IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 33399/18

BETWEEN:

Hamit Pişkin

Applicant

- and –

Turkey

Respondent

- and –

Amnesty International,
International Commission of Jurists,
Turkey Litigation Support Project

Interveners

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

I. Introduction

1. These submissions are made by Amnesty International, the International Commission of Jurists and the Turkey Litigation Support Project, pursuant to the leave to intervene granted by the President of the Section on 9 May 2019, in accordance with Rule 44 § 3 of the Rules of Court.

2. This case raises significant questions regarding procedural rights in employment proceedings leading to the dismissal of an employee working with or for a State agency on grounds related to national security, including under a State of Emergency, as well as the application of the principles of legality and legal certainty and non-retroactivity as applied to national security, including in counter-terrorism.

3. In this submission, the interveners provide the European Court of Human Rights (Court) with observations concerning the applicability of the criminal limb of Article 6 of the European Convention on Human Rights (ECHR) to judicial proceedings leading to dismissal of an employee of a public institution, in cases where the proceedings involve a determination of the facts (the attribution of an alleged link to proscribed groups) which also constitute 'a criminal offence' as understood under the autonomous meaning of the term in the Convention. Next, the interveners address the lack of procedural guarantees in the dismissal process necessary to comply with Article 6 of the ECHR, in particular with the presumption of innocence Article 6(2), in such proceedings. The interveners then elaborate on the application of the principles of legal certainty and non-retroactivity to such decisions. In doing so, the interveners specifically address the problems arising from the application of State of Emergency decrees to events that occurred before the declaration of the State of Emergency.

II. The applicability of the criminal limb of Article 6 to dismissal proceedings

4. The criminal limb of Article 6(1) is engaged by 'any criminal charge'. Articles 6 (2) and (3) apply to a person 'charged with a criminal offence'. A criminal charge has been defined by this Court as: "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."[1] This Court recognizes that the concept of a 'criminal charge' has an 'autonomous' meaning, independent of the categorisations employed by the national legal systems of the member States.[2] With a view to determining whether proceedings can be considered as "criminal", this Court has regard to three criteria, established in *Engel and others v. the Netherlands* (the *Engel* criteria): (1) the legal classification of the offence in question in national law, (2) the nature of the offence and (3) the nature and degree of severity of the penalty.[3]

5. The first criterion is merely a starting point and is not decisive, while the second and third criteria are alternative and not necessarily cumulative.[4] It therefore suffices that "the offence in question should by its nature be 'criminal' from the point of view of the Convention … or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the 'criminal" sphere.'".[5] When assessing the particular aspects of the case that were relevant to the *Engel* criteria, this Court, in *Bendenoun v. France,* held that "[n]one of them is decisive on its own, but

[1] *Eckle v. Germany*, Application no. 8130/78, 15 July 1982, para. 73. See also, *Ibrahim and Others v. the United Kingdom* [GC], Application no. 50541/08 and others, para. 249; *Simeonovi v. Bulgaria* [GC], Application no. 21980/04, para. 110.
[2] *Blokhin v. Russia* [GC], Application no. 47152/06, para. 179; *Adolf v. Austria*, Applcication no. 8269/78, para. 30.
[3] S, ee, in particular, Engel and Others v. the Netherlands, judgment of 8 June 1976, Series A no. 22, § 82; Pierre-Bloch v. France, judgment of 21 October 1997, Reports 1997-VI, § 53
[4] *Lűtz v. Germany*, Application no. 9912/82, para. 55. See also *Öztürk v Germany*, Application no. 8544/79, para. 54.
[5] *Ibid.* para. 55.

taken together and cumulatively they made the "charge" in issue a "criminal" one within the meaning of Article 6 para. 1."[6]

6. With regard to the second criterion the following factors have been taken into consideration by this Court to classify certain proceedings as 'criminal' under the Convention:

- The legal rule was of a generally binding character and not directed against a specific group.[7]
- The proceedings were instituted by a public body with statutory powers of enforcement.[8]
- The prohibition was commensurate with a deterrent and punitive purpose.[9]
- The prohibition sought to protect the general interests of society of a kind usually protected by the criminal law.[10]
- Imposition of a penalty was dependent upon a finding of guilt.[11]
- The classification of similar subject-matter as being regulated by the criminal law of other Council of Europe Member States.[12]

7. As regards the third criterion (the nature and the severity of the penalty), the fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative leniency of the penalty at stake will not divest an offence of its inherently criminal character.[13] Furthermore, the interveners consider that the severity or leniency of the penalty cannot be assessed solely with reference to the possibility of imprisonment, but that a cumulative or persistent application of other measures may also reach the level of severity required.

8. Similarly, the U.N. Human Rights Committee in considering whether a sanction had a criminal character within the meaning of article 14 of the International Covenant on Civil and Political Rights (ICCPR) has made clear that the "interpretation of the Covenant is based on the principle that the terms and concepts in the Covenant are independent of any national system or legislation and that it must regard them as having an autonomous meaning in terms of the Covenant".[14] The Committee has held that whether the consequences of judicial proceedings appear punitive in nature is relevant to determining when criminal fair trial rights apply.[15] The punitive nature of sanctions has also been held to be of importance to the question of classification by the Inter-American Court of Human Rights.[16]

2.1. Classification of lustration proceedings under Article 6

9. The *Engel* test has been applied in several cases of lustration proceedings.[17] In *Sidabras and Dziautas v. Lithuania*,[18] this Court concluded that both limbs of Article 6 were inapplicable. With regard to the criminal limb, the Court observed that (a) being a former member of the KGB was not a criminal offence under the Criminal Code (test 1); (b) the purpose of the penalties was to prevent former employees of a foreign secret

[6] *Bendenoun v. France*, Application no. 12547/86, para. 47.
[7] *Ibid.*
[8] *Benham v. the United Kingdom* [GC], Application no. 19380(92, para. 56.
[9] *Jussila v. Finland* [GC], Application no. 73053/01, para. 38; *Öztürk v. Germany*, *op. cit.*, para. 53.
[10] *Produkcija Plus Storitveno v. Slovakia*, Application no. 47072/15, para.42.
[11] *Benham v. the United Kingdom*, *op. cit.*, para. 56.
[12] *Öztürk v. Germany*, , *op. cit.*, para. 53.
[13] *Nicoleta Gheorghe v. Romania*, Application no. 23470/05, para. 26.
[14] *Sayadi and Vinck v. Belgium*, U.N. Human Rights Committee, UN Doc. CCPR/C/94/D/1472/2006 (2008), para. 10.11.
[15] *Ibid.*
[16] *Baena Ricardo et al. v Panama*, 2 February 1996, Inter-American Court of Human Rights (IACtHR), para 131.
[17] The Venice Commission defines "lustration" as ""cleansing", and it enables to "exclude persons who lack integrity (even judges) from public institutions". ... Lustration is one of the tools of transitional justice, used to protect newly democratic states from threats posed by those closely associated with the previous totalitarian regimes and to prevent a return of such a regime." (See an example at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)044-e)
[18] *Sidabras and Dziautas v Lithuania,* Applications nos. 55480/00 and 5933/00, Decision, 1 July 2003.

service from gaining access to employment in public institutions and other spheres of activity vital to the national security of the State, rather than being punitive (test 2); and (c) the severity of the employment restrictions (dismissal from public service and a ten-year restriction in accessing certain parts of the private employment sphere) applied to the applicants were not such as to bring the issue into the 'criminal' sphere (test 3).[19]

10. However, in another set of lustration cases, from Poland, the Court determined that lustration proceedings did qualify as "criminal" sanction. In *Matyjek v. Poland*,[20] this Court observed that the organisation and the course of lustration proceedings had been based on the model of a Polish criminal trial and that the rules of the Code of Criminal Procedure were directly applicable to lustration proceedings. (test 1). The Court also observed that the lustration legislation in Poland affected everyone born after May 1972. More importantly, the Court noted that the purpose of the proceedings and the nature of the findings made in the Polish cases were different from those in the above-mentioned Lithuanian cases (test 2):

> "*Contrary to its title, the law … is not about scrutinising the past of those persons, and the historical findings relating to past collaboration with the communist-era security services remain in the background of the proceedings.* ***The lustration court decides whether the person subject to lustration violated the law by submitting a false declaration****. If such a finding is made, the statutory sanctions are imposed. Thus, the lustration procedure in Poland is not aimed at punishing acts committed during the communist regime. This approach distinguishes the nature of lustration in Poland from the solutions adopted in other countries."*[21]

11. As to the severity of the punishment, the Court departed from *Sidabras* and *Dziautas*. Although neither imprisonment nor a fine could be imposed on someone who had been found to have submitted a false declaration, being prevented from applying for a wide range of public posts for the period of ten years was seen as severe enough to fall within the criminal limb of Article 6 (test 3).[22] This Court has upheld this approach in other Polish cases.[23] In *Ivanovski v. The Former Yugoslav Republic of Macedonia,*[24] however, this Court found only the civil limb of Article 6 to be applicable. Despite similarities between *Ivanovski* and the Polish cases, the Court held that the key difference lay in the predominantly criminal character of the lustration proceedings in Poland and the administrative character of the lustration proceedings in the *Ivanovski* case. The main distinction appears to be that, while the applicant in *Ivanovski* was subject to lustration for having collaborated with the communist-era secret police, in the Polish cases, the applicants were dismissed for submitting a false declaration in that regard.[25]

12. **In accordance with these principles, the interveners therefore submit that, where judicial proceedings determine the dismissal of an employee on the basis of a factual finding of wrongdoing that equates to an existing criminal offence under national law; where the decision is intended to protect important general interests of the society of a kind usually protected by the criminal law, such as countering terrorism; and where that decision leads to significant and long-term punitive consequences comparable to those of a determination of criminality, the proceedings fall within the criminal limb of Article 6 of the Convention, even where they are not so designated under national law.**

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[19] See, *Rainys and Gasparavičius v. Lithuania*, Applications nos. 70665/01 and 74345/01, Decision, 22 January 2004.
[20] *Matyjek v. Poland*, Application no. 38184/03, Decision, 30 May 2006.
[21] *Ibid.*, para. 53 (emphasis added).
[22] *Ibid.*, para. 54.
[23] *Bobek v. Poland*, Application no. 68761/01, 17 July 2007. See, *Mościcki v. Poland*, Application no. 52443/07, 14 June 2011.
[24] *Ivanovski v The Former Yugoslav Republic of Macedonia,* Application no. 29908/11, 21 January 2016.
[25] *Ibid.*, para. 121.

13. In respect of dismissals taking place in the context of a State of Emergency, where there has been a valid derogation under Article 15 of the Convention, the interveners emphasise that any measures of derogation from article 6 pursuant to the emergencies must be limited "to the extent strictly required by the exigencies of the situation."[26] The situation, in article 15 terms, is limited to a war or other public emergency threating the life of the nation. It is highly improbable that this tight test of necessity and proportionality test could be satisfied in this context. Furthermore, in accordance with the jurisprudence governing the ICCPR and the IACHR, certain safeguards relevant to criminal proceedings are effectively non-derogable in all circumstances, including the fundamental principles of a fair trial, presumption of innocence or the principles of legality, the non-retroactivity of criminal laws, as well as the right to an effective remedy.[27] **In the context of a derogation under Article 15 ECHR during a state of emergency, it is therefore submitted that derogating measures would not justify a different classification of proceedings that are considered to be criminal according to the *Engel* criteria, irrespective of any potential justification of derogation from specific aspects of Article 6 procedural rights.**

III. Presumption of Innocence

14. The presumption of innocence and the fundamental principles of a fair trial are key elements to safeguard the rule of law which cannot be restricted even in times of state of emergency.[28] Access to administration of justice must effectively be guaranteed at all times. In *Kozulina v. Belarus,* the UN Human Rights Committee held that "the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle".[29] The UN Human Rights Committee has likewise recognised the absolute nature of the presumption of innocence.[30]

15. Where a decision to dismiss an employee amounts to the determination of a criminal charge and attracts the protection of the criminal limb of Article 6 as outlined above, the protection of the presumption of innocence under Article 6(2) as well as the procedural guarantees of Article 6(3) is engaged. Irrespective of whether such a decision amounts to the determination of a criminal charge in the domestic context, where it determines facts which amount to a criminal offence, the decision will have consequences for the presumption of innocence.

16. This Court has emphasised that there is a fundamental distinction to be made between a statement that someone is merely suspected of having committed a crime and a clear judicial determination, in the absence of a final conviction, that the individual has

[26] Article 15.3 ECHR.
[27] UN Human Rights Committee, *General Comment no. 29, States of Emergency,* UN Doc. CCPR/C/21/Rev.1/Add.11, para. 11; *Habeas corpus in Emergency Situations*, I.A.Ct.H.R, Advisory Opinion OC-7/85; *Judicial Guarantees in States of Emergency*, I.A.Ct.H.R., Advisory Opinion OC-9/87. See, *Siracusa Principles on the Limitation and Derogation of Provisions* and *Paris Minimum Standards of Human Rights Norms in a State of Emergency*.
[28] See, UN Human Rights Committee, *General Comment no. 32, The Right to Equality before Courts and Tribunals and to Fair Trial*, UN Doc. CCPR/C/GC/32, para.6, as well as *General Comment no. 29*, *op. cit.,* para. 11. See, among others, Article 11 of the Universal Declaration of Human Rights; Article 14.2 of the ICCPR; Article 8.2 of the American Convention on Human Rights; Article 7.1.b of the African Charter on Human and Peoples' Rights; Venice Commission opinion no. CDL-AD(2016)037, para. 122.
[29] *Kozulina v. Belarus*, U.N. Human Rights Committee, UN Doc. CCPR/C/112/D/1773/2008 (2014). This has similarly been noted by the Inter-American Court of Human Rights: "The Court considers that the right to presumption of innocence is an essential element for the effective exercise of the right to defense and accompanies the defendant throughout the proceedings until the judgment determining his guilt is final" (*Ricardo Canese v. Paraguay*, 31 August 2004, IACtHR, para 154).
[30] See U.N. Human Rights Committee, *General Comment no. 32*, *op. cit*. See also, U.N. Human Rights Committee, *General Comment no. 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6; U.N. Human Rights Committee, General Comment no. 29, *op. cit.*

committed the crime in question.[31] The latter infringes the presumption of innocence. Therefore, in the absence of a final criminal conviction, if an administrative or disciplinary decision were to contain a statement imputing criminal liability to an individual for misconduct at issue in the case, it would raise an issue under Article 6(2).[32] In *Kemal Coşkun v. Turkey,* this Court held that "in the absence of any reasoning that would allow a reader to discern how the disciplinary and judicial authorities established and evaluated the facts from the perspective of disciplinary law, that is the compatibility of the applicant's conduct with work discipline and the requirements of civil service, the lines separating disciplinary liability from criminal liability become theoretical and illusory. In that respect, the Court reiterates that no authority may treat a person as guilty of a criminal offence unless he has been convicted by a competent court".[33]

17. **The interveners submit that, in the absence of adequate judicial reasoning to distinguish the grounds of dismissal from the commission of a criminal offence, a judicial decision to dismiss an employee, involving a finding of fact that he or she engaged in conduct amounting to a criminal offence, violates the presumption of innocence.**

IV. No Punishment Without Law: Article 7 ECHR

18. According to the well-established jurisprudence of this Court, individuals must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make them criminally liable and what penalty will be imposed for the act committed and/or omission.[34] This is also true in international law more broadly.[35]

19. As with Article 6, the concept of criminal law has an autonomous meaning under Article 7. The three alternative criteria laid down in the *Engel* case also apply to Article 7.[36] The concept of law used in Article 7 also has an autonomous meaning and implies qualitative requirements, notably those of accessibility and foreseeability.[37] Nevertheless, as noted by this Court, even in criminal law where the legality principle is most strictly applied, there is an inevitable element of judicial interpretation.[38] However, the discretion left to the local authorities and courts cannot be unlimited. This Court has stated that "the principle of legal certainty may be compromised if domestic courts introduce exceptions in their case-law which run counter to the wording of the applicable statutory provisions"[39].

20. Article 7 unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage.[40] The principle of non-retroactivity of criminal law applies both to the provisions defining the offence[41] and to those setting the penalties incurred. It is also prohibited to extend the scope of provisions to conduct which did not constitute previously a criminal offence. In *Contrado v. Italy* (no. 3),[42] the applicant was convicted of aiding and abetting an organized crime entity from the outside. However,

[31] See, among others, *Matijašević v. Serbia*, Application no. 23037/04, para. 48; *Garycki v. Poland*, Application no. 14348/02, para. 71; and *Wojciechowski v. Poland*, Application no. 5422/04, para. 54.
[32] See, *Çelik (Bozkurt) v. Turkey*, Application no. 34388/05, para. 32.
[33] *Kemal Coşkun v. Turkey,* Application no. 45028/07, para. 54.
[34] *Cantoni v. France*, Application no. 17862/91, para. 29*; Kafkaris v. Cyprus* [GC], Application no. 21906/04, para. 140; *Del Río Prada v. Spain* [GC], Application no. 42750/09, para. 79.
[35] Article 15.1 ICCPR.
[36] *Zaja v. Croatia*, Application no. 37462/09, para. 86.
[37] *Del Rio Prada v. Spain*, *op. cit.* para. 91.
[38] *Kafkaris v. Cyprus*, *op. cit.*, para. 150.
[39] *Alparslan Altan v. Turkey*, Application no. 12778/17, para. 111.
[40] *Del Río Prada v. Spain*, *op. cit.,* para. 116; *Kokkinakis v. Greece*, *op. cit.,* para. 52.
[41] *Vasiliauskas v. Lithuania* [GC], Application no. 35343/05, paras 165-166; *Jamil v. France*, Application no. 15917/89, paras. 34-36; *M. v. Germany*, Application no. 19359/04, paras. 123 and 135-137; *Gurguchiani v. Spain*, Application no. 16012/06, paras. 32-44.
[42] *Contrado v. Italy*, Application no. 66655/13, paras. 64-76.

the definition of the crime which led to the conviction of the applicant was consolidated under the case-law after the applicant had been convicted. The Court held that this breached Article 7.

21. The UN Human Rights Committee has emphasized the non-derogable nature of the legality principle in the field of criminal law which entails "the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty."[43] The Inter-American Court of Human Rights has said that "[t]he definition of an act as an unlawful act, and the determination of its legal effects must precede the conduct of the subject being regarded as a violator".[44] It has also affirmed the importance of non-retroactivity as "one of the fundamental principles of the Rule of Law to impose limits on the punitive power of the State".[45]

22. The interveners submit that it follows, from this Court's case-law, that Article 7 is breached not only when a provision enters into force after the impugned act was committed, but also when the courts interpret provisions in a way that runs counter to the express terms of the provision. As long as a new provision imposes new restrictions on individuals that were not covered previously under other criminal law provisions, this violates the principle of *nulla poena sine lege* that requires both the non-retroactivity and foreseeability of criminal law.

V. The Turkish "mass dismissal" process

23. As is well known, following the *coup* attempt that took place on 15 July 2016, the Turkish Government declared a nationwide State of Emergency and informed the Council of Europe of Turkey's derogation from the Convention rights in accordance with Article 15(3) of the ECHR. The Government issued 32 state of executive decrees during the two-year long state of emergency. Among the measures with direct impact on individuals were: (a) dismissing individuals and banning them for life from public service; (b) dismissing students in higher education; (c) revoking the ranks of retired military personnel; and (d) closing non-governmental organisations (including foundations, associations and trade unions) and private institutions (i.e. universities, student accommodation, hospitals, and media outlets) with links to organisations or groups deemed by the Government to pose a risk to national security. Dismissals of public servants were carried out in two different ways in this period:

a. By executive decrees directly listing civil servants to be dismissed;
b. By administrative decisions of dismissal delivered under new extraordinary powers accorded by State of Emergency decrees.

Almost 130,000 public sector workers[46] were purged collectively by lists attached to decrees, and an unknown number by administrative decisions through powers accorded through decrees.

24. The first group of purged public sector workers had to apply to the State of Emergency Inquiry Commission to seek revocation of their dismissal; the second group could apply directly to the courts to request the annulment of their dismissals. However,

[43] UN Human Rights Committee, *General Comment no. 29, op. cit.*, para. 7.
[44] *Baena Ricardo et al. v Panama*, I.A.Ct.H.R., *op. cit.*, para. 106.
[45] *Vélez Loor v. Panama*, I.A.Ct.H.R., Judgment of 23 November 2010, para 184. Non-retroactivity is also observed by the U.N. Human Rights Committee, which noted that the ruling in the case of *David M. Hicks v. United States of America*, set aside and dismissed the guilty verdict against the author [for "material support for terrorism"] and vacated his sentence, finding that the author's conviction was unlawfully retrospective" because his acts did not constitute a criminal offence when they were committed. *Hicks v. Australia*, U.N. Human Rights Committee, UN Doc. CCPR/C/115/D/2005/2010.
[46] "Public sector work" applies to a wide variety of sectors in Turkey and includes people who would not be considered "civil servant" elsewhere.

the criteria that applied to both groups were the same: dismissals were based "on grounds of membership, affiliation, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State."[47] Membership of a "terrorist organisation" also amounts to a crime under the Turkish Criminal Code.[48] Other actions prescribed as 'association', 'connection' and 'contact' may also constitute crimes under anti-terrorism legislation in Turkey e.g. aiding, abetting, supporting, or propagandising for a terrorist organisation.[49]

5.1. Legal classification in national law

25. Under ordinary legislation, in Turkey, a public servant can be dismissed following a disciplinary investigation. Broad defence rights, similar to those available under criminal law, are recognised under administrative law in such cases.[50] However, the dismissals during the State of Emergency were unprecedented, as they did not follow this ordinary path, even for civil servants who do not exercise sovereign power of the state. Council of Europe bodies have criticized the sweeping nature of these dismissals in the absence of the ordinary procedural safeguards, and without any objective or reasonable grounds.[51]

26. The Constitutional Court, while deciding to dismiss two of its members under the State of Emergency, concluded that the State of Emergency dismissals were *sui generis* measures.[52] It held that such measures were neither criminal nor administrative sanctions; but rather final, permanent "extra-ordinary" measures.[53] The same formula was adopted by the Council of State.[54] The members of the Constitutional Court who were dismissed were not allowed by the Constitutional Court to avail themselves of certain basic defence rights such as calling witnesses to give evidence in their cases, on the grounds that the State of Emergency proceedings differed from both ordinary criminal and administrative measures. Therefore, despite the unclear classification of State of Emergency dismissals under Turkish law, it is clear that the national courts do not deem the measure to be an ordinary disciplinary sanction.

5.2. Nature of the offence

27. In the post-Soviet lustration cases, the key point determining the applicability of the criminal limb of Article 6 ECHR to judicial proceedings has been the nature of the offence. While the Court separated the Polish cases, to which it found the criminal limb of Article 6 applicable, from other lustration cases, it observed that the applicants in the former cases had been punished for submitting a false declaration, but not for having collaborated with the communist-era secret police.

28. In applying this jurisprudence to the dismissal of Turkish public sector workers under the State of Emergency, three factors should be considered. First, under the State of Emergency, Turkish public sector workers were not dismissed only as a result of their conduct during a former regime. Rather, they were dismissed for their alleged connection to a present danger, namely to a "terrorist organisation". Unlike the KGB, "terrorist

[47] This basis was first listed in the Executive Decree no. 667 issued on 23 July 2016. It was then repeated in subsequent executive decrees that resulted in dismissals from public sector.
[48] Article 220 and 314 of the Turkish Criminal Code.
[49] Article 220/7 of the Turkish Criminal Code (aiding, abetting and supporting organisations), Article 7 of the Anti-Terror Law (propogandising of terrorist organisations).
[50] Article 38 of the Turkish Constitution makes no distinction between disciplinary and criminal crimes and principles enumerated under this provision apply to both types of crimes.
[51] The Council of Europe Commissioner for Human Rights, *Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey*, Doc. CommDH(2016)35, 7 October 2016, para. 28; Venice Commission, *Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016*, Doc. CDL-AD(2016)037, 12 December 2016.
[52] Case no. 2016/6 Misc., Decision no. 2016/12, 4 August 2016.
[53] *Ibid.,* para. 79.
[54] 5th Chamber of the Council of State, Case no. 2016/8196, Decision no. 2016/4066, 4 October 2016.

organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State"[55] were deemed to still exist and, during the State of Emergency, those who were alleged to have links to these groups were permanently sanctioned as a response to this continuing situation. Secondly, as noted in *Sidabras* and *Dziautas,*[56] membership of the KGB in the past was not a crime in the Post-Soviet Republics. However, having certain forms of engagements with organisations designated as terrorist is a crime in many jurisdictions and described as such under Security Council resolutions.[57] Crimes of terrorism and related acts, including ancillary crimes such as participation in, or support for, a terrorist group, are regarded across the Council of Europe region and globally as particularly serious, carrying a heavy stigma and requiring proportionately severe penalties. Thirdly, as in *Matyjek*, a very wide segment of the population was affected by the dismissals. Indeed, they affected not just a limited group of civil servants with a 'special bond of trust and loyalty' to the state (such as judges and soldiers), but all categories of public sector workers, from teachers to health care professionals, without exception.

5.3. Nature and degree of severity of the penalty

29. Turkey's State of Emergency measures also differed from post-Soviet lustration cases with regard to the higher degree of severity of the penalty. First, the public sector dismissals in Turkey have no temporal limit. Executive decrees make it clear that public sector workers dismissed under the decrees will never be allowed to work in the public sector. Furthermore, as the Venice Commission has pointed out, the legal repercussions of Turkey's executive decrees "go much beyond the loss of a job": other measures are also associated with dismissals:[58] the cancellation of passports; the cancellation of firearm and pilot's licences; the termination of membership of 'all kinds of boards of trustees, boards, commissions, boards of directors, supervisory boards and liquidation boards'; the eviction within fifteen days from 'public or foundation-owned houses'; the prohibition to act as founder, co-founder or personnel of private security companies; and the prohibition on using certain professional titles. Passports of public servants are cancelled for an indefinite period.

30. Given the broad interpretation of public service in Turkey, in many cases being banned from public sector work means that dismissed people are effectively precluded from continuing their professions. Dismissed judges, prosecutors and lawyers cannot be registered as members of bar associations, and, as such, are barred from practising law. Teachers and university professors cannot work at private educational institutions.[59] Recently, the High Election Board cancelled the results of the local municipal elections where purged public sector workers had been elected.[60] These restrictions are very

[55] See, Article 4 of State of Emergency Decree no. 657. The Decree was later approved by the Parliament and became an Act of Parliament no. 6749.
[56] *Sidabras and Dziautas v. Lithuania*, *op. cit.*
[57] see U.N. Security Council, Resolution 1373 on threats to international peace and security caused by terrorist acts, UN Doc. S/RES/1373 (2001): all States shall "Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts". This echoed Resolution 1269: The Security Council "[u]nequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security". (U.N. Security Council, Resolution 1269 on Responsibility of the Security Council in the maintenance of international peace and security, UN Doc. S/RES/1269 (1999)).
[58] Venice Commission, Opinion on Emergency Decree Law Nos 667 to 676, *op. cit.*, para. 213.
[59] See Amnesty International, *No End in Sight: Purged Public Sector Workers Denied a Future in Turkey*, 22 May 2017.
[60] The certificate for mayorship was granted to the candidates who had come second in the election. See news report at https://www.bbc.com/turkce/haberler-dunya-47886108; https://www.cnnturk.com/turkiye/son-dakika-yskdan-khkli-baskan-karari; https://bianet.org/english/politics/207350-elected-mayors-discharged-by-statutory-decrees-won-t-be-given-certificates-of-election [accessed on 18 June 2019]. The decision was criticised by the Secretary General of the Council of Europe: https://m.bianet.org/english/politics/207564-council-of-europe-not-recognizing-winners-is-against-democracy [accessed on 18 June 2019].

similar to those that are imposed on convicted criminals as envisaged under Article 53 of the Turkish Criminal Code.

31. Taking all of these factors into account, the Parliamentary Assembly of the Council of Europe (PACE) was "dismayed by the social consequences of the measures applied in the framework of the state of emergency". It also concluded as follows:

> *"The civil servants who were dismissed have had their passports cancelled. They are banned from ever working again in the public administration, or in institutions which have links to the administration. …. Their families have also been affected by these measures. The Assembly fears that these measures amount to a "civil death", for those concerned. This situation will have a dramatic and detrimental long-term effect on Turkish society, which will need to find the means and mechanisms to overcome this trauma".*[61]

32. It is therefore submitted that the permanent nature of the sanctions suggests that their purpose is more punitive and deterrent rather than solely preventative. Taken as a whole, they have a severe impact on a person's life, so serving the function of criminal rather than administrative sanctions.

VI. Procedural rights and the presumption of innocence in dismissals of Turkish public servants

33. In the lustration cases mentioned above, a commission was created to assess the connections between the public servants and the KGB. However, in the case of Turkey, no such body was created to assess links to proscribed groups or organisations before taking a dismissal decision. The State of Emergency Inquiry Commission in Turkey, which became operational a year after the dismissals began, was not involved in the initial dismissal decisions and was only set up as an attempt to provide a remedy, given the absence of an appeal mechanism for those named in the lists annexed to the executive decrees.

34. According to the information available to the intervenors, individuals dismissed from the public sector through executive decree powers did not go through an ordinary disciplinary or a criminal process. While some of those dismissed had disciplinary investigations opened against them, these were not concluded, and they were not informed as to whether or note their final dismissal (by executive decree powers) was a result of the investigation. Others did not even have knowledge of any investigation against them; be it disciplinary or criminal. As such, their dismissal was not a result of a formal process with appropriate procedural safeguards through which they heard the allegations and evidence against them and had a proper opportunity to respond.[62]

35. Even following their dismissal by emergency decree, public sector workers were not provided with official reasons for their dismissals, beyond a generalized justification set out in relevant executive decrees to the effect that they were assessed to have links to "terrorist" organizations. Furthermore, not all public servants dismissed during the State of Emergency have been prosecuted afterwards. As the dismissal was not seen as a disciplinary or criminal process, those who were dismissed could not avail themselves of their usual defence rights protected under domestic and international law. As the dismissal decision did not explain the reason for the dismissal, the dismissed individual could not know:

[61] Parliamentary Assembly of the Council of Europe, *The functioning of democratic institutions in Turkey*, Resolution 2156 (2017), para. 17.
[62] See Amnesty International, *No End in Sight: Purged Public Sector Workers Denied a Future in Turkey*, 22 May 2017.

i. whether they were dismissed due to their membership, affiliation, connection or contact with terrorist organisations or other proscribed bodies, entities or groups; or
ii. with which terrorist organisation, body, entity or group they were found to have had links; or
iii. what conduct led the administrative authority to reach that conclusion.

36. The consequence is that, when dismissed public sector workers submit applications to the courts to challenge their dismissal, they do not know what specific allegations they are facing, nor do they have knowledge of any evidence used against them. They would simply be aware that they were dismissed due to their links with "terrorist organisations". **Therefore, the interveners submit that, as a general rule, proceedings for the dismissal of public sector workers did not involve procedural safeguards equivalent to those in a criminal trial, such as would be required under Article 6 ECHR.**

VII. Retroactive application of decrees as a basis for dismissals in Turkey

37. The executive decree no. 667, which is the first executive decree providing for the dismissal of thousands of public sector workers in Turkey, was adopted on 23 July 2016, after the declaration of the State of Emergency.[63] Therefore, the new law applied retroactively to the past conduct of public sector workers, raising concerns as to conformity with Article 7 ECHR. According to the working principles of the State of Emergency Inquiry Commission (the Commission), set up to review appeals against dismissals by lists annexed to emergency decrees, the Commission will assess applications purely on the basis of whether "membership, affiliation, allegiance, connection, or links" to proscribed groups can be determined on the basis of documents and information supplied by government bodies.[64] Fundamentally, there is a lack of clarity regarding what constitutes 'membership, affiliation, allegiance, connection, or links' to proscribed groups. Moreover, to the interveners' knowledge, at least two of these elements have no precedent in Turkish law: *iltisak* (connection) and *irtibat* (contact). Neither the public sector workers themselves, nor legal professionals, knew or could have known what these concepts meant and what acts they would constitute.

38. This lack of clarity continues despite a ruling on a dismissal case issued only on 24 April 2019, where the 13th Chamber of the Ankara Administrative Court of Appeal provided definitions for the first time to these two elements, albeit in extremely broad terms. According to the Court of Appeal, 'connection' includes 'acting together', 'being a volunteer', 'having the same point of view', 'looking at the same way', and 'acting according to signs, orders and guidance of the organisation'. The term 'contact' includes "acting according to messages received from direct communication or through printed, visual or social media because of personal interests".[65]

39. **The interveners accordingly submit that such wide and vague definitions of the requisite conduct, which in any event were only provided by the courts almost three years after the first executive decree entered into force, mean that the application of the provision in question has been unforeseeable to those affected by it.**

[63] Executive Decree No. 667.
[64] Official Gazette, *From the Prime Minister's Office: Rules and Procedures in Relation to the Workings of the State of Emergency Inspection Commission*, 12 July 2017, Article 12 and Article 14(2).
[65] Ankara Administrative Court of Appeal, 13th Chamber, Decision no. 2019/246, 24 April 2019.