislative decrees and did not exist in Turkish law before.[133] They are novel concepts, and there is no established jurisprudence to determine their scope and application. Although the Turkish Criminal Code and the Anti-Terror Law provide a definition of "membership of an armed terrorist organisation", there is no definition in any Turkish legislation regarding what it means to be "affiliated" with "an armed terrorist organisation".

Article 125/E of the Turkish Civil Servants Law no. 657 provides a list of acts requiring the application of the disciplinary sanction of dismissal from public service, which does not include the act of "being affiliated or linked" with "terrorist organisations". Sub-paragraph (l) of Article 125/E, which was amended on 3 October 2016, mentions the following acts as one of the reasons requiring the disciplinary sanction of dismissal from public service: "to act in line with terrorist organisations, to help these organisations, to use public facilities and resources to support these organisations, to make propaganda of these organisations". However, this sub-paragraph does not make any reference to the concepts of "affiliation" or "link".

The approach of the Ankara Administrative Courts

In most of the decisions reviewed for this report, the administrative courts do not define the terms "affiliation" and "link"; thus, the plaintiffs did not know what the allegation of being affiliated or being linked to "a terrorist organisation" meant when they were dismissed. Only the Ankara 19th, 21st and 28th Administrative Courts provided a definition in their decisions (of the decisions which were reviewed), albeit after having functioned for several years. The 19th Administrative Court, which started functioning in November 2017, only provided a definition of the terms "affiliation" or "link" in September 2020, almost three years later. The 21st and 28th Administrative Courts started functioning in September 2018 and July 2020 and provided their definitions in May 2019 and June 2021, respectively.

In the decisions analysed concerning alleged ties with the PKK/KCK, the 21st Administrative Court defines an "affiliation and link" as "acting together as if being attached, voluntary subjection, carrying out actions according to the signs, instructions and directions of a group, organisation or structure, determining one's own behaviour by taking into account messages received through individual communication or through written and visual media and social media". The court does not specify where this obscurely formulated definition originates from.

In the decisions analysed concerning "FETÖ/PDY", the 19th and 28th Administrative Courts refer to the TCC's judgment of 14 November 2019, which defines the term "being affiliated" *(iltisaklı)* as "being associated, become adjoint, being united" *(kavuşan, bitişen, birleşen)* and the term "being linked" *(irtibatlı)* as "being connected" *(bağlantılı)*.[134] According to the TCC, although they "are general concepts, it cannot

[133] Kerem Altiparmak, "Ölü Doğan Çocuk: 685 Sayılı KHK ile Kurulan OHAL Komisyonu" (Stillborn Child: The State of Emergency Commission Established by Decree Law no. 685), Ankara Barosu Dergisi, 2017/1, p. 77.
[134] Turkish Constitutional Court, E.2018/89, K.2019/84, 14/11/2019, § 30 (published in the Official Gazette no. 31038, 13/02/2020).

be said that they are ambiguous and unpredictable. The legal nature and objective meaning of these concepts can be determined by jurisprudence [of the courts]".[135]

These concepts are, indeed, vague, and their application is unforeseeable as explained in the following sections. The definitions provided by the TCC are, in fact, taken from the dictionary of the Turkish Language Association and merely correspond to synonyms of the terms "affiliation" and "link". Therefore, they are not legal interpretations which could shed light on the meaning of these terms, and the TCC does not provide any further legal definition.

The 19th and 28th Administrative Courts also refer to the decisions of Ankara Regional Administrative Court's 13th Division, which defines the concepts of affiliation and link as "acting together in unity of understanding and behaviour; subordinating voluntarily; determining one's actions within the framework of the messages, signs, instructions and directions given by a group, organisation or structure through individual communication, written and visual media, social media posts". [136]

In addition, the courts refer to the decision of 12 March 2020 by the Council of State's 5th Division, which states that "to determine the affiliation and link of individuals with terrorist organisations, *it is sufficient to form an opinion* that, as a result of their actions, either in line with the instructions from the organisation or on their own initiative, they *appear* to benefit the organisation or themselves or to share the same purpose or have social ties with the organisation, to realise the organisation's aim or of benefiting from the organisation".[137]

Thus, the Council of State sets out various elements in determining "affiliation with a terrorist organisation": (1) individuals appear to (a) benefit the organisation, (b) benefit themselves, (c) share the same purpose with the organisation, or (d) have social ties with the organisation; (2) they have the intention of (a) realising the organisation's aim or (b) benefiting from the organisation; and (3) they take actions (a) in line with the instructions from the organisation or (b) on their own initiative. This test of affiliation is highly problematic for the following reasons.

First, individuals do not need to benefit the organisation or themselves, share the same purpose or have social ties with the organisation for them to meet the criteria, rather, it was and is sufficient for them to merely *appear* to do so. This is a very low threshold. Second, it is sufficient for the courts to *form an opinion* about such an appearance, rather than to establish such an appearance, which pushes the threshold even lower. Third, it is unclear how the individuals can be said to 'appear' to carry out these actions, such as what acts of the individuals make them benefit the organisation or take advantage of it; what purpose the organisation has, and whether it is known by the individuals; and what kind of social ties the individuals must have with the organisation. Fourth, the individuals must have the intention to realise "a terrorist organisation's" aim or to benefit from "a terrorist organisation", which requires knowledge of the existence of "a terrorist organisation" at the time when such activities were carried out. However, as explained above, it was not possible for the individuals to know this since the organisation was not proscribed by a court until 26 September 2017. Fifth, the decisions of the administrative courts reviewed for the present report do not include any concrete application of this test applied by the Council of State, rather they consist of

[135] *Ibid.*
[136] Ankara Regional Administrative Court, 13th Administrative Law Division, doc. no. 2019/56, decision no. 2019/39, 30/01/2019.
[137] Council of State, 5th Division, doc no. 2016/53272, decision no. 2020/1930, 12/03/2020 (emphasis added).

subjective assertions of the judges about the plaintiff, without providing any proper reasoning or concrete evidence.

Furthermore, the Ankara Administrative Courts do not provide any clear legal guidance to define or interpret these concepts which are so vague that almost any activity of the plaintiffs could be interpreted as an "affiliation" with such organisations. It is unduly cumbersome to expect the plaintiffs to prove that they are not "affiliated" or "linked" with "a terrorist organisation" in the absence of any clear definition or interpretation of the concepts of "affiliation" or "link".

As the Venice Commission stressed, the concepts of "relation, connection, contact, affiliation, or link" are "broad" concepts, which "imply that any sort of link to the Gülenist network may lead to dismissal".[138] The administrative courts should have looked for a "meaningful" affiliation or link, meaning that such affiliation should have raised "objective doubts" about the plaintiff's loyalty to the Constitution, and should have excluded any "innocent" or "accidental" links with the Gülenists.[139] The administrative courts should have examined the actions for annulment brought by the dismissed public servants "on the basis of a combination of factual elements which clearly indicate that the public servant acted in a way which objectively cast serious doubts on his or her loyalty to the democratic legal order".[140] Neither objective criteria nor a concrete definition of these concepts have been provided by the administrative courts.

The TCC's judgment of 14 November 2019 also indicated that "the evaluation regarding the existence of the affiliation must be based on concrete facts in the ordinary period" when there was no state of emergency.[141] According to the TCC, it is "a natural consequence of the requirement of interpreting the laws in accordance with the Constitution".[142]

Even though the state of emergency ended in July 2018, the administrative courts do not make their evaluation based on concrete facts, as required by the TCC, and therefore, they fail to interpret the provision in the legislative decree in accordance with the Constitution. These concepts are open to subjective interpretation and do not amount to concrete actions. There is no legal regulation or procedural guarantee that balances this uncertainty and prevents these concepts from being interpreted in a way that goes beyond their reasonable limits.[143] The administrative courts were required to clarify these concepts within the framework of the rule of law, legal certainty and predictability, but they failed to do so.

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[138] Venice Commission's 2016 Report, p. 28, para. 128.
[139] *Ibid.*, p. 29, para. 131.
[140] *Ibid.*, p. 29, para. 131.
[141] Turkish Constitutional Court, E.2018/89, K.2019/84, 14/11/2019, § 32.
[142] Turkish Constitutional Court, E.2018/89, K.2019/84, 14/11/2019, § 32. In their dissenting opinions to the same judgment, Judges Yildirim and Akinci stated that: "It is not possible to say that there is no ambiguity, uncertainty and unpredictability regarding what should be concretely understood from the concepts of 'affiliation and link'.... In a period when threats and reasons that caused the declaration of the state of emergency continue to exist, in order to quickly and effectively eliminate these threats, some connection, information, findings and relationships can be used in the evaluation of whether individuals are 'affiliated or link' with terrorist organisations, provided that they are not completely groundless and arbitrary. It may seem reasonable for the administration to have a certain degree of flexibility in this regard. However, maintaining the same flexibility in the ordinary period results in the normalisation of the state of emergency, which is not an acceptable situation for a constitutional democracy respecting human rights".
[143] See Tarım's Report, p. 61.

B. Relationship of the Administrative Case to Criminal Proceedings

In its Activity Report, the Commission indicates that 115,341 of the 126,190 complainants (91%) who applied to the Commission have either ongoing or completed investigations or prosecutions against them (charged with "being a member of a terrorist organisation", "of aiding or abetting the organisation", or "acting against the constitutional order").[144] In assessing the applicants' alleged "affiliation with a terrorist organisation", the Commission takes into account "information on whether applicants have been convicted at the end of the criminal proceedings" and "information and findings in the judicial investigations and prosecutions", among others.[145]

Since the vast majority of the applicants to the Commission were dismissed public servants (123,467), it is reasonable to conclude that more than 90% of the dismissed public servants who brought an action for annulment of the Commission's decision before the administrative courts have ongoing or completed investigations or prosecutions against them. Similar to the Commission's approach, the administrative courts also consider **(1)** the outcome of, and **(2)** findings obtained in, the criminal proceedings against the dismissed public servants as one of the criteria for assessing their "affiliation with an illegal organisation". Therefore, understanding the administrative courts' approach to the relationship between the administrative case and criminal proceedings is highly important in examining whether the principle of presumption of innocence is respected during administrative proceedings.[146]

1. Outcome of the Criminal Proceedings

In their decisions, the administrative courts explain the relationship between the administrative case and criminal proceedings against the plaintiff.

Firstly, they state that the case at hand is not a criminal case; that they will assess the plaintiff's alleged "affiliation" and "link" with "terrorist organisations" independently from their criminal responsibility; that their assessment only consists of an examination of the suitability of the plaintiff's reinstatement to public service; and that, therefore, it is not possible to review whether or not the principles and rules of criminal law were applied during the dismissal procedure.

Secondly, they indicate that there may be criminal investigations or prosecutions opened against the plaintiff on charges of "being a member of a terrorist organisation", of "knowingly and willingly helping a terrorist organisation without being a member of an organisation", or "of making propaganda for a terrorist organisation". As a result, there may be different decisions regarding the plaintiff, including the decision not to prosecute the plaintiff, the decision "on delaying the pronouncement of the judgment" *(hükmün açıklanmasının geri bırakılması)*,[147] a decision of "no need to inflict punishment" due to the remorse of the plaintiff,[148] an acquittal decision, or a conviction decision.

The administrative courts also state that the criminal decisions "would not impede the continuance of the action for annulment before the administrative courts because the reasons for the dismissal from

[144] Commission's Activity Report (2017-2022), p. 22; Commission's Activity Report (2021), p. 22.
[145] Commission's Activity Report (2017-2022), p. 22; see also p. 32 ("6- Information on the criminal investigation/prosecution").
[146] See below, section (V)(B)(2).
[147] Turkish Criminal Procedure Code, Article 231(6). In cases where a decision on delaying the pronouncement of the judgment has been rendered, the accused shall be subject to a probation term for five years.
[148] Turkish Criminal Procedure Code, Article 223(4)(a). The committed conduct is still considered as crime.

public service are not only limited to the membership but also include the affiliation and link, which are not within the scope of criminal proceedings".[149]

In the decisions reviewed for this report, some plaintiffs were subject to ongoing prosecutions and, therefore, there had not been any decision rendered by the court of first instance. On the other hand, some plaintiffs were not the subject of any criminal investigation or prosecution. We emphasise that most of the acquittal or conviction decisions were not final at the time when the administrative court issued its decision about the dismissal of the plaintiff.

The administrative courts always begin their assessment of the plaintiff's affiliation with illegal organisations by referring to the outcome of the criminal investigation or prosecution in which the plaintiff is the suspect or accused. The following examples illustrate the approach taken by the courts concerning (a) a decision not to prosecute, (b) an acquittal, and (c) a conviction.

a) A decision not to prosecute

In the cases where prosecutors decide not to prosecute the plaintiff, the administrative courts state that this decision will not prevent the continuation of the administrative case and that it is still necessary to determine whether there is any affiliation or link between the plaintiff and an illegal organisation.[150]

Strikingly, one of the case files accessed for this report reveals that the plaintiff was dismissed pursuant to being profiled as "FETÖ/PDY". Following an interlocutory decision by the Ankara 21st Administrative Court requesting information on the matter by the public institution where the plaintiff had worked, the latter stated that it was not aware of any evidence of a link or affiliation with this organisation. Shortly after, the administrative court requested evidence of any criminal proceedings against the plaintiff in relation to a link with the PKK/KCK.

In its decision on the case, the court stated that an investigation conducted *ten years earlier* concerning the plaintiff, not leading to his/her prosecution, evidenced that he/she had participated in a demonstration allegedly organised by the PKK, which in its view called for rejecting the plaintiff's request for annulment. Hence, the decision not to prosecute taken into account by administrative courts does not necessarily relate to the reason put forward for individuals' dismissal.

b) An acquittal

In some cases, criminal courts may render acquittals on the grounds that there is a lack of evidence that the accused had committed the crime charged, i.e., "membership of a terrorist organisation".[151] In these cases, the administrative courts usually state that "the acquittal decision will not be binding on [administrative] proceedings" and "will not constitute a legal obstacle in making a different assessment [from the criminal court] in terms of whether public servants have any affiliation and link [with the terrorist organisation in question]".[152]

In general, the administrative courts draw a link between the criminal case and the administrative proceedings when reaching their decisions. For example, in one decision in 2021, the Ankara 19th

[149] A uniform text included in almost all the decisions.
[150] *E.g.*, Ankara 19th Administrative Court, 2021.
[151] Turkish Criminal Procedure Code, Article 233(2)(e).
[152] A uniform statement included in almost all the decisions.

Administrative Court noted the acquittal but found the Commission's decision rejecting the plaintiff's application lawful considering the findings in the criminal proceedings against the plaintiff, including participating in the religious meetings *(sohbet)* of the Gülenists and opening a bank account with Bank Asya. The court thus concluded that the plaintiff had an affiliation and a link with the Organisation.

In another case,[153] the plaintiff was acquitted by the Regional Assize Court of Appeal because transactions in his Bank Asya account were found to be routine banking transactions and his membership of the trade union was not considered as evidence to prove his "membership of a terrorist organisation". However, having examined information and documents in the case file and the UYAP records, the administrative court concluded that "the plaintiff had a more intense relationship with FETÖ/PDY than that would be expected from a normal citizen, and he had at least the minimum level of contact with FETÖ/PDY", and concluded that the Commission's decision was lawful.

In these two decisions, the administrative court adopted the same wording used by the criminal courts and did not make a fresh assessment of the facts.[154] In other words, it did not examine the facts of participating in religious meetings, opening a bank account with Bank Asya, and being a member of a trade union; rather, it accepted the findings made in the criminal proceedings in which the public servants were acquitted. By doing so, the administrative court went beyond its task of examining the lawfulness of the Commission's decision. In effect, it found the plaintiffs guilty of "being a member of a terrorist organisation" or "aiding and abetting an illegal organisation" when, in fact, no such conclusion had been reached by any criminal court.

In a third case, concerning an alleged link with the PKK/KCK, the plaintiff was acquitted of "propaganda on behalf of a terrorist organisation" and "of knowingly and willingly assisting a terrorist organisation". However, the Ankara 24th Administrative Court relied on "findings and facts" in the criminal proceedings suggesting that the plaintiff has on several occasions expressed support for the PKK, including during a demonstration and an association meeting, and assisted an individual in getting to a PKK base.

Furthermore, these examples demonstrate that the same facts regarding the same plaintiff may lead to starkly different outcomes in criminal and administrative cases. For example, in the second case, while the criminal court did not consider the facts regarding the plaintiff's Bank Asya account and membership of a trade union as evidence of the crime of "membership of a terrorist organisation", the administrative court considered the same facts as sufficient evidence of "affiliation with a terrorist organisation". The administrative courts failed to provide any reasoning as to why they reached different assessments to the criminal court, thereby undermining public trust and confidence in the judiciary.

c) A conviction

The administrative courts take account of both final and non-final convictions. In the former situation, the administrative courts state that since there is a final court decision about the plaintiff, they can decide on the lawfulness of the Commission's decision without the need for further evidence and research. In the latter situation, the courts state that since the decision is not final, it is not possible to evaluate the conviction against the plaintiff and to reach a decision that the plaintiff is "a member of a terrorist organisation", taking account of the presumption of innocence. However, as is shown in the following

[153] Ankara 19th Administrative Court, 2020.
[154] See *Çelik (Bozkurt) v. Türkiye*, no. 34388/05, § 35, 12 April 2011.

example, the courts failed to respect the principle of presumption of innocence because the plaintiffs' convictions were not yet final.

In a 2018 decision, the Ankara 19th Administrative Court referred to the plaintiff's non-final conviction by a first instance assize court for "being a member of an armed terrorist organisation". The basis for his conviction was that he had used the ByLock messaging programme, that there had been an increase in his bank account balance at Bank Asya in 2014, and that he had been a member of a trade union. By considering this non-final conviction decision and the Commission's findings together, the administrative court concluded that the plaintiff had "at least the minimum level of contact with FETÖ/PDY" and that the Commission's rejection of the plaintiff's application was lawful. Therefore, the court rejected the case.

In a number of cases, judges indicate in their dissenting opinions that the administrative court should have waited until the conviction had become final. In their view, only after the final outcome in the criminal case can the administrative court assess the plaintiff's connection with an illegal organisation. Therefore, they disagree with the majority opinion to dismiss the case based on a non-final conviction decision. [155]

2. Administrative Courts' Use of Evidence Obtained in the Criminal Proceedings

In assessing the plaintiff's alleged affiliation with an illegal organisation, the administrative courts explicitly state that they "take into account evidence obtained by the prosecution's office or criminal courts, factual findings obtained throughout the criminal proceedings [in which the plaintiff was the accused], and information and documents in the criminal case file".[156] For "FETÖ/PDY" cases, this can include witness statements taken during criminal proceedings; the findings of the prosecutor that the plaintiff participated in religious meetings *(sohbet)*; the prosecutor's examination of the plaintiff's digital materials revealing that the plaintiff logged into a website affiliated with the Gülenists (www.herkul.org) more than once; the criminal court's assessment of the plaintiff's bank account with Bank Asya; membership of a trade union; and usage of ByLock.

For example, in one case the Ankara 28th Administrative Court relied on witness statements provided in the course of the criminal proceedings by the plaintiff's colleagues and friends, and by an anonymous witness, even though the criminal court acquitted the plaintiff of "being a member of an armed terrorist organisation" and this decision became final without appeal.[157] The administrative court concluded that the findings obtained during the criminal investigation and prosecution were sufficient to establish the plaintiff's affiliation and link with the Organisation. The administrative court failed to provide sufficient reasoning on this apparent discrepancy between the conclusions of the criminal and administrative courts.

In the PKK/KCK cases examined, evidence from criminal proceedings included participation in demonstrations and in association meetings, membership of a lawful association, as well as secret witness statements (alleging, for instance, that the plaintiff offered material support to the PKK/KCK).

[155] *E.g.*, dissenting opinion, Ankara 24th Administrative Court, 2020.
[156] A uniform statement included in almost all the decisions.
[157] Ankara 28th Administrative Court, 2021.

The administrative courts' practice is in contravention of a number of the fundamental elements of the right to a fair trial, namely the principle of equality of arms, fairness in the use of evidence and the presumption of innocence.

First, the plaintiffs do not have a chance to examine the witnesses since the courts do not call the witnesses who gave evidence in the criminal proceedings to testify before the administrative court, in violation of the principle of equality of arms.[158]

Second, the witness statements referred to in the decisions often amount to hearsay evidence or they simply reflect the witness's subjective views about the plaintiff, which raises question about their reliability and relevance as evidence before a court.[159] Furthermore, when relying on digital data as evidence, the courts do not provide any reasons to explain how connecting to a website more than once can create a 'link' between the person and an illegal organisation. Nor do they examine when and why the plaintiff had access to the website. The courts appear to proceed on the assumption that anything can be 'linked' to the Organisation as long as there is a grain of contact with the Gülenists, even if it is simply one click on a publicly accessible website.

Finally, the administrative courts' approach may violate the presumption of innocence under Article 6(2) of the ECHR, which provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Although the proceedings in question are classified under domestic law as 'administrative', if the administrative courts make statements imputing criminal liability to the dismissed public servant, it will raise an issue falling within the ambit of Article 6(2) of the ECHR.[160]

For example, in *Çelik (Bozkurt) v. Turkey*, the ECtHR confirmed the applicability of Article 6(2) to administrative proceedings and reiterated that:

> "the scope of Article 6 § 2 is not limited to criminal proceedings which are pending, but may extend to judicial decisions taken after the proceedings end or following an acquittal, in so far as the issues raised in these cases are a consequence of and concomitant to the criminal proceedings concerned, in which the applicant was the 'accused' … The Court considers that the language used by the Administrative Court in rejecting the applicant's case created a 'link' between the criminal case and the administrative proceedings, which justifies the extension of the scope of Article 6 § 2 to cover the latter".[161]

The ECtHR concluded that the applicant's right to the presumption of innocence had been breached and that, therefore, there had been a violation of Article 6(2).[162]

In its decision of 2 July 2020 in the application of *Hüseyin Sezer*, the Plenary of the TCC explained the importance of the presumption of innocence in administrative cases concerning disciplinary sanctions.

> "In cases where the acts subject to disciplinary offence and criminal proceedings are the same, the administrative courts dealing with disputes related to the disciplinary investigation

[158] For a detailed analysis of the court's reliance on witness statements, see below, Section V(C)(5).
[159] Anonymous witness mentions that he or she "*heard* that the plaintiff was a supporter of FETÖ"; another witness states that the plaintiff "*was known* as someone who is prone to FETÖ" (Ankara 28th Administrative Court, 2021).
[160] *Çelik (Bozkurt) v. Turkey*, no. 34388/05, § 32, 12 April 2011.
[161] *Ibid.*, § 34.
[162] *Ibid.*, § 37.

> are expected to respect the finding of the criminal court regarding the truth of the act and not to use expressions to question it. Otherwise, the person's acquittal in the criminal court makes no sense. In this respect, other authorities of the state, including the administrative courts, should refrain from acting in a way that raises suspicion about the acquittal decision"[163]

The TCC went on to state that: "The public interest in respecting the presumption of innocence is so important that in some cases it is even justified that the perpetrator of the wrongful act is not sanctioned in terms of discipline".[164]

In dismissal cases, the Ankara Administrative Courts employ the same wording used in the criminal trial by directly citing the witness statements and making no fresh, independent assessment of the facts.

Furthermore, the criminal and administrative courts characterise the same conduct by the plaintiff (such as using the messaging application ByLock, depositing money into a Bank Asya account, and being a member of a trade union) in different ways. Whereas the criminal courts characterise such conduct as a criminal act ("being a member of a terrorist organisation" or "aiding and abetting a terrorist organisation"), the administrative courts characterise the conduct as indicating an "affiliation" or "link" with "a terrorist organisation". Although the administrative courts do not formally characterise the conduct of the plaintiff as a crime, there are cases in which, in effect, they trespass into the criminal domain by making statements imputing criminal liability to the plaintiffs, as demonstrated by the examples above.

In conclusion, the administrative courts impute criminal liability to the plaintiffs whose guilt has not been established by a final court decision in criminal proceedings, thereby violating their right to the presumption of innocence.

C. Criteria Applied by the Administrative Courts in Assessing the Plaintiff's "Affiliation with Proscribed Terrorist Organisations"

The emergency legislative decrees do not cite any criteria concerning the definition of "belonging to" or being "affiliated" or "linked" with "an illegal organisation".[165] Instead, such criteria were first established by the Commission and were then adopted by the Ankara Administrative Courts.

In its Activity Report, the Commission indicates that its "approach for the assessments focuses mainly to identify whether individuals have acted in line with the order and instructions of the terrorist organisation".[166] In most of the decisions made in 2020 and 2021, the Ankara Administrative Courts refer to the criteria established by the Commission in determining the applicant's "affiliation with an illegal organisation" and indicate that they will also apply these criteria in the actions for annulment of the Commission's decisions. The courts state that:

> "[E]vidence [i.e., criteria] on the basis of which [the Commission took its decision] relates to [acts occurred] prior to the effective date of the legislative decree, and [these criteria] were established afterwards. [However,] since this evidence consists of facts relating to the past, which reveal the membership of, belonging to, affiliation or link with terrorist organisations

[163] Turkish Constitutional Court, *Hüseyin Sezer* [GK], no: 2016/13566, 02/07/2020, § 55.
[164] *Ibid.*, § 59.
[165] See also, *Pişkin v. Turkey*, § 207.
[166] Commission's Activity Report (2017-2022), p. 20.

> and the loss of loyalty to the State, [the court] can take them into account in its examination of [the lawfulness of the Commission's decision]. In this context, [the court] will assess whether the information, documents and findings specified in the Commission's decision establish any affiliation and link with [terrorist organisations]".[167]

It is not clear how the Commission established its criteria. Nevertheless, the administrative courts followed the Commission's approach without adequately considering the relevance or the reliability of evidence.

In determining the existence of "the affiliation", the administrative courts indicate that they consider "all kinds of facts determined by legally obtained evidence (usage of the ByLock communication system and a relationship with institutions and organisations closed down on the grounds that they were affiliated with FETÖ/PDY, such as trade unions, associations, financial institutions, educational institutions etc)".[168] The administrative courts add that "it is not possible to interpret [consideration of these factors] as a violation of a right and freedom to which the fact is connected".[169] For example, in the courts' view, the courts' consideration of the trade union membership of the plaintiff as evidence for their "affiliation with an illegal organisation" cannot be interpreted as a violation of their right to join trade unions (enshrined in Article 51 of the Constitution, Article 11 of the ECHR, and Article 22 of the ICCPR).

The Ankara Administrative Courts consider two factors in determining a plaintiff's affiliation with an illegal organisation: the Commission's findings and any criminal court findings.

In "FETÖ/PDY" cases, the courts usually adopt the same formulaic verbatim text in their decisions, as shown in the example below:

> "After examining the information and documents in the case file together with the UYAP records, [it is seen that] the Commission, with evidence legally obtained, determined that the plaintiff had used the ByLock communication system …; that he had deposited money in Bank Asya … after 2014; that between [date] and 2015 he had been a member of the … Trade Union, which was closed down on the grounds of being linked to FETÖ/PDY; that between [date] and 2016 his child had been enrolled in the Private Secondary School …, which was among the institutions that were closed down on the grounds of being in contact with FETÖ/PDY; that he had made payments to Cihan Media Distribution between [date] and 2015. [The Plaintiff did not submit] any concrete information and documents that would leave the aforementioned findings unfounded.
>
> In addition, the … Assize Court, in its decision, docket no. … and decision no. …, determined that the plaintiff had used the ByLock program, that he had deposited money in Bank Asya within the scope of organisational activity, and that witness statements had revealed his affiliation with the organisation. [For this reason, the criminal court] decided that he had committed the crime of being a member of FETÖ/PDY and sentenced him to prison.

[167] *E.g.*, Ankara 28th Administrative Court, 2021.
[168] *E.g.*, Ankara 19th Administrative Court, 2018.
[169] *Ibid.*

> Considering the above-mentioned Commission's findings and evidence obtained in the criminal proceedings, which are together deemed to be the basis for judgment, [the administrative court] concludes that the plaintiff had at least the minimum level of contact with FETÖ/PDY, and that the Commission's decision regarding the rejection of the plaintiff's application was lawful.
>
> In the light of the foregoing, [the court] rejects the case …"[170]

The findings of the Commission and those of the criminal court establish the basis of the administrative courts' decision. As is evidenced by the example above, the administrative court only briefly summarises these findings and then decides on the existence of "an affiliation" without making its own assessment regarding the evidence.

The courts fail to explain their reasoning as to how the plaintiffs' ordinary and commonplace actions – depositing money into a legally established bank, being a member of a trade union, sending one's children to a private school, and making payments to a media company – before the coup attempt of 15 July 2016 and, more importantly, predating the determination of "FETÖ/PDY" as "a terrorist organisation" by the plenary criminal divisions of the Court of Cassation on 27 September 2017, are sufficient to create a "link" between the plaintiff and the Organisation.

Furthermore, the administrative courts proceed by the assumption that any contact with the institutions affiliated with the Gülenists in the past is equivalent to a "link" to "FETÖ/PDY". Therefore, the administrative courts retrospectively view the plaintiffs' acts that were legal at the time when they occurred as if they were part of an illegal activity linked to a "terrorist" organisation.

In the PKK/KCK cases analysed, the administrative courts follow a similar approach. In most cases analysed, the courts fail to carry out their own assessment of the evidence, simply summarising the findings of the Commission, any criminal proceedings against the plaintiff, and the information provided by the institution.

For instance, in one of these cases, the 20th Administrative Court rejected the plaintiff's request for annulment of the Commission's decision on the basis that there had been "findings" that the plaintiff was part of the youth organisation of the PKK/KCK, "provided material support" to the PKK/KCK, and made social media posts that "could be evaluated" as constituting a "link" or "affiliation" with that organisation. The administrative court did not further detail or discuss any of these findings. In a dissenting opinion, one of the judges highlighted that there lacked any concrete or reliable information or evidence of the plaintiff belonging to the youth organisation of the PKK/KCK, that the Commission had failed to explain how the social media posts in question evidenced a "link" or "affiliation" with the PKK/KCK assessment of the evidence, and that the respondent institution had not provided any further evidence of a "link" or "affiliation".

The following sections analyse each "criterion" applied by the courts as "evidence" to find that the plaintiff was "affiliated with" "an illegal organisation". While the majority of the criteria below relate exclusively to "FETÖ/PDY" cases (as these formed the bulk of analysed decisions), some of them were present in both "FETÖ/PDY" and PKK/KCK related decisions analysed.

[170] *E.g.*, Ankara 19th Administrative Court, 2019.

1. Holding a Bank Account with Bank Asya or Depositing Money into a Bank Asya Account

In assessing an affiliation with "FETÖ/PDY", the Commission analyses "information on whether the applicants have opened a new account [with Bank Asya] and deposited money [into that account] directly or via taking a loan from another bank with a view to provide support upon the instruction of the leader of the [Organisation]".[171]

Similar to the Commission's approach,[172] the administrative courts also consider this information in the actions for annulment. In all the decisions in which the Ankara Administrative Courts applied this criterion, they provide the following description of Bank Asya:

> "By its decision of 29 May 2015, the [Banking Regulation and Supervision Agency (BRSA)] transferred [Bank Asya's] partnership rights, excluding dividends, management and control, to the Savings Deposit Insurance Fund (SDIF). [Bank Asya's] banking activities continued until its operating license was revoked by the decision of the BRSA dated 22 July 2016 in accordance with the last paragraph of Article 107 of Banking Law no. 5411. [Bank Asya] is affiliated with FETÖ/PDY".

The administrative courts explain the scope of this criterion by referring to certain decisions of the Court of Cassation[173] and TCC,[174] as well as to the Commission's Activity Report.[175] The courts cite the following passage from a decision of 27 June 2019 by the plenary criminal divisions of the Court of Cassation:

> "Criminal investigations concerning FETÖ/PDY revealed that … Bank Asya, which was established upon the instruction of Fethullah Gülen, has been one of the financial resources of [the Organisation]… In line with the instruction of the leader of the organisation dated 25 December 2013 to deposit money in the Bank, people … especially since the beginning of 2014, had deposited money, had opened participation accounts and had conducted transactions of foreign exchange and gold trading without any [economic motive], either by selling off some of their assets or by withdrawing loans from other financial institutions, for the benefit of [the Organisation]".[176]

The administrative courts do not specify the details of the "instructions" allegedly made by Fethullah Gülen; nor do they explain through which channels, *e.g.*, via phone call, publicly available video, interview etc., such 'instructions' were given. The assessment of the administrative courts with respect to this criterion centres around the following two dates:

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[171] Commission's Activity Report (2017-2022), p. 22, see also p. 31 ("2-As regards the Bank Asya account information").
[172] See TLSP's 2019 Report, "Having an account in Bank Asya", pp. 29-30.
[173] Plenary criminal divisions of the Court of Cassation, decision of 27/06/2019, docket no.2018/16-418, decision no. 2019/513; 16th Criminal Division of the Court of Cassation, decision of 13/11/2018, docket no. 2018/1603, decision no. 2018/4170.
[174] Constitutional Court, *Metin Evecen* individual application, decision of 04/04/2018, application no. 2017/744, §26.
[175] Referring to Commission's Activity Report (2018), pp. 13-15.
[176] Plenary criminal divisions of the Court of Cassation, decision of 27/06/2019, docket no.2018/16-418, decision no. 2019/513.

- **25 December 2013** on which the leader of the organisation allegedly instructed his supporters to deposit money into the Bank to help it survive its financial crisis.
- **29 May 2015** on which the SDIF seized control of Bank Asya.

The administrative courts assess whether the plaintiff carried out these banking transactions within the scope of ordinary banking activities *or* upon instruction. There are three possible scenarios faced by the plaintiffs in the decisions of the administrative courts.

> ***First Scenario***: If the plaintiff opened a bank account, deposited money into that account or increased its balance **between 25 December 2013 and 29 May 2015**, the administrative courts assume that the plaintiff made these transactions upon the instruction of the leader of the organisation.

According to the courts, it was "clear that this organisation had become completely risky within the specified period", and therefore, "depositing money into a bank belonging to an organisation, …which has been described [as a terrorist organisation] by the Council of National Security in its decision of 26 February 2014, cannot be considered as a pure banking activity".[177]

The administrative courts expect the plaintiff to prove that they did not make their banking transactions in response to an 'instruction', in effect, shifting the burden of proof to the plaintiff. If the plaintiff cannot prove it, the courts consider the plaintiff's banking transactions "beyond the ordinary course of life", i.e., having been made upon an 'instruction', thereby establishing the plaintiff's affiliation. This procedure adopted by the courts is manifestly unfair.

The administrative courts state that they will not consider the plaintiff as being affiliated with an illegal organisation if the plaintiff proves that they made their transactions for "a real commercial, economic, or personal reason such as payments of loans (housing, vehicle or personal loans), credit card, tuition fee, social security premium, tax, individual pension".[178] In practice, however, the courts disregard the arguments put forward by the plaintiffs and do not engage in any discussion in that regard.

For instance, in three cases before the Ankara 19th Administrative Court, the plaintiffs argued that they did not deposit money in Bank Asya because they were 'instructed' to do so by Fethullah Gülen. On the contrary, they claimed that they had deposited or withdrawn money for different reasons, such as to buy a house with a housing loan; to benefit from interest-free banking, more favourable gold prices, and the proximity of the Bank's branch to their home; and to buy a vehicle.[179] In all three decisions, the court merely stated that the evaluation of the plaintiffs' account activities at Bank Asya as a whole revealed that they deposited money in their account on the instruction of the leader. The court concluded that "the money deposited in the bank should be evaluated within the scope of the affiliation and link" of the plaintiffs to the Organisation. Furthermore, it indicated that "not only bank account activities but also account openings, if supported by other evidence, [would] constitute evidence of affiliation and link".

In such cases, the administrative courts failed to comply with the obligation to give sufficient reasons for their decisions, as enshrined in Article 6(1) of the ECHR. Although the plaintiffs explained why

[177] *E.g.*, Ankara 19th Administrative Court, decisions from 2020.
[178] Ankara 19th Administrative Court, decisions from 2020, referring to the Criminal Court of Cassation's 16th Criminal Division decision of 13/11/2018, docket no. 2018/1603, decision no. 2018/4170.
[179] Ankara 19th Administrative Court, decisions from 2020 and 2021.

they had conducted banking activities at Bank Asya (*e.g.*, payment of housing loan etc,), the administrative courts did not provide any reasons for rejecting their explanations. The lack of reasoning in this regard creates a perception on the part of the dismissed public servants that their arguments were not truly heard.[180]

Furthermore, the administrative courts failed to establish the causal link between depositing money into a bank account or opening a bank account on a certain date (at a bank whose activities legally continued until 22 July 2016), and the instruction allegedly given by Fethullah Gülen. The courts' assumption that any banking transaction between 25 December 2013 and 29 May 2015 was conducted upon that instruction has never been explained or sufficiently reasoned.

> ***Second Scenario:*** If the plaintiff conducted these banking transactions **prior to 25 December 2013 or after 29 May 2015**, the courts do not consider these transactions, regardless of their amount, as acts demonstrating an 'affiliation' or 'link' with the Organisation.
>
> ***Third Scenario:*** If the plaintiff increased the amount in their balance or did not withdraw money **after the seizure of Bank Asya on 29 May 2015**, the administrative courts interpret this as a sign that the plaintiff did not act upon Fethullah Gülen's instruction, and therefore, that they do not have any 'affiliation' with the Organisation, and vice versa.

In the third scenario, the administrative courts consider banking transactions between 25 December 2013 and 29 May 2015 as regular banking transactions. For instance, in one of the cases before the Ankara 19th Administrative Court, the court did not consider increases in the balance between December 2015 and July 2016 as a sign of acting upon instruction.[181] Furthermore, the administrative court also implied that there was another instruction from Fethullah Gülen to withdraw money after the seizure of the Bank by the SDIF. However, the administrative courts do not explain the details of this instruction or the channel through which such an instruction was given. Nor do they explain whether or not this instruction was publicly available for everyone so that it could be said that any person who withdrew money from Bank Asya after its seizure knew of the existence of such an instruction.

The administrative courts also failed to consider the following points in their decisions:

- Bank Asya was established on 24 October 1996[182] and continued its banking activities in accordance with the domestic law until 22 July 2016 on which date Türkiye's Banking Regulation and Supervision Agency revoked its operating licences. As was argued by most of the plaintiffs, the State itself permitted Bank Asya to engage in banking activities between these periods. Any routine banking transaction made by the dismissed public servants was legal at the time when the transaction occurred.
- Routine banking transactions cannot be considered as providing financial support to a proscribed "terrorist organisation" as confirmed by the decision of the Court of Cassation on 27 September 2017.[183]

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[180] See *Magnin v. France* (dec.), no. 26219/08, § 29, 10 May 2012.
[181] Ankara 19th Administrative Court, 2020.
[182] DBpedia, About: Bank Asya.
[183] See also in this way decisions of the Court of Cassation and the Constitutional Court that administrative courts often ignore: Court of Cassation, 16th Criminal Division, E:2018/1603 K:2018/4170, 13 November 2018 (stating that the routine account activities carried out at Bank Asya, which continued its legal banking activities until its operating

- Individuals can freely decide in which bank they want to open a bank account and deposit money in accordance with the right to property and the rule of law. In choosing a bank, individuals may prioritise their own economic interests or personal preferences.
- Individuals may have a wide variety of different reasons to deposit money into a bank account, *e.g.*, payment of a housing loan, benefiting from interest-free banking, favourable prices, and proximity of the bank branch to their home.
- The courts are obliged to provide detailed reasoning in their decisions rather than relying on abstract assumptions.

However, as illustrated in the above examples, similar to the Commission's approach, the administrative courts consider the plaintiffs' relations with Bank Asya, which was completely lawful at the time of the transactions, as constituting legitimate grounds for their dismissals.

2. Being a Member of a Trade Union/Association

Trade unions allegedly "belonging to, affiliated or linked with FETÖ/PDY, which ha[d] been identified as posing a threat to national security," were liquidated.[184] The Legislative Decree no. 667 includes a list of 19 trade unions in its Appendix (V),[185] ten of which belong to the *Cihan* Unions Confederation *(Cihan-Sen)*[186] and nine of which belong to the Action Workers' Union Confederation (*Aksiyon-İş*).[187] Subsequent emergency legislative decrees ordered the dismissal of public servants, including thousands of members of these trade unions.

In evaluating the applicant's affiliation with the Organisation, the Commission analyses "information on whether the applicants have become members or leaders of the unions, associations, foundations and federations which have been shut down due to their membership, association and connection with FETÖ/PDY".[188] Similar to the Commission's approach,[189] the administrative courts also consider this information as justification for the dismissal of the plaintiffs.

The administrative courts most frequently cited membership of the Active Educators Union (*Aktif Eğitimciler Sendikası)*, whose members were primarily teachers, as justification for the dismissal of public servants. The administrative courts, referring to the decisions of the Court of Cassation and assize courts, make the following statements about this trade union and other trade unions:

> "The Active Educators Union, which was united under the umbrella of the Cihan Unions Confederation, was established on 1 March 2012, dissolved itself on 31 March 2013, and

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license was revoked and which was affiliated with FETÖ/PDY, cannot be considered within the scope of organisational activity or aiding the organisation); Constitutional Court, İhsan Yalçın, B. No: 2017/8171, 09.01.2020, § 53-55 (stating the mere bank account movements should not be considered as a strong indication of acting in an organisational relationship or for the purpose of aiding the organisation).

[184] Emergency Legislative Decree no. 667, Article 2(1)(d), Official Gazette no. 29779, 23 July 2016.

[185] Emergency Legislative Decree no. 667, Annex, Official Gazette no. 29779, 23 July 2016. See also Commission's Activity Report (2017-2022), p. 9.

[186] 1) Ufuk Büro-Sen, 2) Aktif Egitim-Sen, 3) Ufuk Sağlık-Sen, 4) Ufuk Yerel-Sen, 5) Ufuk Haber-Sen, 6) Ufuk Kültür-Sen, 7) Ufuk Bayındır-Sen, 8) Ufuk Ulaştırma-Sen, 9) Ufuk Tarım Orman-Sen, 10) Ufuk Enerji-Sen.

[187] 11) Pak Gida-İş, 12) Pak Maden-İş, 13) Pak Finans-İş, 14) Pak Eğitim-İş, 15) Pak Toprak-İş, 16) Pak Metal-İş, 17) Pak Enerji-İş, 18) Pak Taşima-İş, 19) Pak Deniz-İş.

[188] Commission's Activity Report (2017-2022), p. 22, see also p. 31 ("3- As regards membership to the associations/foundations/trade unions/ federations that were shut down").

[189] See TLSP's 2019 Report, p. 30.

was re-established on 22 November 2013. After that, on 14 January 2014, unions, including Ufuk Büro Sen, Ufuk Tarım Orman Sen, Ufuk Enerji Sen, Ufuk Sağlık Sen, Ufuk Yerel Sen, Ufuk Ulaştırma Sen, Ufuk Haber Sen, Ufuk Kültür Sen and Ufuk Bayındır Sen, were established. The fact that the aforementioned unions reached very high number of members in a short period of time can only be explained by the existence of a group consciousness affiliated with [a terrorist organisation]. Indeed, the Court of Cassation's 16th Division, in its decision of 20 December 2017 (docket no. 2017/1862, decision no. 2017/5796), emphasised that the act of being a member of a trade union belonging to a terrorist organisation can be evaluated within the scope of the crime of aiding the terrorist organisation, which serves the organisation's purpose. On the other hand, Ankara 19th Criminal Court, on 62nd page of its decision of 11 June 2018 (docket no. 2017/87, decision no. 2018/121) regarding the conviction of the executive officers of the Active Educators Union to 6 to 13 years of imprisonment for the crime of being a member of a terrorist organisation, stated that the Chairperson of the [Active Educators] Union had sent a message to multiple users of ByLock [messenger application] … stating that '[the right to] union is a protection. Active Educators Union is a steel shield…'".[190]

The courts also state that:

"In the light of the foregoing, it is clear that [the court] will evaluate whether individuals acted in accordance with the instructions of the [terrorist] organisation [and] … [it will] not [evaluate] whether they were members of a union within the scope of their constitutional right to form and join trade unions".[191]

The courts indicate that the following categories of individuals "*may* be found to have acted in accordance with the purpose of [the Organisation], thereby having affiliation and link with the organisation":

- "those who were determined to be the executive [officer], representative or founding member of [any of] the [listed 19] trade union[s];
- those who became members after the establishment of the trade union and became members again after its re-establishment…;
- those who continued their membership until the date of the trade union's closure [by legislative decree]".[192]

Whenever the courts include this criterion in the evidence of the plaintiff's affiliation with an illegal organisation, they generally mention the timeframe and duration of the membership. The following extracts from five decisions made by the Ankara 19th Administrative Court between 2018 and 2020 demonstrate the use of this criterion:

i. "…the plaintiff was a member of the Active Educators Union, which was closed on the grounds of belonging to, being affiliated and linked with FETÖ/PDY"[193]

[190] A uniform text included in almost all the decisions.
[191] *E.g.*, 19th Administrative Court, decisions from 2020.
[192] A uniform text included in almost all the decisions.
[193] Ankara 19th Administrative Court, 2018.

ii. "...the plaintiff was a member of the union named … for a total of 7 months [in] 2015. … [T]his situation shows the plaintiff's affiliation and link with [the Organisation] [since] the plaintiff acted in accordance with the purpose of the terrorist organisation through a trade union that had a legal appearance…" [194]
iii. "…the plaintiff was a member of the union named … for a total of 8 months [in] 2015. … If this situation is supported by other evidence, it should be taken as a justification of the affiliation [with the Organisation] ..."[195]
iv. "…the plaintiff … was a member of the … Union for 16 months [between 2015 and 2016] …"[196]
v. "…the plaintiff … was a member of the … Union, which was closed on the grounds of belonging to, being affiliated and linked with FETÖ/PDY, for 38 months between … 2012 - … 2016".[197]

It is worth noting that all the trade unions mentioned by the administrative courts were established lawfully in accordance with Turkish legislation. Individuals wanting to join one of these unions were able to do so by submitting an application form or by using the service on the website "e-Government Gateway" *(e-Devlet Kapısı)*.[198] Nevertheless, the administrative courts consider these unions as belonging to "a terrorist organisation" and the members of these unions as being "affiliated" with such an organisation. The administrative courts explicitly state that they will not examine the question of whether the plaintiff became a member of the trade union simply because they wanted to exercise their freedom of association. The courts' decisions, therefore, violate Article 51 of the Turkish Constitution (right to organise unions), Article 11 of the ECHR (freedom of association), Article 22 of the ICCPR (freedom of association) and Article 22 of Turkish Public Servants Law no. 667.[199]

Additionally, the decisions using this criterion as justification for dismissal are problematic for several other reasons. For instance, in some decisions, such as in the first example, the administrative court neither states the duration nor the timeframe of the plaintiff's membership of the union. In the second example, the plaintiff's membership of the union for seven months, in the court's view, proves that the plaintiff acted to further the purpose of "the terrorist organisation". However, the court does not explain the causal link between becoming a member of a legally established trade union and acting in line with the purpose of "a terrorist organisation". The administrative court appears to consider union membership for as short as seven months, and as long as 38 months, as evidence of the plaintiff's affiliation. This would suggest that the length of time of union membership in practice has no relevance to the court's determination, even if it frequently refers to the duration. Moreover, the court does not provide any individualised explanations or reasoning in these decisions as to why the act of being a member of a union is considered as evidence. Notably, in all the examples, the court does not make any reference to the right to join trade unions of one's choice enshrined in Article 51 of the Turkish Constitution and Article 11 of the ECHR.

[194] Ankara 19th Administrative Court, 2020.
[195] Ankara 19th Administrative Court, 2019.
[196] Ankara 19th Administrative Court, 2019.
[197] Ankara 19th Administrative Court, 2018.
[198] https://giris.turkiye.gov.tr/Giris/gir this e-platform provides online access to government services. The task of establishing and managing this e-platform belongs to the Digital Transformation Office of the Presidency of the Republic of Türkiye.
[199] Article 22 of Turkish Public Servants Law no. 667: "Public servant can form and join the unions…"

There is also inconsistency in the decisions of the Ankara 19th Administrative Court in evaluating this criterion as "evidence". For example, in contrast with the five decisions referred to above, in some of its decisions taken between 2019 and 2020, where the plaintiffs' trade union membership ranged from 8 to 37 months,[200] the court ruled that being member of a certain trade union *cannot* be considered as evidence for the plaintiff's affiliation with an illegal organisation. Therefore, the court decided to annul the Commission's decision, using the same formulaic verbatim text as follows:

> "Considering that the membership of the trade union is open to all public servants; civil servants who are not affiliated with [the Organisation] were also targeted to become members of this trade union; furthermore, the motivations of the public servants to become a member of union in our country may stem from reasons unrelated to FETÖ/PDY, such as benefiting from the [trade union's] legal support or social opportunities [provided by the trade union], pressure from the manager, insistence of friends/colleagues… [The administrative court concludes that] admitting that [the membership of the trade union] provided a link between the plaintiff and FETÖ/PDY would be disproportionate and unfair in the present case without any other evidence and that [this finding] did not reveal beyond all doubt the plaintiff's affiliation or link with FETÖ/PDY". [201]

Many of the plaintiffs argue that membership of a lawful trade union (whose activities were permitted by the State) cannot be considered as a legitimate reason for their dismissals from public service and that they became a member of the trade union without being 'instructed' to do so. However, the administrative courts do not address the plaintiffs' arguments, thereby failing to respect the principle of equality of arms.

Furthermore, the administrative courts failed to consider the International Labour Commission's (ILO) findings regarding the closure of trade unions and the dismissal of their members from employment in Türkiye.[202] On 24 March 2021 the ILO Governing Body adopted two reports concerning petitions submitted by *Aksiyon-İş,* alleging that Türkiye did not observe certain provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Termination of Employment Convention, 1982 (No. 158).[203] The first report concerns allegations regarding the closure of *Aksiyon-İş* and its affiliated trade unions, and the second report includes an assessment regarding the dismissal of the members of these trade unions.[204]

In its first report concerning Convention No. 87, the ILO Committee found that the dissolution of the trade unions by a decision of the executive branch of the government, like the dissolution by an

[200] Eight months (2015), 15 months (2015-2016), 21 months (2014-2015), 29 months (2012-2016) and 37 months.
[201] Ankara 19th Administrative Court, decisions from 2019 and 2020.
[202] See also Av. Levent Mazılıgüney, "ILO Sözleşmeleri ve İdare Mahkemesi Kararları Işığında Sendika Üyeliği Nedeniyle İhraçlar" (Dismissals Due to Trade Union Membership in the Light of ILO Conventions and Administrative Court Decisions), hukukihaber.net, 15 March 2021.
[203] ILO Governing Body, 341st Session, Geneva, "Decision concerning the Reports of the two Committees set up to examine the representation alleging non-observance by Turkey of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Termination of Employment Convention, 1982 (No. 158)", GB.341/INS/13/5/Decision, 24 March 2021 (hereinafter, "ILO Governing Body's Decision").
[204] ILO Governing Body, 341st Session, Geneva, Report of the Director-General, GB.341/INS/13/5, 24 March 2021 (hereafter "ILO Committees' Reports").

administrative authority, violated Article 4 of that Convention,[205] and added that the dissolution of a union can only be carried out by judicial authorities.[206] The ILO Committee expressed its concern that in cases brought by public servants dismissed due to their membership of a trade union allegedly associated with the Organisation, the Commission did not review the legality of the closure of the relevant trade union or any of the individual's own activities.[207] It highlighted that "these trade unions had been constituted and were operating lawfully until the state of emergency",[208] and found that the public servants –

> "…were punished for their membership in a trade union, without any need for proof of specific action or involvement or even knowledge that they may have had about a possible affiliation with a terrorist organization. In other words, they were punished for having exercised their right to join organizations of their own choosing guaranteed by Article 2 of Convention No. 87 without any possibility of review of their individual situation". [209]

In its second report concerning Convention No. 158, the ILO Committee noted with concern that members of the dissolved trade unions had been "deemed by the Government to be terrorists on the basis of alleged links with a terrorist organization merely due to their association with the trade union confederation".[210] Citing the sample decisions provided in the Commission's 2019 Activity Report, the Committee stated that simply being a member of one of these unions was considered by the Commission as sufficient evidence for the applicant's affiliation with the Organisation, thereby justifying the dismissal.[211] The Committee noted that there had been "no indication … of the nature or content of any information provided by the applicant, or whether he was afforded an opportunity to provide information or evidence, including witnesses or witness statements, in his defence".[212] Furthermore, the Committee observed that the sample cases "appear[ed] not only to place the burden of proof on the worker but also to restrict his or her means of defence".[213] The Committee recalled that, according to Article 9(2) of Convention No. 158, the burden of proving the existence of a valid reason for the termination of employment rests on the employer.

In its decision of 24 March 2021, the ILO Governing Body urged the Turkish Government to ensure that "a full, independent and impartial review be made with regard to all those workers who suffered from reprisals and retaliatory acts for their membership in the dissolved unions".[214]

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[205] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Article 4: "Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority".
[206] ILO Committees' Reports, pp. 9-10, para. 23.
[207] *Ibid.*, p. 11, para. 28.
[208] *Ibid.*, p. 11, para. 27.
[209] *Ibid.*, p. 11, para. 27.
[210] *Ibid.*, p. 19, para. 28 and p. 20, para. 31.
[211] *Ibid.*, p. 20, para. 30.
[212] *Ibid.*, p. 20, para. 30.
[213] *Ibid.*, p. 21, para. 34.
[214] ILO Governing Body's Decision.

3. ByLock

In evaluating the applicant's alleged affiliation with "FETÖ/PDY", the Commission takes into account "information on the usership of intra-organisational communication software used by the FETÖ/PDY organisation such as ByLock, eagle etc".[215]

Similar to the Commission's approach, the Ankara Administrative Courts also consider the plaintiff's use of the encrypted messaging application, ByLock, as evidence of their affiliation. In this regard, they refer to the Constitutional Court's judgment in *Aydın Yavuz and Others* (app no. 2016/22169, 20 June 2017) and the 16th Criminal Division of the Court of Cassation's judgment dated 24 April 2017 (E. 2015/3, K. 2017/3).[216] In their decisions, the Ankara Administrative Courts summarise their approach to this messaging application as follows:

> "It has been accepted that the use or download of the ByLock application on electronic/mobile devices by individuals could be regarded by the investigating authorities as an indication of the existence of a link between the individual and FETÖ/PDY (Aydın Yavuz and Others, §267), in view of the [following] characteristics of the ByLock application:
>
> - this application was not of an institutional and commercial nature;
> - almost all the decrypted content of the messages sent/received via this application concerned the contacts of the organisation and the activities of the members of FETÖ/PDY;
> - the information on the Internet relating to ByLock was spread from fictitious accounts disseminating publications in favour of FETÖ/PDY;
> - this application with a large user base was not known to others before the coup attempt of 15 July;
> - the existence of its unusual functioning and encryption system to prevent the identification of its users;
> - the use of the application was only possible with the approval of another user and is thus conducive to cell-type organisation;
> - communication content was automatically deleted after a certain period of time (Aydın Yavuz and Others, §106).
>
> In its judgement of 24 April 2017 (E.2015/3 K.2017/3) …,[217] the 16th Criminal Division of the Court of Cassation, ruling as a court of first instance, held that – since ByLock communication system was a network created for the use of members of the FETÖ/PDY armed terrorist organisation and used exclusively by some members of this criminal organisation – it would be an evidence indicating the person's connection to this organisation if [the court] determines his or her involvement in this network with the instruction of the organisation and use for communication purposes to ensure confidentiality. In this case, there is no doubt that the persons found to have used the ByLock communication system have

[215] Commission's Activity Report (2017-2022), p. 22; see also p. 31 ("1- As regards the use of intra-organisational communication software").
[216] For a detailed summary of these judgments, see *Akgün v. Turkey*, no. 19699/18, §§ 83-85 ("the judgment in *Aydın Yavuz and Others*") and §§ 66-82 ("the case-law of the Court of Cassation"), 20 July 2021.
[217] By its judgment of 26 September 2017 (E.2017/956 K.2017/370), the plenary criminal divisions of the Court of Cassation upheld the judgment of the 16th Criminal Division.

membership, affiliation and contact with the FETÖ/PDY organisation and that this is a legal ground for dismissal from public office.

On the other hand, if it is determined that the ByLock application was installed on the [electronic] device used by a person against his or her will and was not used in any way in communication, it is clear that this situation alone cannot be considered as a reason for [that person's] affiliation or contact [with the Organisation]"[218]

In most of the administrative cases, the public servants dispute their alleged use of the ByLock application as evidence of their affiliation with an illegal organisation. The following two cases exemplify the administrative courts' approach in this respect. In the first case, the Ankara 20th Administrative Court ruled that:

"Assize Court sentenced the plaintiff to imprisonment on the grounds that s/he committed the crime of being a member of an armed terrorist organisation. The case is pending at the appeal stage. An examination of the [assize] court decision reveals that the plaintiff was found to have accessed the ByLock application via the GSM and ADSL line. [This] shows that s/he had a more intense relationship with FETÖ/PDY than that would be expected from a normal citizen; it is reasonable and fair to consider this situation to mean that the plaintiff has affiliation with FETÖ/PDY; given that there was concrete evidence indicating that the plaintiff had affiliation with a terrorist organisation aiming at overthrowing the free democratic order established by the Constitution, s/he violated the obligation of loyalty to the Constitution; [therefore] [the court finds lawful] the Commission's decision that rejected the plaintiff's application requesting his/her reinstatement to public service from which s/he was dismissed by [an emergency legislative decree]…".[219]

In the second case, the Ankara 25th Administrative Court held that the plaintiff had "at least the minimum level of contact with FETÖ/PDY" and that the Commission's decision was lawful because the plaintiff, a Bylock user, had been prosecuted for "membership of a terrorist organisation" and three members of their immediate family were also dismissed from public service and two were sentenced to imprisonment.[220] The court explicitly stated that the situation of the plaintiff's family members "reinforced" its conclusion in rejecting the case.

As shown in these examples, the administrative courts mainly relied on the Commission's decision, and/or the Assize Court's decision, to determine a public servant's usage of the ByLock messaging system. They do not make their own assessment and instead take the findings in these decisions as if they were undisputed. The first case demonstrates that even if the criminal case against the public servant was pending at the appeal stage and, therefore, not final, the court relied on the finding of the Assize Court in determining whether the plaintiff used ByLock. Other than usage, the administrative court did not make any evaluation as to when, how, with whom, in which context, and for what purpose, the plaintiff had used this messaging application. Nor did it refer to the content of the communication in question. In the second case, the Ankara

[218] Ankara 19th Administrative Court, decisions from 2020.
[219] Ankara 20th Administrative Court, 2019.
[220] Ankara 25th Administrative Court, 2021.

25th Administrative Court refers to the plaintiff's family members' dismissal and conviction in evaluating the plaintiff's case.

The decisions of the administrative courts also conflict with the ECtHR's case law. In its judgment in *Akgün v. Turkey*, concerning the pre-trial detention of the applicant, a former police officer, who was suspected of being a member of the Organisation solely based on his alleged active use of the ByLock application, the ECtHR emphasized that:

> "the mere fact of downloading or using an encrypted means of communication, or the use of any other form of protection of the private nature of the messages exchanged, cannot in itself constitute an element capable of convincing an objective observer that an illegal or criminal activity is involved".[221]

The ECtHR also stated that:

> "…it is only when the use of an encrypted means of communication is supported by other elements relating to its use, such as the content of the messages exchanged or the context in which they were exchanged, or by other types of elements relating to it, that one can speak of evidence capable of convincing an objective observer of the existence of a plausible reason to suspect its user of being a member of a criminal organisation. Moreover, the information presented to the national judge on such use must be sufficiently specific to allow that judge to conclude that the messaging system in question was in fact intended for use only by members of a criminal organisation. These elements are lacking in the present case".[222]

The ECtHR concluded that the evidence available to the domestic court, i.e., the applicant's usage of ByLock, did not meet the criterion of "reasonable suspicion" required by Article 5 of the Convention. Therefore, it could not convince an objective observer that the applicant might have committed the alleged offence for which he had been detained.[223]

In the judgment of *Yalçınkaya v. Türkiye*, the Grand Chamber found that the applicant's conviction based on the use of ByLock alone created an almost automatic presumption of guilt made it nearly impossible for the applicant to exonerate himself from the accusations which amounted a violation of Article 7. The Grand Chamber also noted that procedural deficiencies during criminal proceedings prevented the applicant to contest the accuracy of the allegations in relation to ByLock evidence and found a violation Article 6.[224]

Contrary to these judgments, the Ankara Administrative Courts have considered the mere fact of downloading or using the ByLock application by public servants as an illegal activity, making them affiliated with an illegal organisation. In their view, this evidence alone is sufficient to justify their dismissal from public service. The courts do not make any evaluation as to the content, or context, of any messages exchanged.

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[221] *Akgün v. Turkey*, § 173.
[222] *Ibid.*
[223] *Ibid.*, § 182.
[224] *Yalçınkaya* v. *Türkiye, no*. 15669/20, § 268 and 337, Grand Chamber, 26 September 2023.

4. Opinion by the Public Institution/Superior Officer

In evaluating an application by a dismissed public servant before the Commission, the Commission requests an opinion from the last public institution where the applicant worked as to whether the applicant has "affiliation", or "contact", with any "terrorist organisation". The public institution provides the Commission with an opinion through a document called the "personnel information file". The Commission considers these opinions in its assessment and rejects the applications if the opinions identity the plaintiffs as having such an affiliation or contact.[225]

Similarly, the Ankara Administrative Courts rely on, among others, the following opinions to decide whether the plaintiff is affiliated with an illegal organisation:

- An opinion provided by the public institution which was the plaintiff's last employer *(kurum kanaati)*; and
- an opinion provided by a superior public servant who worked in the same public institution where the plaintiff used to work before their dismissal *(üst amir kanaati)*.

These opinions, among others, may form the basis of the court decisions. For instance, in one PKK/KCK case analysed, the 22nd Administrative Court held that the issuing of a decision not to prosecute the plaintiff - after his or her dismissal - did not suffice to annul the Commission's decision. It relied on a "joint statement of the personnel" concerning a social media post *liked* by the plaintiff, as well as the plaintiff's refusal to take pride in the Turkish flag, to find an affiliation or link between the plaintiff and the PKK/KCK.

In "FETÖ/PDY" cases, the courts usually mention them under the heading, "Other Findings", after their assessment with respect to, if any, usage of Bank Asya and/or ByLock and the membership of a trade union. In this way, the courts seem to treat these opinions as corroborating one of the three main pieces of "evidence" of the dismissed public servant's affiliation with an illegal organisation.

For instance, in a case before the Ankara 28th Administrative Court, the main evidence for the plaintiff's affiliation and contact with the Organisation was their membership of a trade union for 14 months between 2014 and 2016. The court also found that the assessment made by the plaintiff's last employer that the plaintiff had an affiliation and contact with the Organisation was supported by the finding concerning his or her membership of the trade union.[226] The Ankara 26th Administrative Court rejected another case, holding the Commission's decision lawful on the following grounds: the plaintiff's bank account activities at Bank Asya; his ongoing prosecution in the Assize Court for the crime of "being a member of an armed terrorist organisation"; and the personnel information file submitted to the Commission by the public institution where the plaintiff worked, which included the opinion of the plaintiff's superior who stated that the plaintiff had an affiliation and contact with the Organisation.[227]

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[225] Commission's Activity Report (2017-2022), p. 32 ("7- As regards any other findings"). In the same report, the Commission also states that, in evaluating the applicant's affiliation with the Organisation, it considers "information collected from examinations, inquiries and administrative investigations carried out by [public] institutions [where the dismissed public servant worked]", p. 23. See also TLSP's 2019 Report, pp. 34-36 ("Administrative investigation").
[226] Ankara 28th Administrative Court, 2021.
[227] Ankara 26th Administrative Court, 2021.

In some decisions, the Ankara Administrative Courts also refer to the decision of the Governor of a city where the plaintiff used to work. For example, the Ankara 21st Administrative Court referred to the opinion of the plaintiff's last employer as well to as the Office of the Governor's finding regarding the plaintiff that he used the ByLock application, that his son went to a school affiliated with the Gülenists, and that he had a connection with the Organisation.[228] Similarly, the Ankara 20th Administrative Court referred to the finding of the Office of the Governor that the plaintiff was affiliated with and provided material support to the PKK/KCK.[229]

There are a number of manifest failings in the course of such proceedings. For instance, the name of the public servant who provided the opinion about the plaintiff is not provided, nor is there a signature on the opinions.[230] It is therefore not clear who provided these opinions, nor their factual basis. Furthermore, there is also no explanation as to why the opinion holder reached the conclusion that the dismissed public servant had contact with "a terrorist organisation". The courts do not examine whether the opinions of the superior officers are based on their subjective views or whether they are supported by any objective, reliable facts. They do not expect the superior officer who wrote the opinion to explain the concrete reasons for this opinion. Therefore, these opinions raise serious doubts about their objectivity. They are subjective and arbitrary and have very little or no evidentiary value, or reliability, as they do not set out any facts or reasoning.

Furthermore, since there is no witness hearing procedure in administrative proceedings in Türkiye, it is not possible to obtain a copy of the opinion holder's statement or question them about the factual basis of their opinion. This raises issues under the rules of adversarial proceedings and the principle of equality of arms which provide the parties "the possibility to familiarise themselves with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form".[231] In administrative proceedings, however, the public servants lack any opportunity to comment on the content or authenticity of the opinion provided by the public institution or the superior officer because the facts relied on and the person who wrote the opinion are not known to the plaintiffs. Therefore, their right to a fair trial has not been respected before the Ankara Administrative Courts.

5. Witness Statements

In deciding the lawfulness of the dismissal from public service, the Ankara Administrative Courts rely on witness statements given:

- in previous or ongoing criminal proceedings against the plaintiffs;
- in administrative investigations against the plaintiffs;
- in the "personnel information file" of the public servant sent by the public institution to the Commission; or,
- by anonymous witnesses in the course of criminal proceedings.

As established by jurisprudence of the Council of State, the administrative court proceedings do not include a procedure of witness examination or cross-examination because, in principle, the

[228] Ankara 21st Administrative Court, 2020.
[229] Ankara 20th Administrative Court, 2020.
[230] Tarım's 2021 Report, p. 6.
[231] *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 42, 3 March 2000; see also, *Ruiz-Mateos v. Spain*, 23 June 1993, § 63, Series A no. 262.

administrative procedure is a written procedure based on written submissions.[232] Therefore, lack of any witness examination procedure in administrative courts may violate the plaintiff's right to a fair trial in certain circumstances, especially when the witness statements constitute the main basis of the court's decision and the plaintiffs are denied the opportunity to orally challenge the witnesses.

For example, in one case which was reviewed, the Ankara 24th Administrative Court considered witness statements in the personnel information file submitted to the Commission by the relevant public institution which indicated that: "the plaintiff was following FETÖ-affiliated media outlets/publications and encouraged others to subscribe to them; he attended the organisation's activities and meetings; *he was known by those around him* to be affiliated with the organisation; he defended and praised the organisation and its leader; he raised funds to provide financial support to the organisation; and he actively used his bank account at Bank Asya".[233] The court also considered witness statements[234] of a similar nature obtained in the course of his trial before the Assize Court, despite the fact that the plaintiff was acquitted. Considering the Commission's findings and evidence obtained in the criminal proceedings against the plaintiff, the court concluded that the plaintiff had "at least the minimum level of contact with FETÖ/PDY" and thus that the Commission's decision rejecting the plaintiff's application was found to be lawful.

This decision as to the plaintiff's "affiliation with a terrorist organisation" was based, to a decisive extent, on the evidence of the witness statements contained in the personnel information file prepared by the public institution – the other party to the administrative case – as well as witness statements taken in criminal proceedings in which the plaintiff was acquitted. The plaintiff did not have any opportunity to call the witnesses to testify before the Ankara 24th Administrative Court. Nor were these witnesses examined by this court. Therefore, the plaintiffs are denied the right to obtain the attendance and examination of witnesses on their behalf.

A similar example in the PKK/KCK cases analysed concerns a decision of the Ankara 22nd Administrative Court, where the court had regard to witness statements in ongoing criminal proceedings against the plaintiff alleging that the latter exercised duress over others for them to vote for the HDP in local elections and denounced those who voted for the AKP to the PKK. The court considered these statements decisive in finding an "established link and affiliation" of the plaintiff with the PKK/KCK. In another case, the Ankara 21st Administrative Court relied exclusively on anonymous witness statements in ongoing criminal proceedings to reject the plaintiff's request.

Although Article 6(1) of the Convention does not explicitly guarantee the right to have witnesses called, "the proceedings in their entirety, including the way in which evidence was permitted," must be "fair within the meaning of Article 6(1)".[235] The administrative court proceedings lack fairness to the plaintiff in this regard due to the way in which evidence of witness statements was admitted.

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[232] See Sezin Öztoprak, "Yargı Kararları Işığında İdari Yargılama Usulünde Tanık" (Witness in Administrative Judicial Procedure in the Light of Judicial Decisions), Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Cilt: 23, Sayı: 2, 2021, p. 1363-1404.
[233] Ankara 24th Administrative Court, 2021.
[234] The court decision does not identify who these witnesses are.
[235] *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 31, Series A no. 274

6. Anonymous Witnesses – Presence of the Plaintiff's Name on the Profiling Lists of "FETÖ/PDY"

There are two individuals who gave evidence anonymously, whose statements have been relied on extensively by the Ankara Administrative Courts in their decisions as to the dismissed public servants' affiliation with an illegal organisation. These anonymous witnesses were known by the following pseudonyms:

- **"ALBATROS"** who provided a list in a digital format of thousands of public servants working in different courthouses, and
- **"GARSON"** who provided a list of law enforcement personnel, such as police officers, deputy police chiefs and police chiefs.

a) Albatros

According to information provided by the Ankara Administrative Courts in their decisions, on 9 August 2016 an anonymous witness with the pseudonym "ALBATROS" gave a statement to the Terror and Organized Crimes Investigation Bureau of the Ankara Chief Public Prosecutor's Office.[236] As an annex to this statement, Albatros provided the prosecutor's office with "an evaluation list in a digital format", which, according to Albatros, was allegedly "prepared by the organisation itself about certain public servants working in the courthouses".[237] This list allegedly consists of rankings prepared by the organisation (such as 3, 3A, 4, 4A, 5, 5A) of the candidates who would take the entrance exam organised by the Ministry of Justice.[238] The higher the number is allegedly the more allegiant the person is to the organisation, and Albatros claims that highly ranked individuals were given priority in the entrance exams to the public service.[239]

The Ankara Administrative Courts also state that "the anonymous witness Albatros did not know the individuals on the list and therefore could not know whether everyone on the list had contact with the organisation".[240] Furthermore, Albatros stated that "s/he was involved in the organisation until May 2013 and that s/he did not know whether the individuals on the lists continued to be in contact with the organisation".[241] Albatros added, "the fact that there is information about a person on these lists indicating that s/he is linked to the organisation does not mean that s/he is affiliated with the organisation or is a member of the organisation. This issue should be separately investigated".[242]

In all the decisions reviewed, "there was no concrete statement or determination by the anonymous witness in relation to the plaintiff", as indicated by the Ankara Administrative Courts themselves.[243] Nor was there an explanation as to the concrete facts on the basis of which these ranking lists were created. Nevertheless, the Ankara Administrative Courts conclude that "the profiling/rating lists are of a nature that can be taken as a basis for revealing the plaintiff's affiliation and contact with the [illegal] organisation".[244]

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[236] Ankara 24th Administrative Court, 2021.
[237] *Ibid.*
[238] Ankara 19th Administrative Court, 2021.
[239] *Ibid.*
[240] Ankara 21st Administrative Court, 2021.
[241] *Ibid.*
[242] Ankara 19th Administrative Court, 2021.
[243] *Ibid.*
[244] *Ibid.*

In some decisions, they refer to the findings of the Turkish Constitutional Court in the case of *Ulvi Kün* in which organisational profiling/rating was found as "a strong indication" of a relationship with the organisation.[245]

The following examples demonstrate how the administrative courts consider these arbitrary rankings to confirm the lawfulness of the dismissal of the plaintiffs from public service.

- The Ankara 19th Administrative Court found that in the rating list obtained by the Ankara Chief Public Prosecutor's Office the plaintiff was rated with the code "5", which means that the plaintiff is "trusted by the organisation and has a previous connection to the organisation in a way that reveals his affiliation and/or connection with the FETÖ/PDY". [246] Considering that this evidence was obtained in accordance with the appropriate procedure and law, the court concluded that this rating could be evaluated as a reason for the plaintiff's affiliation and contact with the Organisation. The court's decision was based exclusively on the evidence of the anonymous witness. The mere indication that there is "5" next to the name of the plaintiff on the list provided by Albatros was considered sufficient for the court's conclusion.
- The Ankara 24th Administrative Court referred to the Commission's findings that the personnel information file stated the code of the plaintiff to be "4" according to the statement of the anonymous witness, Albatros.[247] According to the Commission's findings, the plaintiff was given the code "4" as a result of an interview and research conducted by the organisation, and code "4" refers to "a person who had previously stayed and continues to stay with the organisation". The Administrative Court considered the Commission's findings together with evidence obtained in the criminal proceedings and concluded that the plaintiff had "at least the minimum level of contact with FETÖ/PDY" and the Commission's decision rejecting the plaintiff's application was found to be lawful.

On the other hand, in some cases, the administrative courts acknowledge that statements given by anonymous witnesses cannot be considered as sufficient to prove the plaintiff's affiliation with an illegal organisation. For instance, the Ankara 21st Administrative Court referred to a statement given by Albatros which specified the plaintiff's position in the organisation as "4". The court stated as follows: "Albatros did not know the people on the list and therefore could not know whether everyone on the list had links to the organisation; there was no concrete statement or determination by the anonymous witness in relation to the plaintiff; … the anonymous witness did not know whether the people on the lists continued to be in contact with the organisation". Therefore, the court concluded that "the rating of the plaintiff as '4' on the list prepared by the organisation prior to 17-25 December 2013 … alone would not be sufficient evidence to establish beyond doubt the plaintiff's intense connection with FETÖ/PDY".[248]

It is therefore evident that there is inconsistency in the decisions given by administrative courts in assessing anonymous witness statements. There is no reasonable explanation as to why the same assessment

[245] Ankara 19th Administrative Court, 2021, referring to Turkish Constitutional Court's decision, *Ulvi Kün*, application no. 2016/72052, 10/12/2019, para. 40. The courts mention this case although it is about the profiling lists provided by another anonymous witness with pseudonym "Garson" in relation to law enforcement personnel, explained in the following section of this Report.
[246] Ankara 19th Administrative Court, 2021.
[247] Ankara 24th Administrative Court, 2021.
[248] Ankara 21st Administrative Court, 2021.

made by the 21st Administrative Court in the last example was not applicable in the first two examples. This is contrary to the principle of legal certainty, as the courts gave divergent decisions on the same facts.

b) Garson

The anonymous witness with the pseudonym "Garson" provided to the police two micro-SD cards and a mobile phone, which allegedly includes a list profiling law enforcement personnel according to their relationship with the Organisation. Apparently, more than tens of thousands of police officers were dismissed simply for being on this list.[249]

In evaluating the lawfulness of the dismissal from public service, the Commission has taken into account "information about the personnel of the Turkish national police, who were found to have been 'coded' (i.e. profiled) with respect to their allegiance to the FETÖ organisation".[250] Similarly, the Ankara Administrative Courts assess the mere presence of the plaintiffs' name in the profiling lists provided by "Garson" as evidence of their affiliation with an illegal organisation, thereby considering their dismissal lawful.

In the decisions referring to "Garson", the plaintiffs are police officers, deputy police chiefs, and police chiefs who were dismissed by Legislative Decree no. 701.[251] The defendant public institution before the administrative courts was the Ministry of Interior. To explain the details of information provided by Garson, the Ankara Administrative Courts mainly relied upon on a "comparative report on FETÖ's Police Structure" prepared by the General Directorate of Security, Department of Anti-Smuggling, and Organised Crime.[252]

For example, the administrative courts explain that the plaintiff was coded in the profiling list provided by Garson as "EA" which corresponds to "people who are in FETÖ/PDY and who say that the Organisation is my organisation, but they have some weak points".[253] or as "A4" which corresponds to "the highest level of FETÖ/PDY membership, submission, loyalty and devotion".[254] The courts concluded that this type of profiling can be considered as a reason for confirming their affiliation and contact with the Organisation.

7. Payment to Certain Media Outlets

Emergency Legislative Decree no. 668 (published in the Official Gazette on 27 July 2016), ordered the closure of three news agencies, 16 TV channels, 23 radio channels, 45 newspapers, 15 magazines, and 29 publishing houses in Türkiye on the grounds that they "belong to, have affiliation or contact with FETÖ, which has been identified as posing a threat to national security".[255] *Cihan* Media, Türkiye's second largest

[249] Tarım's 2021 Report, p. 22.
[250] Commission's Activity Report (2017-2022), p. 23.
[251] Legislative Decree no. 701 published in Official Gazette, no.30472, 8 July 2018.
[252] The General Directorate of Security, meaning the Turkish national police, operates under the Ministry of Interior.
[253] *E.g.*, Ankara 26th Administrative Court, 2021.
[254] Ankara 24th Administrative Court, 2019.
[255] Emergency Legislative Decree no. 668 published in Official Gazette no. 29783, 27 July 2016, Article 2(1)(b)(c), Annexes 2 and 3, pp. 61-63; see also Commission's Activity Report (2017-2022), p. 9; Ceylan Yeginsu, "Turkey Expands Purge, Shutting Down News Media Outlets", The New York Times, 27 July 2016.

news agency, and the *Zaman* newspaper, both of which were previously seized by the government, were among the closed media outlets.[256]

Both the Commission and the Ankara Administrative Courts consider a payment to *Cihan* Media or subscription to the *Zaman* newspaper as evidence of affiliation with an illegal organisation. Thus, "[i]nformation on connection with the media outlets associated with the organisation" forms part of the "evidence" on the basis of which the Commission makes its decisions in the dismissal cases.[257] In its analysis, the Commission includes this finding "as a factor contributing to the applicant's contact with the [illegal] organisation".[258]

The Administrative Courts also employ the same approach and consider the plaintiffs' subscription to the *Zaman* Newspaper between 2014 and 2015[259] or a payment to the *Cihan* Media Distribution[260] as evidence of affiliation or contact with the Organisation. The Ankara Administrative Courts simply restate the Commission's findings in this regard. In some decisions, the courts do not even mention the amount of money paid to the media outlet.

In all the rejection decisions which were reviewed, the courts did not assess the reason why the plaintiffs made their payments to *Cihan* Media. Some plaintiffs stated that they had made a payment to *Cihan* Media as a subscription for their children's practice exams. Some argued that "the payment to *Cihan* Media fell within the scope of the freedom of press". It is undisputable that the plaintiffs exercised their right to freedom of expression and the right of access to information by making a payment to a media outlet. Such an action does not indicate a connection with any terrorism-related activity. However, the courts failed to examine any of these claims, in violation of the principle of equality of arms.

Nonetheless, the administrative courts also decided to the contrary in some cases. For instance, the Ankara 19th Administrative Court first considered the payment to the *Cihan* Media Distribution as evidence of affiliation with the Organisation in 2018. However, in 2020 the same court found that the record of a payment to *Cihan* Media was not sufficient to establish a link with the Organisation on the grounds that "such payments are generally payments for subscriptions, the last payment in the transaction subject to this lawsuit was made in 2014, … no new subscription or payment records were found after this date".[261] The court concluded that "in the absence of other evidence, an acceptance that the payment provides a link between the plaintiff and FETÖ/PDY would be unjust and unfair and therefore, these findings do not prove the plaintiff's affiliation with FETÖ/PDY".[262]

These conflicting decisions not only create legal uncertainty but also, in the absence of any concrete evidence of a link with an illegal organisation, violate the right to freedom of expression and right of access to information.

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[256] Constanze Letsch, "Seizure of news agency is 'nail in coffin of journalism in Turkey'", The Guardian, 8 March 2016; Nicola Slawson, "Turkish police fire teargas at protestors at seized newspaper", The Guardian, 5 March 2016.
[257] Commission's Activity Report (2017-2022), p. 23.
[258] *Ibid.*, p. 35, see also p. 31 ("4- As regards relationship with the media outlets associated with the organisation").
[259] Ankara 19th Administrative Court, 2019.
[260] Ankara 19th Administrative Court, 2018.
[261] Ankara 19th Administrative Court, 2020.
[262] *Ibid.*

8. Payments to the Kimse Yok Mu Solidarity and Aid Association

The *Kimse Yok Mu* Solidarity and Aid Association were among the associations closed down by Emergency Legislative Decree no. 667 (published in the Official Gazette on 23 July 2016).[263] In its decisions, the Commission mentions payments to *Kimse Yok Mu* as evidence of affiliation with an illegal organisation.[264]

The Ankara Administrative Courts adopted the same approach without any further evaluation of the causal link, if any, between the payment to an aid organisation and the affiliation with an illegal organisation. They fail to examine the reason why the plaintiffs made these payments, such as simply an altruistic motivation to help others. Nor do they conduct any assessment about the amount of money and what kind of assistance it provided to the said organisation.[265]

9. Employment Records in Institutions Allegedly Affiliated with "FETÖ/PDY"

Through emergency legislative decrees, many institutions where thousands of people were employed were shut down on the basis that these institutions had contact with "FETÖ/PDY". The Commission and the Ankara Administrative Courts consider "the records of employment at the associated establishments" as evidence justifying the dismissal from public service.[266]

As a primary point, the plaintiffs argued that their employment record in a legally established institution cannot be viewed as evidence of their affiliation with an illegal organisation. The Ankara Administrative Courts disregard such arguments and proceed with the assumption that the employment record creates a link with the organisation, although the courts failed to establish any causality between the two. Thus, they interpret the plaintiffs' exercise of the right to work as engagement in illegal activity.

For instance, in a case before the Ankara 19th Administrative Court, the plaintiff was acquitted by the Assize Court of "membership of a terrorist organisation", having denied that she had any connection or contact with the Organisation. However, the court found that "the plaintiff and her child had records in educational institutions affiliated with the Organisation; *the plaintiff had a record of employment in a company affiliated with the Organisation [between 2010 and 2013]*; she made payments to the Organisation's media outlet; and she held an account with Bank Asya".[267] Therefore, the court rejected the case, holding that the plaintiff had "a more intense relationship with FETÖ/PDY than could be expected from a normal citizen" and she had ties with the Organisation "at least at the level of affiliation or contact".

As this decision demonstrates, these activities were legal at the time when the public servants carried them out, but they are now regarded as "evidence" that justifies their dismissal. There are contradictory decisions of the administrative courts when applying this criterion. For example, the Ankara 19th Administrative Court ruled that "the plaintiff's employment record in an institution affiliated to [the Gülenists] [prior to] 2010 belongs to the period before [the Organisation] was publicly criminalised" and thus "the employment record of the plaintiff, who is not in the position of the founder or manager of the

[263] Emergency Legislative Decree no. 667 published in Official Gazette no. 29779, 23 July 2016.
[264] See for example, Commission's Activity Report (2017-2022), p. 32 ("5- As regards the information on financial support/money transfers to the affiliated establishments").
[265] Ankara 25th Administrative Court, 2020 ("In 2014 the plaintiff made a payment to the *Kimse Yok Mu* Association, which was closed down on the grounds of belonging to, affiliation or contact with FETÖ/PDY".).
[266] Commission's Activity Report (2017-2022), p. 23.
[267] Ankara 19th Administrative Court, 2020.

Organisation, before 2010 cannot be interpreted as having a connection with [the Organisation] that requires dismissal from public office".[268] This reasoning of the court, however, does not provide any clear guidance as to the exact date of criminalisation of the Organisation and creates inconsistency in the jurisprudence.

10. Educational Records of the Plaintiff's Child(ren) in Schools Closed Down by Emergency Legislative Decrees

Emergency Legislative Decree no. 667 ordered the closure of 934 educational institutions (kindergartens, primary and secondary schools, and high schools) and 15 private universities in Türkiye.[269] The Commission evaluates "the records [of the applicants' children] at the associated educational institutions" as evidence of the applicants' contact with a terrorist organisation.[270] The Ankara Administrative Courts have adopted the same approach and, for example, considered the enrolment of a plaintiff's child for the 2014-2015 academic year in a private school which was among the institutions closed down on the grounds of affiliation or contact the Organisation as evidence.[271]

In its decision of 22 January 2018, the Court of Cassation held, "the fact that the accused's children attended schools affiliated with the organisation cannot be accepted as evidence or indication of the crime [of membership of a terrorist organisation]".[272] The same principle should have been applied in administrative cases, and the plaintiffs' children's educational record should not have been considered as any kind of indication or evidence that justifies arbitrary dismissal. However, the administrative courts have failed to take account of this decision.

11. Attending Religious Meetings ("sohbet" – halaqa)

The Ankara Administrative Courts consider attendance at religious meetings ("*sohbet"* – halaqa) organised by the Gülenists in the past as "evidence" of affiliation with an illegal organisation. However, the courts do not examine what motive the plaintiffs had in attending those meetings, what topics they discussed during those meetings, and how frequently they met. Therefore, they fail to establish a causal link between the exercise of the right to freedom of religion and the dismissal from public service.

For instance, in a case before the Ankara 21st Administrative Court, the plaintiff was acquitted of all charges in the criminal proceedings against him since the assize court could not determine the reason why the plaintiff attended the religious meetings.[273] Nevertheless, the administrative court used the witness statements taken in these criminal proceedings as evidence for the plaintiff's contact with an illegal organisation, without determining the plaintiff's motive in attending these meetings. Nor did the court examine the fact that the plaintiff had been exercising his right to freedom of religion by attending these religious gatherings. In addition, the court also mentioned the employment record and a payment to *Kimse Yok Mu* (which were not illegal at the time when they occurred), and the opinion of the plaintiff's last employer, as being sufficient for the administrative courts to make a person connected to "FETÖ/PDY" and to justify his dismissal from public service.

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[268] *Ibid.*
[269] Emergency Legislative Decree no. 667 Annex List (II), pp. 2-18 (educational institutions) and Annex List (IV), p.57 (universities).
[270] Commission's Activity Report (2017-2022), p. 29.
[271] Ankara 19th Administrative Court, 2019.
[272] Court of Cassation, 16th Criminal Division, docket no. 2017/3271, decision no. 2018/63, 22/02/2018.
[273] Ankara 21st Administrative Court, 2020.

12. Participating in meetings or demonstrations held by lawful organisations or political parties

In several of the PKK/KCK decisions analysed, the plaintiffs' participation in meetings or demonstrations organised by groups or bodies that were lawful at the time are considered as forming evidence of a link or affiliation with the PKK/KCK. The administrative courts do not attempt to explain the link between the relevant groups and "the terrorist organisation", merely stating that the former are "sponsors" of the PKK/KCK.

For instance, in one decision, the 24th Administrative Court founds its rejection of the plaintiff's request for annulment partly on the "facts and findings" of criminal proceedings against the plaintiff due to the latter's participation in a meeting of a lawful civil society organisation and alleged deployment of "terrorist slogans and posters" during this meeting. The administrative court affirms that the association was a "sponsor" of the PKK/KCK, without explaining how the two were linked or what this allegation relies on. Moreover, although the plaintiff was acquitted in these proceedings, the administrative court does not provide any explanation regarding the "slogans" or "posters" referred to, or any other activity of the plaintiff during the meeting that could suggest a "link or affiliation with a terrorist organisation".

In another case, the 20th Administrative court refers to the Commission's opinion that the plaintiff was "a member of a leftist organisation", tying this with "social environment research reports" indicating membership of organisations "sponsoring" the PKK/KCK. The administrative court goes on to find that the plaintiff's participation in a demonstration organised by the (former) DEHAP, a lawful political party at the time, and the plaintiff's arrest following demonstrators' failure to disperse, evidenced "at least the minimum level of contact" with the PKK/KCK.

D. Evaluation of the Plaintiffs' Human Rights Claims by the Ankara Administrative Courts

In their submissions to the Ankara Administrative Courts, the dismissed public servants primarily claim that their right to respect for private life, right to a fair trial, the principles of presumption of innocence and of no punishment without law have been violated due to their arbitrary dismissal from public service. The plaintiffs who were formerly members of a trade union which was closed down by Legislative Degree no. 667 argue that their right to freedom of association has been violated (see Section (V)(C)(2) above).

In the decisions reviewed, the Ankara Administrative Courts do not make any individualised assessment with respect to each plaintiff concerning their claims of human rights violations. In cases where they assess these claims, they do so using standard text that includes the same statement for different plaintiffs, without considering their individual circumstances.

The following sections explain the Ankara Administrative Courts' approach to the alleged violations of the (1) right to respect for private life, (2) right to a fair trial, (3) principle of presumption of innocence and (4) right to freedom of association in turn. It is then followed by an analysis of shortcomings of the courts' approach under each section.

1. Right to Respect for Private Life[274]

None of the PKK/KCK cases examined - aside from one exception - contain an assessment under different rights, even where the plaintiff explicitly invokes these rights. Instead, the administrative courts refer in an abstract manner to the possibility to derogate from certain rights under Article 15 of the Convention in times of emergency threatening the life of the nation. They affirm that the rights affected in the situation at hand are not "core" (non-derogable) rights, in general without specifying which rights are at stake.

In "FETÖ/PDY" cases, the administrative courts begin their analysis by indicating that there has been an interference with the dismissed public servants' right to respect for private life under Article 8 of the ECHR and Article 20 of the Turkish Constitution. The courts refer to the ECtHR's findings that "professional activities are within the scope of the right to respect for private life" and that "private life encompasses an individual's right to establish and develop relationships with other individuals, including professional and business relationships".[275]

The administrative courts indicate that "the question whether the interference with the right to respect for private life constituted a violation must be examined in line with the principles of lawfulness, legitimate aim, necessity in a democratic society and proportionality" under Article 8(2) of the Convention. Having found the applicability of Articles 15 of the Constitution and the Convention, they state that, in the event of a public emergency threatening the life of the nation, "the adoption of measures contrary to the guarantees provided for in Article 8(2) of the Convention or the provision of guarantees of a lower standard may happen".

a) <u>The lawfulness of the interference</u>

The courts find that the interference was prescribed by law on the following grounds: "[t]he act at issue [namely the dismissal from public service] was introduced by a legislative decree issued during the state of emergency. This legislative decree was [approved and] enacted by the Grand National Assembly of Türkiye. […] For this reason, the [dismissal], which constitutes an interference with the right to respect for private life, was established pursuant to a foreseeable and specific legal provision, and the interference meets the requirement of prescribed by law".[276]

The administrative courts' approach is strongly contestable in light of the ECtHR case law which provides that the lawfulness requirement in Article 8(2) of the Convention "not only require[s] that the impugned measure should have some basis in domestic law, but also refer[s] to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law".[277] It is, therefore highly questionable whether the legal basis relied on by the administrative courts – the mere existence of the emergency legislative decree – also satisfies the accessibility and foreseeability requirements under the ECHR.

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[274] For an extensive discussion on Article 8 and dismissals from public service, see Tom Ruys and Emre Turkut, "Turkey's Post-Coup 'Purification Process' and the European Convention on Human Rights", Human Rights Law Review, Volume 18, Issue 3, September 2018, 539, at pp. 547-553.

[275] Citing *Niemietz v. Germany*, no. 13710/88, 16 December 1992, § 29, Series A no. 251-B and *C. v. Belgium*, no. 21794/93, 7 August 1996, § 25, Reports of Judgments and Decisions 1996-III.

[276] A uniform text included in almost all the decisions.

[277] *Pişkin v. Turkey*, § 206.

It is reiterated that key terms in the emergency legislative decrees, such as "belonging to" and "affiliated or linked with a terrorist organisation", are not defined (see above, Section (V)(A)(6)(b)). The Commission, followed by the Ankara Administrative Courts, developed certain criteria, as discussed in detail above. For these provisions to be sufficiently foreseeable to the public servants, domestic courts must "construe the exact meaning of general provisions of law in a consistent manner and dissipate any interpretational doubts".[278] As explained by the examples above, there is no "specific and consistent interpretational practice" of the Ankara Administrative Courts concerning the meaning of the terms "belonging to", "affiliation or link" with an illegal organisation or the criteria applied to assess such affiliation.[279] As the Venice Commission highlighted in December 2016, the use of "excessively vague terms" in the legislative degrees, in reality, created "large-scale abuses, which cannot be tolerated in a State under the rule of law".[280]

It was certainly not foreseeable to the public servants that their membership of a trade union, their activities at a legally established bank, their usage of a lawful mobile messaging application, their subscription to a regular newspaper, and so on, would mean that they would be considered to be 'affiliated with' an illegal organisation, thereby resulting in their dismissal from public service through a system of "lists" annexed to the emergency legislative decrees.

b) <u>The existence of a legitimate aim</u>

The Ankara Administrative Courts conclude that the interference pursued the legitimate aim of the "protection of national security, public order and the rights and freedoms of others" on the ground that "the presence of persons with membership, affiliation, association or connection to FETÖ/PDY may lead to serious disruption of public order".[281] The courts explain that "due to the necessity to take decisions in an urgent manner and in order to protect national security, public order and the rights and freedoms of others, dismissals from public office have been established by legislative decrees issued during the state of emergency".[282] The courts refer to the Commission findings that "it was inappropriate to reinstate the plaintiff, who would have exercised more or less public power, to public office" and thus decided that "the interference with the right to respect for private life was based on a legitimate aim".[283]

The courts mainly maintain that due to the public servants' exercising of a state's sovereign power, Türkiye had a legitimate interest in dismissing thousands of public servants to protect national security, public order and the rights and freedoms of others. Even though the courts mention the exercise of "more or less public power", they do not make any distinction, say, between a police officer and a teacher or between a judge and a cook.

c) <u>The necessity of the interference in a democratic society</u>

The Ankara Administrative Courts find that the interference was necessary in a democratic society, by adopting the following uniform wording in their decisions:

[278] *Ibid.,* § 208.
[279] *Ibid.,* § 208.
[280] Venice Commission's 2016 Report, p. 23, para. 98.
[281] A uniform text that exists in almost all the decisions.
[282] *Ibid.*
[283] *Ibid.*

> "The interference with the plaintiff's right to respect for private life arose as a compelling social need. As a matter of fact, it is clear that there is a 'general danger threatening the existence of the nation' due to the coup attempt on the night of July 15, 2016 (Alparslan Altan v. Turkey, no. 12778/17, §§ 71-75, 16 April 2019). This danger is in the nature of an extraordinary crisis affecting public order, which poses a threat to the existence of the nation and the State organisation. However, considering the atypical and unique sui generis nature of FETÖ/PDY, which is the perpetrator of the coup attempt, the measure taken against this danger and terminating the plaintiff's use of the authority arising from the public power is also due to the necessity arising from the specific situation and the nature of the perpetrator of this situation, which aims at taking over the State. Therefore, to return to the ordinary democratic order …, the measure terminating the use of public power by the plaintiff, who has an affiliation and connection with the organisation in question, was necessary in a democratic society".[284]

However, the interference in question is not temporary; it is a life-long ban from public service, resulting in a highly damaging stigma for having an alleged connection with "a terrorist organisation". It is, therefore, not possible to reconcile such a blanket permanent ban with the proportionality requirement.

Furthermore, the dismissed public servants face such a serious loss of credibility that continuing to practise their profession in the private sector is also impossible. In Türkiye, they are branded as *"KHK'li",* meaning dismissed "by an emergency legislative decree". The Turkish Social Security Institution *(Sosyal Güvenlik Kurumu)* has added a tag, "Code 37", to dismissed public servants' State insurance records, which is visible to all employers in Türkiye when recruiting an employee.[285] Even though the tag itself is not, as such, a legal obstacle to recruiting a former public servant, in practice it deters employers when they see it on records, who then refrain from recruiting the former public servant.[286] Such a restriction on a former public servants' professional activities, that extends to the private sector, is a clear violation of Article 8 of the ECHR, as has been confirmed by the ECtHR in various comparable cases.[287]

d) Derogation in time of emergency

The Ankara Administrative Courts note that on 23 July 2016 Türkiye sent the Secretary General of the Council of Europe and the Secretary General of the UN a notice of derogation under Article 15 of the Convention due to the declaration of a state of emergency in Türkiye on 21 July 2016. The administrative courts state that in terms of the measures to be taken to overcome the "public emergency threatening the

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[284] *Ibid.*

[285] Hacı Bişkin (Translation: Sebla Küçük), "SPECIAL REPORT | Decree Laws and Code 37: The words that make employers turn away", Dokuz8haber, 17 March 2022; Hacı Bişkin, "Shut out of jobs and ostracized, former Turkish civil servants dismissed via state of emergency decrees struggle to find jobs", duvar.english, 18 March 2022.

[286] See, for example, an interview conducted with Mesut, a public servant dismissed from public service by Legislative Decree no. 672, who described what happened during a job interview with an online shopping company as follows: "After the job interview, they wanted to hire me right away. They were going to register me as a new recruit on the [social security] system, but then the recruiter asked me 'Were you dismissed from civil service via a Decree Law?' They said, according to the official procedures of the company, they had to ask! They decided not to hire me because of that. I told them it was an act of discrimination and a violation of human rights. They wouldn't listen to me, and said 'This is the decision made by our company.' After that interview, I stopped looking for a job". Hacı Bişkin (Translation: Sebla Küçük), "SPECIAL REPORT | Decree Laws and Code 37: The words that make employers turn away", Dokuz8haber, 17 March 2022.

[287] See for example, *Sidabras and Dziautas v Lithuania*, nos. 55480/00 and 59330/00, §§ 57-58, ECHR 2004-VIII; *Ivanovski v the former Yugoslav Republic of Macedonia*, no. 29908/11, § 184, 21 January 2016.

life of the nation", the State has a much wider margin of appreciation than in ordinary times, referring to the case of *Ireland v. the United Kingdom* [GC] (1978).[288] The courts add that the right to respect for private life is not among the rights listed under Article 15(2), in respect of which derogation is not possible. They conclude that "the interference with the plaintiff's 'right to respect for private life' by the [Commission's] decision not to reinstate the plaintiff to the public office on the grounds that s/he has ties with FETÖ/PDY, which is the perpetrator of the said attempt, is a measure to the extent required by the situation within the framework of the European Convention on Human Rights, the Constitution and international law".[289]

Article 15(1) of the Convention provides that any derogation measure may be taken "to the extent strictly required by the exigencies of the situation", thereby applying a proportionality condition. As indicated by the ECtHR in *Ireland v. the United Kingdom* [GC] (1978), "States do not enjoy an unlimited power" in overcoming such a public emergency.[290] In this situation, the measure in question is not proportionate under the case law of the ECtHR and Türkiye goes beyond the extent strictly required by the exigencies of the situation because:

- the measure of dismissal from public service is permanent in nature;
- it is also seriously deleterious to the public servants' employment prospects in the private sector; and
- it results in the very serious stigma of being connected with a "terrorist organisation" due to the presence of their names in publicly available lists appended to the emergency legislative decrees.

2. Right to a Fair Trial

The plaintiffs claim that they were dismissed by legislative decree without adequate reasoning and without their arguments being properly considered and that, therefore, their right to a fair trial was violated. In the decisions reviewed, the Ankara Administrative Courts in general do not examine these claims. In cases where they do examine these arguments, they do so by adopting uniform and general reasoning, without making any individualised assessment.

The courts begin their analysis by stating that the case is not about a disciplinary penalty of dismissal and that "it is not possible to apply disciplinary procedures employed in imposing a disciplinary penalty to the present case".[291] The courts state that "it is not possible to apply the ordinary procedural safeguards at the time of dismissal from public service, such as opening a disciplinary investigation, assigning an investigator, taking the defence [of the public servant]".[292] They also refer to the Council of State's decision of 4 October 2016 which "characterises the dismissals from public service by the legislative decrees as permanent and final 'extraordinary' measures, different from the sanctions imposed for the commission of a criminal or disciplinary offence".[293]

In cases concerning different plaintiffs, the courts adopted the following uniform reasoning:

[288] *Ireland v. the United Kingdom* [GC], no. 5310/71, 18 January 1978, § 207, Series A no. 25.
[289] A uniform text included in almost all the decisions.
[290] *Ibid.*
[291] *Ibid.*
[292] *Ibid.*
[293] Referring to Council of State, E:2016/8196, K:2016/4066, 4 October 2016.

> "Those dismissed from public office may apply to the Inquiry Commission on the State of Emergency, which is recognized as an effective remedy by both the Constitutional Court and the European Court of Human Rights. If the application is rejected, judicial review [before the Ankara Administrative Courts] is possible as in the present case. At the trial stage, defence can be made with all kinds of evidence specified in relevant laws. In accordance with the principle of ex officio investigation, the judicial authorities investigate all issues related to the subject matter of the case in favour and against the plaintiff, without being limited to the requests of the relevant parties. Therefore, [the court rejects] the plaintiff's allegation that his/her right to a fair trial was violated because s/he was not given the right of defence".[294]

The dismissed public servants can appeal to the Ankara Administrative Courts against the Commission's decision. However, the form of judicial review provided in practice does not meet the requirements of Article 6 of the Convention. The main question is whether the plaintiffs benefit from "a genuine examination" of their submissions during the proceedings before the Ankara Administrative Courts and, therefore, from "adequate review" in compliance with Article 6.[295]

As demonstrated by the examples referred to throughout this report, in practice, the administrative courts simply repeated the findings of the Commission, cited "evidence", if any, obtained during criminal proceedings against the same plaintiff, and then concluded perfunctorily that the plaintiff had an affiliation with an illegal organisation and that, therefore, the Commission's decision not to reinstate the plaintiff to public service was lawful.

The plaintiffs made various submissions: – for example, that the Commission's evaluation was based on subjective criteria; that legal activities that were permitted by the State cannot be used as evidence of "affiliation with a terrorist organisation"; that the claims made in witness statements were unfounded; that the opinion provided by the superior public servant or the last public institution was merely subjective and a form of profiling. However, the plaintiffs' arguments were not properly considered or assessed by the Ankara Administrative Courts. Nor did the courts establish any causal link between a "criterion" (*e.g.*, depositing money into a bank account, being a member of a trade union, subscribing to a newspaper) and a connection with an illegal organisation.

According to the principle of equality of arms – one of the features of the wider concept of a fair hearing – "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent".[296] The Ankara Administrative Courts mainly rely only on information and documents submitted by the respondent public institution, such as a "personnel information file", without considering the plaintiffs' arguments regarding the criteria arbitrarily adopted by the Commission. These shortcomings clearly place the public servants at a significant disadvantage *vis-à-vis* the respondent Ministry, in contravention of the principle of equality of arms and of the rules of adversarial proceeding.

[294] A uniform text included in almost all the decisions.
[295] See *Obermeier v. Austria*, 28 June 1990, § 68, Series A no. 179; *Denisov v. Ukraine* [GC], no. 76639/11, § 67, 25 September 2018.
[296] See *APEH Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, § 39, ECHR 2000-X.

Article 6 of the Convention obliges the courts to give adequate reasons for their decisions. The reasons given by the administrative courts in establishing the plaintiff's alleged affiliation with an illegal organisation are wholly inadequate and do not enable the dismissed public servants to make effective use of their right of appeal to the Ankara Regional Administrative Court.[297] The "formulaic" reasoning provided by these courts in relation to the plaintiffs' human rights claims clearly demonstrate that the courts do not engage in any individualised assessment.

Accordingly, the plaintiffs did not benefit from "a genuine assessment" of their submissions during the proceedings before the Ankara Administrative Courts. Contrary to the conclusions reached by the courts in relation to the right to a fair trial, the extent of the judicial review provided by these courts does not constitute an "adequate review" in compliance with Article 6 of the Convention.

In addition, the dismissals took place directly by legislative decrees which were issued between July 2016 and July 2018 under the state of emergency. Almost six years after the adoption of such decrees, the interpretation of essential aspects of the reasoning, on the basis of which public servants were not reinstated to public service, is still changing at the first-instance level.[298] The Ankara Administrative Courts issue contradictory decisions concerning the same facts and evidence. There is still no definitive settlement of the interpretation given by these courts to various criteria that are believed to justify the dismissal from, and non-reinstatement to, public service. According to its established case-law, the ECtHR considers that "in the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty".[299] This legal uncertainty continues to deprive the dismissed public servants of a fair trial before the Ankara Administrative Courts.

3. Principle of Presumption of Innocence

The plaintiffs argue that the Commission's decision violates the principle of the presumption of innocence under Article 6(2) of the ECHR, reiterating that the criminal proceedings against them were concluded with a decision not to prosecute, a decision of acquittal or a non-final conviction decision. However, the administrative courts disregard these claims and instead issue the following formulaic, one-paragraph evaluation:

> "The case under consideration is not a criminal case, and in some cases, as in the case of the plaintiff, there are investigations opened/completed by the Public Prosecutor's Office against those dismissed from public service. If, as a result of criminal investigations and prosecutions, public servants are sentenced for membership or assistance to terrorist organisations, the administrative judicial authorities may decide to dismiss the case without the need for any further evidence and investigation due to this sentence. This is because the element of 'membership', which is one of the grounds [cited in the legislative decrees] for dismissal from public office, has been determined by a court decision. However, in the legislative decrees, the grounds for dismissal from public service are not limited to membership. The existence of affiliation and connection, which are not the subject of criminal proceedings, are also considered among the legal grounds for dismissal from public

[297] See *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001.
[298] *Mutatis mutandis*, *Tudor Tudor v. Romania*, no. 21911/03, § 30, 24 March 2009.
[299] *Tudor Tudor v. Romania*, § 31; *Păduraru v. Romania*, no. 63252/00, § 98, ECHR 2005-XII (extracts).

service. Therefore, even if 'a decision not to prosecute' has been made as a result of the investigations initiated by the Public Prosecutor's Office, the administrative court is obliged to examine the action of dismissal in terms of affiliation and connection. Therefore, the court disregarded the plaintiff's allegation [of violation of the principle of presumption of innocence]".[300]

Although the Ankara Administrative Courts simply disregard the dismissed public servants' complaints, the question that remains to be answered is whether their right to the presumption of innocence was respected during the administrative proceedings. As discussed in Section V(B) above, the principle of presumption of innocence may be applicable and may have been breached in proceedings before the Ankara Administrative Courts.

4. Freedom of Association

The Ankara Administrative Courts consider membership of a trade union which was closed down by the emergency legislative decree as justification for the dismissal of the plaintiffs.[301] Although the plaintiffs argue that their right to freedom of association has been violated, no assessment of such arguments was made by the Ankara Administrative Courts in the decisions reviewed.

VI. ANALYSIS OF DECISIONS OF THE ANKARA REGIONAL ADMINISTRATIVE COURT

If their cases are rejected by the Ankara Administrative Courts, the plaintiffs are entitled to appeal to the Ankara Regional Administrative Court. If the Ankara Administrative Court decides in favour of the plaintiff by annulling the Commission's decision, the respondent institution, i.e., the relevant Ministry, can appeal to the Regional Court.

A total of 99 appeal decisions made by the Ankara Regional Administrative Court were reviewed in preparation for this report, 90 of which concern appeals by the plaintiffs and nine of which concern appeals by the respondent institution. The Regional Court rejected the appeal in 87 cases lodged by the plaintiffs and accepted only three cases (a rejection rate of 97%). In appeals brought by the institution, the Regional Court rejected just one case and allowed the appeals in eight cases (an acceptance rate of 89%). Regardless of the party who brought the appeal, the plaintiffs lost at the appeal stage in 95 appeals out of 99 (a loss rate of 96%). The following table shows the number of appeal decisions according to the Division rendering the decision and the year in which the decision was given.

	Appeal by the plaintiff (90 cases)		**Appeal by the respondent institution (9 cases)**	
Division no. / Year	Rejected	accepted	rejected	accepted
13 / 2019	15*			
13 / 2020	22		1	6
13 / 2021	18	3		1
14 / 2021	32			1
Total	**87**	**3**	**1**	**8**

[300] A uniform text included in the decisions.
[301] See above, Section V(C)(2).

** One appeal was rejected due to the expiration of 30-day period.*

In general, the content of the Regional Court decisions consists of the following sections:

1. Subject-matter of the request
2. Summary of the decision of the court of first instance, i.e., Ankara Administrative Court
3. Appellant's claims
4. Summary of the defence of the other party
5. Outcome of the decision

In some decisions, there is a section entitled "legal assessment" before the last section, "outcome of the decision". However, that section consists of verbatim repetitions of what the court of first instance stated in relation to the "nature of the case", "dismissal as an extraordinary measure", "definition of the terms 'affiliation' and 'link'", and "relationship of the case with criminal proceedings" (see above, sections (V)(A)(6) and (V)(B)). As part of its legal assessment, the Regional Court may, in some cases, evaluate the evidence taken as the basis for the decision of the court of first instance, *e.g.*, a conviction decision, usage of ByLock, membership of a trade union, and holding a bank account with Bank Asya. However, this evaluation also replicates the general statements made by the court of first instance in relation to each criterion (see above, section V (C) (1,2,3)).

The section "legal assessment" ends with the Regional Court answering the question "whether the intervention by way of dismissal from public service is within the limits of the Constitution and international law". The Regional Court gives the same answer to this question given by the court of first instance, by using verbatim statements in relation to the principle of proportionality and derogation in time of emergency, which are clearly simply extracted from the decision of the court of first instance. The Regional Court does not even change the structure of the reasoning of the court of first instance.

The decisions taken by the Regional Court follows a trend of increasingly shortened decisions without adequate reasoning for the rejection of the appeal brought by the plaintiff. Whilst in the majority of 2019 decisions examined, the decisions were approximately nine pages long, the 2020 and 2021 decisions, however, were in general between 2-3 pages. The latter no longer includes the sections headed "legal assessment" and "summary of the decision of the court of first instance". Based on information available in the appeal decisions, it is not always possible for external readers to assess the evidence on which the court of first instance based its rejection decision.

In general, the Regional Court does not carry out any individualised legal assessment of the main arguments raised by the appellant public servants. Considering that the court of first instance does not properly evaluate these arguments, the Regional Court should carry out its own examination. However, the Regional Court fails to set out any specific reasoning for the rejection of these appeals, and simply states that:

> *"[t]he decision ...given by the Ankara Administrative Court is in accordance with the procedure and law, and since there is no reason for its annulment, the court has decided to reject the appeal"*.

In 55 decisions out of 87 rejected appeals brought by the plaintiffs (63%), the decision concerning the merits of the case only consists of the same formulaic sentence cited above. In these decisions, the Regional Court did not explain whether or how it examined any of the plaintiffs' arguments. In the

remaining decisions, the Regional Court provides an explanation in a few paragraphs which is based on the same reasoning given by the administrative court.

In some cases, the Regional Court extends the scope of the grounds on the basis of which the court of first instance rejected the case. In other words, the court goes beyond the evidence relied upon by the court of first instance and cites other facts as the basis for rejecting the appeal. For example, in one case the Regional Court considered the participation of the plaintiff in a press conference that was organised by a trade union closed down by a legislative decree as additional evidence revealing the plaintiff's relationship with the Organisation. Notably, the Regional Court disregarded the fact that the plaintiff was exercising his/her right to freedom of assembly and association while participating in this press statement organised by a legally established trade union.

With respect to allegations of human rights violations, the appellant public servants argue that the Commission did not examine these allegations and that the rejection of the case by the Ankara Administrative Court did not remedy these violations. They emphasise that the Ankara Administrative Court did not conduct a proper legal examination in terms of their fundamental rights and freedoms. In particular, they make, *inter alia*, the following claims in respect to alleged human rights violations:

- dismissal from public office is contrary to the principle of proportionality;
- their right to a fair trial was violated due to the dismissal from public office without an investigation and without taking proper account of their defence;
- the use of statements in the decisions of the Commission and of the Ankara Administrative Court, which imply that they are "a *member* of a terrorist organisation", violates the principle of presumption of innocence;
- the fact that it is deemed sufficient for dismissal from public office to have an 'affiliation and contact' with the Organisation violates the principle of the foreseeability of legal provisions;
- the administrative court rejected the case without examining many of the arguments raised in the petition, which might have affected the outcome of the case on the merits, thus violating the right to a reasoned decision;
- the publication of the plaintiff's name and other personal information in the Official Gazette as well as on the Internet violates the right to respect for private life under Articles 70 and 129 of the Constitution;
- the right to education has been violated since they have had difficulty in finding a suitable job commensurate with their level of education due to the arbitrary termination of their employment in public service;
- the right to property has been violated because of the consequences of the dismissal from public service, such as the inability to earn a salary, or benefit from social security and the deprivation of pension rights.

In 99% of the decisions examined, the Regional Court fails to examine any of these complaints.

As noted above, in only three decisions out of 90 appeals brought by the plaintiffs did the Regional Court accept the appeals, reversing the Ankara Administrative Court's decision. In those three cases, the Regional Court ordered the payment of salaries that had not been paid since the date of the dismissal to the

public servant.[302] However, the Regional Court did not address human rights violations alleged by the plaintiffs in any of these three decisions.

In eight decisions out of nine appeals brought by the respondent institution, the Regional Court accepted the appeal, reversing the decision of the Ankara Administrative Court. This meant that the plaintiffs who had been reinstated to public service after the administrative court's decisions, were then subject to a second dismissal.

In each of these eight decisions, the Regional Court reversed the decision of the administrative court using the *same* reasoning given by the Commission as to the applicant's affiliation with an illegal organisation. The Regional Court does not provide any clear reasoning as to why it reached a different conclusion from that of the administrative court concerning the same facts. The administrative court's and the Regional Court's assessments of the same "evidence" are frequently contradictory, without there being a clear explanation for the differences. For example, in one case concerning the same plaintiff, the court of first instance concluded that membership of a trade union could not be considered as a justification for the plaintiff's affiliation with an illegal organisation for the following reasons:

> "*the membership of the trade union is open to all public servants; civil servants who are not affiliated with [an illegal organisation] were also targeted to become members of this trade union; furthermore, the motivations of the public servants to become a member of trade union in our country may stem from reasons unrelated to [illegal organisations], such as benefiting from the [trade union's] legal support or social opportunities [provided by the trade union], pressure from the manager*…"

However, the Regional Court, referring to the same evidence, held that membership of a trade union showed "the plaintiff's affiliation and contact with a terrorist organisation within the group consciousness through a trade union that seemingly looks legal".[303] It did not explain how it arrived at a sharply different conclusion from the court of first instance.

The examination of 99 appeal decisions reveals that these appeals took several years.[304] For example, in one appeal decision made by the 13th Division of the Regional Court in 2021, the plaintiff obtained this decision four years and 304 days after the dismissal by legislative decree. In another decision made by the 14th Division of the Regional Court in 2021, the plaintiff received the decision five years and seven days after the dismissal. In the current system of domestic remedies, the public servants have no choice but to wait for an excessive amount of time since the date of their dismissal.

In their appeal, the parties may also request a stay of execution of the decision of the court of first instance. In addition to 99 appeal decisions, nine stay of execution decisions issued by the Regional Court were reviewed in preparation of this report. All of these decisions concern requests made by the respondent institution. In a petition submitted to the Regional Court by the Ministry of National Education, the Ministry argued that the court should suspend the execution of the decision of the court of first instance since it "is

[302] Article 10 of Law no. 7075 stipulates that the financial and social rights corresponding to the period from the beginning of the month following the date of their dismissal from public service to the date of their reinstatement shall be paid to those who take office again.
[303] Ankara Regional Administrative Court 13th Administrative Division, 2020.
[304] For official statistics as to the length of proceedings before the Ankara Administrative Courts and Regional Court, see Sections IV(A)(3)(b) and IV(B)(3)(b).

clearly contrary to the law and it is obvious that irreparable or impossible damages will arise if the appointment [of the plaintiff to public service] occurs".[305]

In nine stay of execution decisions reviewed, the Regional Court accepted all the requests made by the respondents. This meant that the plaintiffs who were reinstated after the administrative court decisions in their favour had to stop working until the Regional Court issued its appeal decision. Therefore, the risk of 'second dismissal' not only exists as a result of the appeal decision (as explained above) but also arises even before the appeal decision if the Regional Court grants a stay of execution.

An examination of the nine stay of execution decisions reveals that the plaintiffs who were successful at first instance, were subject to a stay of execution within an average of 207 days after the decision of the Ankara Administrative Court. The shortest of the stay of execution decisions was issued 78 days after the administrative court decision, while the longest was 314 days. It follows that the plaintiffs who received a court decision that resulted in their reinstatement to public service constantly faced uncertainty and stress because of the risk of the suspension of that decision, and thus of their employment, anytime within 3,5 months to 11 months after the decision of the Ankara Administrative Court.

On the other hand, the Regional Court, in general, does not accept requests for a stay of execution made by the plaintiffs. Within 99 appeal decisions reviewed, there were five decisions in which the Regional Court gave its decision on the merits without giving a separate decision about a stay of execution, because it considered that "the file was finalised at the appeal stage". Four of these requests were made by the plaintiff and one was made by the respondent institution.

VII. ANALYSIS OF DECISIONS OF THE COUNCIL OF STATE (*DANIŞTAY*)

As is discussed in chapter VI above, the Ankara Regional Administrative Court rejected the appeals brought by the dismissed public servants in 97% of the 90 appeals reviewed. Therefore, many plaintiffs also appealed to the Council of State, the last-instance appeal court in administrative proceedings in Türkiye. In the majority of these cases, the Council of State rejected the dismissed public servants' appeal without making any in-depth legal assessment.[306]

This section firstly explains the limited scope of judicial review carried out by the Council of State. Secondly, it examines the Council of State's contradictory decisions with respect to the same criteria. Finally, it demonstrates that the decisions of the Council of State have revealed procedural shortcomings by the Commission, which were not considered by the lower courts.

A. Limited Scope of Judicial Review

The Council of State applies the same criteria as that applied by the Commission and lower courts (as explained in Section V(C) above) in assessing the plaintiffs' affiliation with an illegal organisation, so as to justify their dismissal from public service. It does not assess whether these criteria can be considered as a sufficient legal basis for the plaintiffs' dismissal from public service. In other words, the Council of

[305] The respondent Ministry refers to Articles 27 and 52 of Administrative Procedure Law no. 2577.

[306] The Council of State rejected the plaintiffs' appeal without any legal examination of the plaintiffs' arguments by the following uniform statement: "the decision of the Regional Administrative Court […] and the grounds on which it was based were in accordance with the law and procedure, and since there was no reason for its reversal, the appeal request was rejected, and the decision was upheld". See *e.g.*, Council of State 5th Division, E: 2022/464, K: 2022/5151, 21/06/2022; Council of State 5th Division, E: 2022/991, K: 2022/5169, 21/06/2022; Council of State 5th Division, E: 2020/677, 2022/3665, 24/05/2022; Council of State 5th Division, E: 2022/870, K: 2022/5165, 21/06/2022.

State failed to evaluate the reliability or legitimacy of these criteria in establishing a link with an illegal organisation. Instead, it simply examines whether the evidence available in a particular case is sufficient to establish any of the criteria.[307]

To illustrate this point, take the Council of State's assessment regarding the criterion of using the ByLock messaging application. The Council of State considers the mere fact of downloading or using ByLock as evidence indicating affiliation or contact with the Organisation, thereby justifying dismissal from public service. In its decision dated 11 October 2022, the Council of State cited the findings of the Assize Court with respect to the usage of ByLock by the plaintiff and rejected the plaintiff's appeal, holding that the plaintiff had an affiliation with an "armed terrorist organisation".[308] In another case on appeal, the plaintiff claimed that an expert report confirmed that he was not a ByLock user and that the CGNAT[309] records could not be used as evidence of ByLock usage. However, the Council of State did not examine these arguments and rejected the plaintiff's appeal.[310]

The Council of State has failed to explain the alleged link between the usage of a messaging application and "affiliation with an armed terrorist organisation". It neither examines "the content of the messages exchanged" nor "the context in which they were exchanged".[311] Furthermore, as reiterated by the ECtHR, there is insufficient evidence to establish that this messaging system was exclusively used by members of a "terrorist organisation".[312] Yet all the administrative courts in Türkiye, from the first to the last instance, proceeded on the an assumption that this was the case.

In certain cases, the Council of State has interpreted the rights of public servants even more restrictively than the lower courts and has reversed the Regional Court's decisions made in favour of the public servants. For example, in an appeal lodged by the relevant Ministry before the Council of State against the Regional Court's decision to order the reinstatement of the plaintiff to public service, the Council of State reversed the Regional Court's decision.[313] Whereas the Regional Court considered that the fact of the plaintiff's membership of a trade union for 16 months between August 2014 and November 2015 and the subscription to the Zaman newspaper was not sufficient to establish the plaintiff's affiliation with an illegal organisation, thereby not justifying dismissal from public service; the Council of State regarded these factors as being sufficient and reversed the Regional Court's decision.[314]

Furthermore, similar to the lower courts, the Council of State has also failed to address the appellant public servants' allegations of human rights violations as a result of their dismissal from public service. Therefore, the scope of the judicial review by the Council of State does not go beyond merely an examination of the "criteria" justifying the dismissals.

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[307] See for example, Council of State 5th Division, E: 2020/2851, K: 2022/1189, 22/03/2022 (Bylock, Bank Asya and trade union membership for 3,5 months); Council of State 5th Division, E: 2020/7518, K: 2022/1704, 04/04/2022 (trade union membership for 16 months and subscription to the Zaman newspaper); Council of State 5th Division, E: 2020/6908, K: 2022/6202, 04/10/2022 (witness statement taken in the criminal proceedings against the plaintiff); Council of State 5th Division, E: 20219/6092, K: 2022/335, 048/02/2022 (anonymous witness statements, including "Garson").

[308] Council of State 5th Division, E: 2021/1490, K: 2022/6515, 11/10/2022.

[309] Carrier-Grade Network Address Translation.

[310] Council of State 5th Division, E: 2021/1608, K: 2022/6518, 11/10/2022.

[311] See *Akgün v. Turkey*, § 173.

[312] *Ibid.*

[313] Council of State 5th Division, E: 2020/7518, K: 2022/1704, 04/04/2022.

[314] *Ibid.*

B. Contradictory Decisions

The Council of State's decisions, in some instances, have been contradictory in that it reached different conclusions with respect to the same evidence. Conflicting rulings by the court of last instance do not provide clear or consistent guidance for the lower courts, thereby making the decisions unforeseeable for dismissed public servants at every stage of the administrative proceedings.

To illustrate this point, take the Council of State's assessment regarding the criteria of holding a bank account with Bank Asya and being a member of a trade union. Two public servants who were dismissed by Emergency Legislative Decree no. 672 brought separate appeals before the Council of State on different dates. The main criteria relied on by the lower courts were, among others, their transactions at Bank Asya, and their membership of a trade union. The first appellant argued as follows:

> "His Bank Asya account transactions consisted of ordinary banking transactions and his deposit account should be evaluated within the scope of his right to property; the membership of a trade union is a constitutional right; and the dismissal from public office without the right of defence is unlawful".[315]

The second appellant, in more detailed submissions, claimed that:

> "No one can be punished for an act that is not criminalised by the law in force at the time of its commission; legal activities carried out during the period when the congregation ("cemaat") was considered a lawful entity cannot be used as a basis for terrorism charges after it was declared a terrorist organisation.
>
> The information on his membership of a trade union was obtained after his dismissal from public office, and therefore cannot be used as a basis for the action subject to the lawsuit. Bank Asya operated as a bank established with the permission of the State. Therefore, it is a bank [owned by] a structure that was not qualified as a terrorist organisation before 26 May 2016. It is not possible to make banking transactions made before the said date as a basis for his affiliation [with a terrorist organisation].
>
> His dismissal violated the principles of presumption of innocence, non-retroactivity of crimes and punishments, and no crime and punishment without law, as well as many rights guaranteed by the Constitution".[316]

On 19 October 2021 and 23 November 2021, the Council of State rejected the appeals brought by the first and second appellants, respectively, with a uniform statement as follows:

> "the decision of the Appeal Court… and the grounds on which it was based were in accordance with the law and procedure, and since there was no reason for its reversal, the appeal request was rejected, and the decision was upheld".

By these decisions, the court of last instance accepted the criteria relied on by the lower courts – bank account transactions at Bank Asya and membership of a trade union – as justifying the dismissal of a public servant. It disregarded the ILO's findings of 24 March 2021 and, in effect, "punished" the public

[315] Council of State 5th Division, E: 2021/2491, K: 2021/3171, 19/10/2021.
[316] Council of State 5th Division, E: 2021/1668, K: 2021/3928, 23/11/2021.

servants "for having exercised their right to join organizations of their own choosing guaranteed by Article 2 of Convention No. 87".[317]

On 15 June 2022, around seven months after these decisions, the Council of State rendered a totally different decision with respect to the same criteria.[318] In this case, the applicant was a teacher dismissed by Emergency Legislative Decree no. 672. The Commission, the Ankara Administrative Court, and the Regional Administrative Court rejected his application based on the following reasons:

- increasing the amount of money in his account at Bank Asya after the date instructed by the leader of the the Organisation,
- being a member of the Active Educators Trade Union for a total of 38 months,
- the fact that his children were enrolled in a private secondary school between 2014 and 2016, which was closed down on the grounds of belonging to, affiliation or contact with the Organisation, and,
- payments to the *Kimse Yok Mu* Solidarity and Aid Association between 1 January 2014 and 25 October 2014.

The Council of State accepted the appeal made by the dismissed teacher and reversed the decision of the lower courts, holding that:

- his banking transactions were routine banking activities,
- his trade union membership, which was maintained without taking an active role in the trade union in the form of an executive or similar position, was not, on this basis alone, a matter that could establish that the applicant acted with an organisational purpose,
- there is no concrete finding, witness statement or any other information and document in the case file that could reveal that the plaintiff acted with an organisational purpose, as opposed to acting with an educational motive for his children to attend a school affiliated with the Gülenists,
- there is no concrete information and documentary evidence that his payment to the *Kimse Yok Mu* Association was not made out of humanitarian feelings but as an aid to the Organisation.

The Council of State's decisions of 19 October 2021 and 23 November 2021 and the decision of 15 June 2022 were contradictory in that the Court reached completely different conclusions with respect to the same criteria. Although the last decision may represent a sign of hope for dismissed public servants who are in similar situations, it is totally unclear why the Court did not apply the reasoning adopted in the last decision to the first two cases. These decisions clearly demonstrate that even the court of last instance could not ensure a sufficient degree of legal certainty to the situation faced by public servants, years after their arbitrary dismissals.

C. Procedural Shortcomings of the Commission as Revealed by the Council of State

The jurisprudence of the Council of State has revealed additional procedural shortcomings in the Commission's examination of the applications brought by dismissed public servants.[319] In various cases,[320] the Council of State has found that a member of the Commission (not identified in the decisions) had been

[317] See ILO Committees' Reports, p. 11, para. 27.
[318] Council of State 5th Division, E: 2021/7730, K: 2022/4892, 15/06/2022.
[319] For a detailed analysis regarding the Commission's shortcomings, see TLSP's 2019 Report, pp. 23-44.
[320] See, among others, the Council of State's 5th Chamber, E: 2022/3126, K: 2022/5005, 17/06/2022; the Council of State's 5th Chamber, E: 2019/3733, K: 2022/ 4995, 17/06/2022; the Council of State's 5th Chamber, E: 2020/882, K: 2022/5002, 17/06/2022; the Council of State's 5th Chamber, E: 2020/558, K: 2022/3453, 24/05/2022.

a chief investigator at the Ministry of Interior who prepared a report on the Organisation, which included the results of the investigation against certain applicants. That member of the Commission voted to reject many applicants' requests for reinstatement to public service.

The Council of State ruled that "the Commission exercises a quasi-judicial function. Therefore, it shall be impartial and appear to be impartial so as to leave out any suspicion".[321] The fact that the chief investigator, who already expressed his opinion regarding the alleged connection of the applicants with the Organisation, subsequently rules on the same subject as a Commission member violates the principles of "impartiality and objectivity". In these cases, the Council of State reversed and remanded the decisions of the Regional Court for the assessment of the applicants' case in light of this ruling. The fact that the same person could act as both "investigator" and "arbiter" in the same dispute demonstrates that lack of impartiality of the Commission.

CONCLUSION

Judicial review of the Commission's decisions before administrative courts fail to provide the dismissed public servants with an effective domestic remedy in Türkiye. A comprehensive analysis of 435 decisions of the Ankara Administrative Courts, 31 interlocutory decisions, 99 decisions of the Ankara Regional Administrative Court, nine stay of execution decisions of the Regional Court and jurisprudence of the Council of State reveals various shortcomings in the functioning and effectiveness of the judicial review process. This approach taken by the courts undermines the rights and freedoms of individuals

The judicial review process of the Commission's decisions before the Ankara Administrative Courts and the appeal process before the Regional Court manifestly fails to offer a reasonable prospect of success for the dismissed public servants. The Ankara Administrative Courts rejected 369 cases on the merits out of 413 decisions reviewed within the scope of this report (89%), and the plaintiffs lost at the appeal stage before the Regional Court in 95 appeals out of 99 (96%).

Only a limited number of "specially authorised" Ankara Administrative Courts (nos. 19-22 and 24-28) exclusively examine actions for annulment brought by thousands of dismissed public servants. This increases the backlog in these courts and eliminates the possibility of the cases being heard within a reasonable time. The plaintiffs are therefore required to wait for excessively long periods – several years – while their cases work their way through the system of appeals.

Similar to the practice in the Commission, the administrative courts refer to the novel concepts of "affiliation" and "link" with a "terrorist organisation" as justification for dismissal from public service. Yet, they do not provide any clear definition or objective criteria to determine the scope of these vague terms. The administrative courts apply these concepts in an unforeseeable manner, which brings about contradictory outcomes in factually similar cases. The review of their decisions reveals that the courts have failed to clarify these concepts within the framework of the rule of law, legal certainty, and predictability.

The Ankara Administrative Courts, the Regional Court and the Council of State adopt the same "criteria" established by the Commission to assess the plaintiff's alleged "affiliation" and "link" with a "terrorist organisation" without adequately considering the relevance or the reliability of the evidence. The courts consider the plaintiffs' ordinary and commonplace actions – such as, depositing money into a bank account at Bank Asya, being a member of a trade union/association, participating in meetings or demonstrations of lawful organisations or political parties, sending children to certain private schools, making payments to media outlets, and subscribing to a newspaper or magazine – as constituting legitimate

[321] *Ibid.*

grounds for their dismissal. The courts rely on abstract, subjective pieces of "evidence" which have been prepared about the plaintiff, such as "personnel information files", "social environment research reports", "profiling lists" given by anonymous witnesses, as well as opinions provided by the public institution and superior officer about the plaintiff, all of which call into question the reliability of the administrative court decisions.

In the decisions reviewed, the administrative courts proceed on the assumption that an affiliation with the Gülenists at any point in the past is equivalent to an affiliation with "FETÖ/PDY" in the present day. Based on this assumption, the courts consider the affiliation with the Gülenists – a group that legitimately existed and functioned in Turkish society – as justification for dismissal from public service. This approach is highly questionable because it equates the plaintiffs' lawful activities that were permitted by the State at the time when they were carried out, with "evidence" of "affiliation with a terrorist organisation".

In the smaller number of decisions analysed in which the administrative courts find an affiliation with the PKK/KCK, this finding largely lacks reasoning. The courts mainly restate the "evidence" invoked by the Commission, provided by the public institution in which the plaintiff used to work, or contained in criminal proceedings sometimes older than a decade, without explaining how it is capable of showing that the plaintiff had a link or affiliation with the PKK/KCK.

The administrative courts fail to adequately address the plaintiffs' claims of human rights violations resulting from their dismissal by legislative decree and the procedure before the Commission, including violations of the right to respect for private life, the right to a fair trial (the principles of equality of arms, presumption of innocence, and the rules of adversarial procedures), and right to freedom of association. In spite of the gravity of the allegations made against the plaintiffs, the administrative courts simply adopt the same formulaic verbatim text in their decisions without an adequately individualised analysis of their claims. This approach taken by the administrative courts undermines the rights and freedoms of individuals.

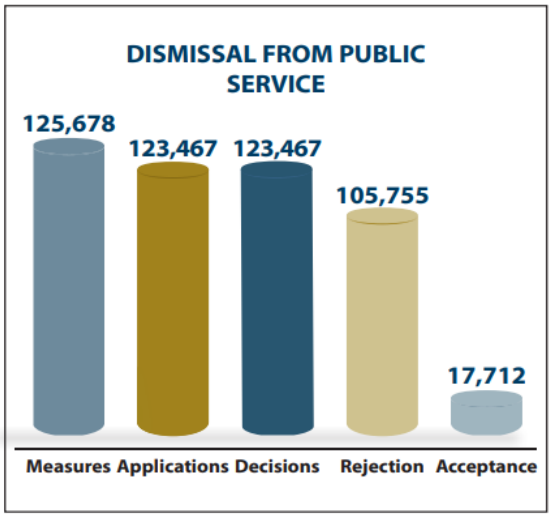
The review of decisions made by the Council of State demonstrates the existence of conflicting rulings by the court of last instance that do not provide clear or consistent guidance for the lower courts, thereby making the decisions unforeseeable for public servants at every stage of the administrative proceedings.

In conclusion, the practice of the Commission (as was examined in the TLSP's 2019 Report) and subsequent judicial review before the administrative courts (as is analysed in this report) show that the domestic remedy established by Emergency Legislative Decree no. 685 has not offered appropriate redress for complaints by the dismissed public servants. In the light of the decisions handed down by the Commission, the Ankara Administrative Courts, the Ankara Regional Administrative Court, and the Council of State, there is a pressing need for a re-examination of the effectiveness of this remedy to ensure access to justice for thousands of dismissed public servants in Türkiye.

ANNEXES

Annex 1: Detailed statistics with respect to type of measures taken by emergency legislative decrees (tables from the Commission's Activity Report (2017-2022), p. 28)

TYPE OF MEASURES	MEASURES	APPLICATIONS	DECISIONS		
			ACCEPTANCE	REJECTION	TOTAL
DISMISSAL FROM PUBLIC SERVICE	125,678	123,467	17,712	105,755	123,467
ANNULMENT OF RANKS OF RETIRED PERSONNEL	3,213	2,534	160	2,374	2,534
CANCELLATION OF SCHOLARSHIP	270	189	16	173	189
CLOSURE OF INSTITUTIONS / ORGANIZATIONS	2,761	1,102	72	1,030	1,102
TOTAL	**131,922**	**127,292**	**17,960**	**109,332**	**127,292**



Annex 2: Summary of different channels through which the dismissals from public service have occurred *on the basis of* the legislative decrees

1) Legislative Decree no. 667, Article 3(1), grants relevant judicial bodies, such as the High Council of Judges and Prosecutors, the power to dismiss the members of the judiciary, i.e., judges and prosecutors. Pursuant to this Article, the plenary HCJP initially dismissed 2,847 judges and prosecutors on 24 August 2016.[322] A further of thousands of dismissals followed it.

According to Article 11(2) of Law no. 7075, dismissed judges and prosecutors are required to apply directly to the Supreme Administrative Court as a court of first instance within 60 days after the dismissal decision becomes final. As of 26 October 2022, 5112 cases were filed with the Fifth Chamber of the Supreme Administrative Court.[323] While 4788 of these cases have been decided, 324 cases are pending for a decision. Notably, of the 4788 cases decided, only 342 cases were decided in favour of plaintiffs (7%).[324]

2) Legislative Decree no. 667, Article 4(1)(a)-(f), requires different institutions answerable to a ministry to dismiss any staff considered as belonging, affiliated or linked to illegal organisations with the approval of the relevant Ministries, *e.g.*, the Ministry of Interior, the Ministry of National Defence.

3) Legislative Decree no. 667, Article 4(1)(g), requires all bodies not answerable to a ministry to dismiss any staff considered as belonging, affiliated or linked to illegal organisations "upon the proposal of the head of unit, with the approval of the director of the recruitment department". This provision established dismissal proceedings based on subjective assessments of the head of unit without any other proof or confirmation mechanism.

These dismissed public servants or public-service employees have brought cases before labour courts in different cities of Türkiye to set aside the decision to terminate contracts.[325] They have claimed, among others, that their dismissals had been unfair and invalid because it had not been based on any valid reason.

4) Legislative Decree no. 375, **Provisional Article 35,** which entered into force on 25 July 2018 (after the end of the state of emergency), requires the dismissal of judges and prosecutors **(Article 35/A)**[326] and other public-service employees in different institutions **(Article 35/B)**[327] for a period of four[328] years from the date when the Provisional Article entered into force[329] if they are considered as belonging, affiliated or linked to illegal organisations. In other words, this provision authorises all the ministries to dismiss from

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[322] High Council of Judges and Prosecutors, decision no. 2016/426, 24/08/2016. See also, *Turan and Others v. Turkey*, nos. 75805/16 and 426 others, §§ 17-18, 23 November 2021.

[323] See press release of the Supreme Administrative Court, 26 October 2022. This number includes cases of judges and prosecutors dismissed under Article 35/A of Provisional Article 35 of Legislative Decree No. 375, which entered into force after the end of the state of emergency.

[324] Press release of the Supreme Administrative Court, 26 October 2022:

> "Of the 4788 cases decided, 4246 cases were dismissed on the merits, 11 cases were dismissed on the grounds that the case was out of time, 51 cases were dismissed on the grounds that the petition was rejected, 15 cases were decided that there was no ground for a decision, and 123 cases were decided that the case was deemed to be not filed.
>
> The number of files in which a decision of annulment was given is 342 and the number of people in whose favor the decision was given is 323 due to reasons such as duplicate lawsuits. There are no files that have yet been finalized on the merits, and since the decisions of the 5th Chamber are the decisions of the first instance court, the appeal review by the Plenary of the Administrative Law Chambers Board is ongoing".

[325] See *Piskin v. Turkey*, §§ 9-27, for particular circumstances of such dismissed public servants.

[326] The wording of this Article is similar to that of Article 3(1) of emergency Legislative Decree No. 667.

[327] The wording of this Article is similar to that of Article 4(1) of emergency Legislative Decree No. 667.

[328] It was initially three years. Pursuant to Article 23 of Law No. 7333 dated 18/7/2021, the wording "three years" in this paragraph was changed to "four years", thereby extending the period of dismissals for an additional one year.

[329] Between 25 July 2018 and 25 July 2022.

public service anyone who are *believed to* have such an affiliation or link. In this way, the provision extended the arbitrary practices of the state of emergency until July 2022 despite the state of emergency ended in July 2018.

Annex 3: Decision format of the Ankara Administrative Courts[330]

REPUBLIC OF TÜRKIYE
ANKARA … ADMINISTRATIVE COURT[331]

PLAINTIFF:
RESPONDENT:

CASE SUMMARY AND PLAINTIFF'S ARGUMENTS:

SUMMARY OF THE RESPONDENT'S ARGUMENTS:

LEGAL FRAMEWORK, FACTS AND LEGAL PROCEDURE: (Template)[332]

THE LAW:[333]

A) Findings and Assessment Concerning "FETÖ/PDY" (Template)

B) Loyalty Obligation of Public Servants (Template)

C) Nature of the Present Case (Template)
1. Dismissal from Public Service as an Extraordinary Measure (Template)
2. Definition of the terms "Affiliation" and "Link" and the Relationship of the Present Case with Criminal Proceedings (Template)

D) Findings for Affiliation and Link [of the Plaintiff] with "FETÖ/PDY" and Its Evaluation
1. Having a Bank Account at Bank Asya or Depositing Money into That Account
2. Being a Member of a Trade Union/Association
3. ByLock
4. Opinion by the Public Institution/Superior Officer
5. Witness Statements
6. Anonymous Witnesses – Presence of the Plaintiff's Name in the Profiling Lists of the Organisation
7. Payment to certain media outlets, *e.g.*, *Cihan* Media and *Zaman* newspaper
8. Payment to *Kimse Yok Mu* Solidarity and Aid Association
9. Employment Record in Institutions Linked to Illegal Organisations
10. Education Record of the Plaintiff's Child(ren) in Schools Closed Down by Legislative Decrees
11. Attending Religious Meetings *("sohbet")*

E) Assessment of the Disputed Act [i.e., Commission's Decision] in the Context of Fundamental Rights and Freedoms (Template)

F) Assessment with respect to the Judicial Process and the Right to a Fair Trial (Template)

G) Whether the Interference through the Dismissal from Public Service comply with the Constitution and International Law (Template)
1. Principle of Proportionality (Template)
2. Consistency with Obligations Arising from International Law (Template)
3. No Interference with Core Rights (Template)

DECISION:

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[330] Cf. Decision Format of the Commission's Decision, Commission's Activity Report (2017-2022), p. 29.
[331] Triple dot (…) indicates the number of the Ankara Administrative Court, *e.g.*, Ankara 19th Administrative Court.
[332] The word "template" is used to describe a part of the decision which does not include any individualised assessment about the plaintiff, and which, from an objective view, is seen as having been copied and pasted in every decision.
[333] Some sections are differently placed or are omitted in some decisions depending on the court or the plaintiff, but the content of the sections is, most of the time, the same. The sections (E), (F) and (G) relating to allegations of human rights violations do not appear in all the decisions, especially in early decisions rendered in 2018 and 2019.