



Unlawful use of information obtained by means of telephone tapping in disciplinary proceedings against a public prosecutor

The case [Karabeyoğlu v. Turkey](#) (application no. 30083/10) concerned a telephone surveillance operation in respect of Mr Karabeyoğlu, a public prosecutor, during a criminal investigation into an illegal organisation known as *Ergenekon*, and the use of the information thus obtained in the context of a separate disciplinary investigation.

In today's **Chamber** judgment¹ in the case the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights as regards the telephone tapping in connection with the criminal investigation,

a violation of Article 8 (right to respect for private and family life) as regards the use in disciplinary proceedings of the information obtained by means of telephone tapping, and

a violation of Article 13 (right to an effective remedy).

The Court found in particular that during the criminal investigation Mr Karabeyoğlu had enjoyed the minimum degree of protection required by the rule of law in a democratic society, since the telephone tapping had been ordered on the basis of an objectively reasonable suspicion and had been carried out in compliance with the relevant legislation. In the Court's view, the interference with Mr Karabeyoğlu's right to respect for his private and family life had been necessary in the interests of national security and for the prevention of disorder and crime.

However, the use of the information thus obtained in the context of a disciplinary investigation had not been in accordance with the law and the relevant legislation had been breached in two respects: the information had been used for purposes other than the one for which it had been gathered and had not been destroyed within the 15-day time-limit after the criminal investigation had ended. The Court concluded that the interference with Mr Karabeyoğlu's right to respect for his private and family life had not been in accordance with the law as far as the disciplinary investigation was concerned.

The Court further noted that in relation to both the criminal and disciplinary investigations Mr Karabeyoğlu had not had a domestic remedy available for securing a review of whether the interference was compatible with his right to respect for his private and family life.

Principal facts

The applicant, Hamdi Ünal Karabeyoğlu, is a Turkish national who was born in 1955 and lives in Usak (Turkey).

In 2007 the Istanbul public prosecutor's office initiated a criminal investigation into a criminal organisation known as *Ergenekon*, whose presumed members were suspected of having engaged in activities aimed at undermining the political regime and bringing about a military coup. On 23 March

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

2008 the premises of a political party were searched in the context of the investigation. The documents and items seized included information about the private lives of a number of judges and prosecutors and their relations with certain individuals and entities.

On 14 August 2008 the public prosecutor sought permission from the Judicial Inspection Board to initiate an investigation into the judges and prosecutors concerned, including Mr Karabeyoğlu. Permission was granted on 5 September 2008, and various procedural steps were taken by inspectors from the Ministry of Justice. On 14 October 2008 the Istanbul Assize Court authorised the monitoring for a three-month period of five telephone numbers registered in Mr Karabeyoğlu's name. On 3 November 2008 the monitoring of three of the five numbers was discontinued on the grounds that they were being used by other people. On 15 January 2009 the order for the monitoring of the two numbers used by Mr Karabeyoğlu was extended.

On 19 January 2009, after examining the results of the first stage of the phone-tapping operation, the inspectors forwarded the records to the public prosecutor with responsibility for organised crime, who gave a decision not to prosecute on 28 December 2009, holding that it could not be concluded from the evidence obtained that the judges and prosecutors concerned had provided the Ergenekon organisation with assistance and support. On 31 December 2009 the phone-tapping records were destroyed by the public prosecutor's office in accordance with the decision not to prosecute. On 5 January 2010 the devices on which the recordings had been made were also destroyed by the same office.

On 31 December 2009 the public prosecutor sent Mr Karabeyoğlu a note informing him of the decision not to prosecute and the destruction of the material obtained during the surveillance operation. Mr Karabeyoğlu was also informed in a letter from the Ministry of Justice dated 12 March 2010 that a disciplinary investigation in respect of him had been discontinued on 5 March 2010 and that the evidence obtained by means of telephone tapping had been destroyed on 11 March 2010.

Complaints, procedure and composition of the Court

Relying on Articles 6 (right of access to a court) and 8 (right to respect for private and family life) of the Convention, Mr Karabeyoğlu alleged that the monitoring of his communications and those of his wife and two children had been arbitrary and illegal. He submitted that his professional and personal reputation had been damaged as a result, and complained that he and his family had been denied the right of access to a court because of the failure of the Ministry of Justice to send him the documents concerning the phone-tapping operations. Since the Court was empowered to determine how the facts of the case were to be characterised in law, it decided to examine all these complaints under Article 8 of the Convention.

Relying on Article 13 (right to an effective remedy), Mr Karabeyoğlu complained that he had not had an effective remedy by which to challenge the failure to comply with the conditions set out in the Code of Criminal Procedure for telephone tapping, and argued that the criteria of "strong presumptions" and "impossible to obtain evidence by any other means" had not been satisfied in his case.

The application was lodged with the European Court of Human Rights on 8 April 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Julia Laffranque (Estonia), *President*,
İşıl Karakaş (Turkey),
Paul Lemmens (Belgium),
Valeriu Griţco (the Republic of Moldova),
Ksenija Turković (Croatia),
Stéphanie Mourou-Vikström (Monaco),

Georges Ravarani (Luxembourg),

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

Article 8 (right to respect for private and family life)

The criminal investigation

The Court considered that the monitoring of Mr Karabeyoğlu's telephone lines had interfered with the exercise of his right to respect for his private life and correspondence. The interference had been in accordance with domestic law² and had been subject to a set of restrictive conditions. The Court also noted that the legislation had been accessible and foreseeable as to its effects, since Turkish law laid down strict conditions for the imposition of surveillance measures and the processing of the information thus obtained and defined with sufficient clarity the scope and manner of exercise of the discretion conferred on the authorities in relation to telephone tapping. The Court thus found no indication that the legislation had been breached, and concluded that Mr Karabeyoğlu had enjoyed the minimum degree of protection required by the rule of law in a democratic society.

As to whether the interference had been necessary, the Court observed that Mr Karabeyoğlu had been placed under surveillance on the grounds that he was suspected of belonging to the Ergenekon criminal organisation or providing it with assistance and support. It noted that the authorities had reached that degree of suspicion after discovering evidence during a search. The Court also considered that there was no indication that the criminal case file in the domestic proceedings had not contained sufficient information to satisfy an objective observer that Mr Karabeyoğlu might have committed the offence for which he had been placed under surveillance. In addition, it found that there was no evidence that the interpretation and application of the relevant legislation in the present case had been so arbitrary or manifestly unreasonable as to render the measure in question unlawful. Furthermore, it noted in particular that both Article 135 of the Code of Criminal Procedure (CCrP) and the relevant rules and regulations contained various clauses aimed at limiting the effects of surveillance measures to the greatest extent possible and ensuring that they were implemented in accordance with the law, any breaches being punishable by imprisonment.

Accordingly, the Court found that the monitoring of Mr Karabeyoğlu's telephone lines had been ordered on the basis of suspicions that could be regarded as objectively reasonable and that the measure had been implemented in accordance with the relevant legislation. In particular, the telephone tapping had been authorised by a court with a view to preserving national security and preventing disorder; the rules and regulations containing strict conditions for the implementation of the measure had been scrupulously observed; the information obtained had been processed in compliance with the legal requirements; the information had been destroyed within the statutory time-limits after the public prosecutor had decided not to prosecute; and Mr Karabeyoğlu had been sent a note within the required time-limit informing him of the procedure undertaken and the measure applied, and had also been sent a copy of the material in the file relating to him.

The Court concluded that the interference with Mr Karabeyoğlu's right under Article 8 § 1 of the Convention had been necessary in a democratic society in the interests of national security and for the prevention of disorder and crime. It therefore held that there had been no violation of Article 8 of the Convention as regards the telephone tapping in relation to the criminal investigation.

² Article 22 of the Constitution and Article 135 of the Code of Criminal Procedure (CCrP), the main legal basis for the court's decision authorising the surveillance measure.

The disciplinary investigation

The Court observed that the material obtained during the monitoring of Mr Karabeyoğlu's telephone lines had also been used in the disciplinary proceedings against him, thus entailing a breach of domestic law, in particular Article 22 of the Constitution and Article 135 of the CCrP, which listed the cases in which surveillance measures could be applied and made no mention of disciplinary investigations. Furthermore, Article 137 §§ 3 and 4 of the CCrP provided that information obtained as a result of a surveillance measure was to be destroyed once the investigation had been completed. The Court observed in this connection that although, following the decision of 31 December 2009 not to prosecute, the prosecutor in charge of the criminal investigation had destroyed the recordings in question on 31 December 2009 and 5 January 2010, a copy had indisputably remained in the possession of the judicial inspectors, who had used the relevant material in the context of the disciplinary investigation opened in respect of Mr Karabeyoğlu and had not destroyed it until 11 March 2010. In the Court's view, the relevant legislation had thus been breached in two respects: the information had been used for purposes other than the one for which it had been gathered and had not been destroyed within the 15-day statutory time-limit after the criminal investigation had ended.

The Court observed that these aspects were specifically covered by provisions of Turkish criminal law that appeared to afford adequate protection of the right to private life in the context of the case under examination: Article 138 of the Criminal Code provided for a term of imprisonment in the event of failure by public officials to destroy data within 15 days after the end of the investigation where this requirement applied, and Article 139 of the Criminal Code provided that a prosecution could be brought even in the absence of a criminal complaint. Nevertheless, there was no indication in the present case that any such investigation had been opened on that account, or that Mr Karabeyoğlu had had any other means of redress available. The Court therefore found that during the disciplinary investigation in respect of Mr Karabeyoğlu, none of those provisions had been observed by the national authorities.

Accordingly, the Court concluded that the interference with the exercise of Mr Karabeyoğlu's right to respect for his private life had not been "in accordance with the law", as required by Article 8 § 2 of the Convention, as far as the disciplinary investigation was concerned. The Court thus held that there had been a violation of Article 8 as regards the use in the disciplinary investigation of information obtained by means of the monitoring of Mr Karabeyoğlu's telephone lines.

Article 13 (right to an effective remedy)

The Court noted that the Government had not produced any examples to show that in a case of this kind it was possible to challenge a failure to comply with the conditions laid down in domestic law regarding surveillance measures, or any examples of the review of the use in the context of a separate procedure – in this case a disciplinary investigation – of information obtained as a result of a surveillance measure performed during a criminal investigation. The Court therefore found that no institution was empowered to review the compatibility of the surveillance measure with the Convention requirements, with a view to granting appropriate relief to Mr Karabeyoğlu if necessary.

The Court thus concluded that Mr Karabeyoğlu had not had a domestic remedy available for securing a review of whether the interference with his right to respect for his private life was compatible with the Convention requirements, whether in relation to the criminal or the disciplinary investigations. It therefore found a violation of Article 13 of the Convention.

Article 41 (just satisfaction)

The Court held that Turkey was to pay Mr Karabeyoğlu 7,500 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.