IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 59481/16

BETWEEN:

Bülent Olcay and Others

Applicants

-and-

Turkey

Respondent

-and-

Volunteer Jurists Association

Intervener

WRITTEN SUBMISSIONS ON BEHALF OF THE VOLUNTEER JURISTS INTERVENER

pursuant to the Section Registrar's notification dated 5 July 2021 that the President of the Section had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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23 September 2021

I. Introduction

1. This submission is made by Volunteer Jurists, pursuant to the leave to intervene as a third party granted by the President of the Second Section on 27 August 2021 in the case of Olcay v. Turkey and 119 others (application no. 59481/16) pursuant to Rule 44(3) of the Rules of Court.
2. The case of Olcay v. Turkey and 119 others concerns the premature termination of the mandates of the applicants working as judges at the Council of State and Court of Cassation, following the adoption of Law No. 6723, adopted on July 1, 2016, and published in the Official Gazette on July 23, 2016, regarding the amendment of the Law on Council of States and certain laws ("Danistay Kanunu ile bazı kanunlarda değişiklik yapılmasına dair kanun").
3. Article 1 and 17 of the Law 6723 establish that all the members of the Council of State and The Court of Cassation except for the Chief Justices, Deputy of the Chief Justices, General Prosecutors of the Council of State and the Court of Cassation and the Chief Justices of the Chambers shall terminate on the date of this act.
4. The applicants allege a violation of Article 6 of the Convention. They were former justices of the Council of State and the Court of Cassation prior to the entry into force of the said law.
5. Volunteer Jurists believes that examination of this case particularly requires assessment and observation of the climate in which the Law no 6723 brought into force in Turkey in July 2016. The impacts and real motives of such important legislative changes on the independence and impartiality of the judiciary cannot be properly assessed without taking into account the circumstances in which they were introduced and sequence of events that preceded and followed the enactment of this law. Therefore, without addressing the merits of the claims and the individual circumstances of each claimant, this third party intervention will first describe the climate in which these changes were made and the sequence of developments before and after the introduction of Law 6723. Secondly it will briefly discuss the current state of independence and impartiality of the judiciary in Turkey, which is an outcome also of this important legislative steps taken in July 2016. Finally, the intervention deals with specific questions posed by the Court to the Parties.

II. SEQUENCE OF EVENTS PRIOR TO INTRODUCTION OF LAW NO 6723

6. The developments that led to the enactment of Law No. 6723 date back to the corruption investigations carried out against some members of the government in 2013.
7. As summarized by the Court in its recent judgement Akgün v Turkey (Application no. 19699/18). On December 17 and 25, 2013, as part of an investigation into corruption, a large wave of arrests was made in circles close to the AKP (ruling Justice and Development Party, in power since 2002). Thus, high-level personalities, of political power, including the sons of three ministers, the head of a state bank, senior civil servants and businessmen working closely with the public authorities, were questioned. The government attributed responsibility for this initiative to police officers and judges allegedly affiliated with the Gülen movement, calling the investigation a plot and an attempted "judicial coup" against the executive.
8. Similar to many modern criminal procedure laws, the Turkish law obliges prosecutors to investigate in a neutral manner, collecting evidence for and against potential suspects, whenever they consider that there are sufficient indications that a crime was committed. However, as outlined in the European Commission's 2014 Turkey Progress Report, "in response to the allegations of corruption, the government alleged that there had been an attempted judicial coup by a 'parallel structure' within the state, controlled by the Gülen Movement. Prosecutors and police officers in charge of the original investigations of 17 and 25 December were removed from their posts. A significant number of reassignments and dismissals in the police, civil service and the judiciary followed, accompanied by legal measures in the judiciary. As part of that response, key legislation, firstly the amendments on the High Council of Judges and Prosecutors (HSYK) and few years later the amendments on the Law on Court of Cassation and Law on State of Council, was drafted and adopted in haste and without consultations. On 19 December (2013) the government amended the regulation on judicial police to require law enforcement officers, when acting upon instructions of prosecutors, to notify their police hierarchy about any criminal notices or complaints. On 25 December, police did not follow instructions from prosecutors to detain suspects as part of two investigations into alleged corruption. The HSYK issued a statement on 26 December criticising this amendment as being contrary to judicial independence. On 27 December, the Council of State suspended implementation of the

amendment considering it to be contrary to the Code on Criminal Procedures. The Minister of Justice, in his capacity as President of the HSYK, decided on 30 December that any HSYK public statement should receive his prior approval."[1]

9. In the Cabinet overhaul of 25 December 2013, the Minister of Justice (Sadullah Ergin) was also fired. The newly-appointed Minister of Justice (Bekir Bozdag) automatically became the ex officio President of the HSYK. He selected a new Undersecretary to the HSYK, who thereby automatically became an ex officio Member of the First Chamber of the HSYK. In the first session of the Plenary of the HSYK on 15 January 2014 which he presided, the Minister proposed (and the majority agreed to) an addition to the agenda concerning changes to the composition of the three Chambers. The reason for this modification given by the Minister was that the work of the Chambers should be made more efficient. The Plenary thereupon re-evaluated each member one by one and decided whether to leave him or her in the current position or transfer him or her to another Chamber. As a result, two members of the First Chamber were exchanged, one with a member of the Second Chamber and the other one with a member of the Third Chamber. On the following day, the newly-composed First Chamber issued a decree by a majority of six (including the three new members) to one. By that decree which was effective immediately the First Chamber transferred to other locations prosecutors who were considered responsible for the investigations against the cabinet members and/or their family members. The reason given was that there had been irregularities in those investigations and that the timing indicated a coordinated attack on the Government by "foreign circles" or a "parallel structure."
10. Pursuant to the Law No. 6087 on the HSYK in the version which was then applicable, the disciplinary power over judges and prosecutors was actually vested in the Second and Third Chambers. The Third Chamber was responsible for investigations with the help of the Inspection Board, subject to the approval of the Minister in his capacity as the ex officio President of the HSYK, and the Second Chamber was responsible for deciding on whether the results of those investigations warranted disciplinary action or even prosecution. But the majority of the First Chamber (which is responsible for routine transfer decisions) believed that there was no time to follow that regular procedure and that the transfers had

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0307&from=BG , page 9.

to be made immediately to avoid "irreparable damage" – to the judiciary. Some members of the HSYK believed that this was interference by the First Chamber in the responsibility of the other Chambers.

11. The course of action taken by the First Chamber risks being perceived by judges and public prosecutors in Turkey as an indication that, if they are involved in high-profile cases, they are subject to immediate transfer of location, whenever the majority of the First Chamber is dissatisfied with their performance, irrespective of the reason for such dissatisfaction and irrespective of whether they committed any disciplinary offence. This raised concerns because it was likely to destroy much of the progress which had been made in creating a mentality of independence in the members of the judiciary.

II. THE DESIGN OF HSYK BY THE GOVERNMENT WITH THE LAW NO 6524

12. In the motion of the Law No 6524 submitted to the Parliament declared that, mentioning the reforms carried out through the 2010 Constitutional referendum carried out in 2010, this draft law foreseeing important changes, inter alia, in the functioning and composition of the HSYK was needed for a more effective and efficient functioning of the HSYK, taking into account the developments took place in last three years.2
13. The Law No. 6524 added the Provisional Art. 4 to the Law No. 6087. According to this provision, the entire personnel of the HSYK (including the Secretary-General, Deputy Secretaries-General, President and Deputy Presidents of the Inspection Board, all the inspectors, rapporteur judges and administrative staff) was automatically dismissed with the entry into force of the Law. New personnel were to be appointed or elected within ten days. The dismissed staff members were to be reassigned to new posts, taking their acquired rights into consideration. With the entry into force of the Law, also all the circulars of the HSYK were automatically revoked.
14. The new appointment powers of the Minister and/or the Plenary of the HSYK were immediately used before the Constitutional Court could order the stay of execution.
15. According to the information shared by the interlocutors of during a Peer Review Mission on the HSYK held by an individual EU Commission expert between 6-8 May 2014, with the enactment of the Law 6524, "the previous President of the Inspection Board was

[2] https://www2.tbmm.gov.tr/d24/2/2-1929.pdf, page 14.

reappointed, and two new Deputy Presidents appointed. 57 of the previous chief inspectors and inspectors were reappointed, while 80 previous members of the Inspection Board were transferred. Of the previous 47 rapporteur judges, 18 were retained and 29 transferred. Of the previous 270 administrative staff members, 228 were retained, 195 of them on a temporary basis. In total 80 of 137 inspectors and 29 of 47 rapporteur judges were removed from the HSYK. Only with regard to the administrative staff, the majority of the previous staff members was rehired"[3].

16. The decision-making process, however, on which members of the previous personnel to rehire was neither transparent and nor based on any objective criteria. The dismissal of hundreds of judicial and administrative personnel by an act of the legislature without consideration of the individual cases was highly unusual. Provisional Art. 4 amounted to an annihilation of the entire record of the post-2010 HSYK.
17. The HSYK has been the most important centralized body responsible for the organization of the entire judiciary, with power to decide on admission, appointment, transfer, promotion, disciplinary measures, dismissal, and supervision of judges and public prosecutors.
18. Constitutional amendments introduced in 2010 transferred the power of supervision of the judiciary and the prosecution service from the Ministry of Justice to the inspectors of the HSYK, with regard to the performance of their duties in accordance with laws, regulations, by-laws and circulars. Investigation into whether judges have committed offences in connection with, or in the course of, their duties, and into whether their behavior and conduct are in conformity with the requirements of their status and duties, are carried out by the Council's inspectors, with the permission of the President of the HSYK.
19. The rapporteur judges of the HSYK and inspectors of the Board of Inspector have remained as an important part of the HSYK and independent and impartial judiciary. They have performed important judicial functions in support of the HSYK that all depend on such support in order to function effectively. The independence and impartiality of the respective judicial body must therefore also cover the rapporteur judges as well as inspectors.

[3] https://www.avrupa.info.tr/sites/default/files/2016-11/Final_TG_Report18122014.pdf

20. The amendments made by Law no 6524 had obviously nothing to do with the declared aim of the said draft law, that is to say creating a more efficient and effective HSYK, but instead it was perceived as a warning to the HSYK – both the members and their staff – as well as to the entire judiciary, represented by the HSYK, that any action considered as a judicial interference by the authorities is unwelcome and will have consequences, including dismissal from the current position. This statutory step taken in response to the 17 – 25 December large-scale corruption probe was the first milestone statutory and de facto intervention of the Government to the independence and impartiality of the HSYK and the judiciary as a whole.
21. The subsequent interventions starting with the enactment and arbitrary enforcement of Law No 6524 and particularly with the latest major problematic changes made in the composition of the Council of Judges and Prosecutors, through amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and submitted to a national referendum on 16 April 2017, have significantly compromised the institutional independence of the judiciary and the personal independence of individual judges and highly politicised the judiciary and its institutions.4
22. The Grand Chamber recently concluded in the judgment of Selahattin Demirtaş v. Turkey(No.2) (Application n. 14305/17) that "The situation of the judiciary in Turkey was recently The reports and opinions by international observers, in particular the comments by the Commissioner for Human Rights, indicate that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency, when hundreds of judges were dismissed, and especially in relation to criminal proceedings instituted against dissenters."

[4] See the details of all those interventions: https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf

III. THE DESIGN OF THE SUPREME COURTS BY THE GOVERNMENT WITH THE LAW NO 6723

23. After the changes made in the HSYK with the Law no 6524, the next action was to design the high level judicial bodies, the Council of State and the Supreme Court.
24. The Ministry of Justice submitted a bill to Parliament on June 13, 2016 which mainly restructures the administrative and civil supreme courts. The proposal was terminating the mandates of nearly all the current members of Council of State and Court of Cassation while shrinking these courts.
25. The seats are then to be filled by the President's direct appointment (a quarter of the seats in the Council of State) and the *HSYK* (the rest of the seats in the Council of State and all seats in the Court of Cassation) within five days of the bill's coming into force. Most of the deposed judges are expected to be reassigned to lower courts across the country. Furthermore, as the Supreme Board of Election, the body responsible for the administration and judicial oversight of elections, consist of six members of the Court of Cassation and five members of the Council of State, it will be automatically dissolved and its new members will be elected from the two newly formed supreme courts. It is with this unprecedented dismissal that the bill is vehemently criticised as being "the final nail in the coffin" of the independence of Turkish judiciary and regarded as grossly unconstitutional.[5]
26. With respect to this move, the government states in its report that in the Constitution there is no specific security of tenure of supreme court judges in addition to the general security of tenure of judges and that, therefore, as long as they are reassigned elsewhere as judges, there is no breach of the security of tenure.[6]
27. As a result of the Law no 6723, the blanket dismissal and potential downgrading of judges to lower courts are incompatible with the constitutional principles of the rule of law (Article

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[5] http://www.hurriyetdailynews.com/chp-head-criticizes-law-schools-for-remaining-silent.aspx?pageID=238&nID=100698&NewsCatID=338; Prof Sami Selçuk, former President of *Yargıtay*: http://www.cumhuriyet.com.tr/haber/siyaset/555209/Tabuta_son_civi.html (in Turkish); Prof İbrahim Kaboğlu, constitutional law scholar: http://www.birgun.net/haber-detay/anayasa-ya-aykiriliklar-yogunlasirken-116270.html (in Turkish); Prof Metin Feyzioğlu, President of the Union of Turkish Bar Associations: http://www.sozcu.com.tr/2016/gundem/feyzioglu-yargida-reisci-yapilanma-istemiyoruz-1286471/ (in Turkish).

[6] Tarik Olcay, *Resetting the Turkish Judiciary*, Int'l J. Const. L. Blog, July 1, 2016, at: http://www.iconnectblog.com/2016/07/resetting-the-turkish-judiciary

2), the independence of the judiciary (Articles 9, 138, 140, 154/5, 155/5, 159/1), and indeed with the security of tenure (Articles 139, 140).

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND APPLICABILITY OF ARTICLE 6

28. With regard to applicants' complaint of violation of their right to access to a court to challenge premature termination of their mandates at the Council of State and the Court of Cassation. The Court asked to the Parties whether article 6 § 1 of the Convention in its civil aspect was applicable to the case in question (Baka v. Hungary [GC], no 20261/12, §§ 100-118, 23 June 2016).

29. For Article 6 § 1 in its civil limb to be applicable, the Court requires that there must be a "dispute" regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. Additionally, the dispute must be "genuine" and "serious"; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise and finally, the result of the proceedings must be "directly decisive" for the right in question, mere tenuous connections or remote consequences are not sufficient to bring Article 6 § 1 into play (see Baka, cited above, § 100 and Denisov v. Ukraine [GC], no. 76639/11, § 44, 25 September 2018). In determining whether there was a "right" within the meaning of Article 6 § 1, the Court ascertains only if the applicants' arguments were sufficiently tenable, not whether they would necessarily have won had they had access to a court (see, inter alia, Neves e Silva v. Portugal, 27 April 1989, § 37, Series A no. 153-A). According to the Court although there is in principle no right under the Convention to hold a public post entailing the administration of justice (see Dzhidzheva Trendafilova v. Bulgaria (dec.), no. 12628/09, § 38, 9 October 2012; and concerning tenured judicial positions, Baka, cited above, § 107; Denisov, cited above, § 47, and Kövesi v. Romania, no. 3594/19, § 113, 5 May 2020), such a right may exist at the domestic level.

30. In the present case it is clear that all the applicants were entitled under the domestic law to work as High Level Court Judges until their retirement if none of the exceptional grounds for early termination of office, as set out in Articles 1 and 22 of Law No 6723, materialised. Articles 1 and 22 of the said law stipulates that all the members of the Council of State and the Court of Cassation except for the Chief Justices, Deputy of the Chief Justices, General Prosecutors of the Council of

State and the Court of Cassation and the Chief Justices of the Chambers shall terminate on the date of this act.

31. According to Article 140 of the Constitution, judges perform their duties based on the principles of independence of judiciary and tenure of judges. These principles provided the applicants at least with an arguable basis on which the right to be protected against arbitrary removal from their duties could be claimed (see, mutatis mutandis, Bilgen v. Turkey, § 57).

32. Law No 2575 and Law No 2797 require certain qualifications to be appointed as a high level court judge. They are selected by the General Board of Council of Judges and Prosecutors from the judges and prosecutors who are believed to be beneficial at the service of the Supreme Courts. In determining that their personal and professional integrity, success in their former duties and other qualifications make them to come to the fore amongst their peers are considered by the General Board.

33. Applicants in the present case were immediately terminated from their positions with the enactment of Law no 6723 and they were not repositioned afterwards. As the Law no 6723 did not require any objective criteria for termination and repositioning, the applicants could never learn the reasoning behind the decision of premature termination of their duties by Law no 6723. It should also be taken into account that the applicants, whose performance and conduct had not been never called into question, and who in any case were not duly apprised of the reasons for their early termination of duties, could argue that their premature termination were not in compliance with the provisions of domestic law. In these circumstances, and in so far as the factual or legal basis for the applicants' premature terminations were not disclosed to them, the applicants could legitimately suspect an element of arbitrariness in their terminations and this provided certainly an arguable basis on which the right to be protected against arbitrary termination of duty could be claimed.

34. In the light of the above considerations, a dispute (contestation) over a "right" for the purposes of Article 6 § 1 can be said to have existed in the instant case. As regards the question whether the subject-matter of the dispute qualified as "civil" within the meaning of Article 6 of the Convention, Volunteer Jurists would like to bring the following to the attention of the Court.

35. Arbitrary or unjustified premature termination without pressing reasons or other legal grounds might have considerable negative impacts over their family life as well. Applicants who had had supreme court judge position and successful professional background with sufficiently long term of service in the other judicial districts had the right to remain and continue to live in Ankara. As most of them had established their family life in Ankara with the expectation of pursuing their profession until their retirement age unless they want to do so and as long as they perform their duties successfully, it is unquestionable that their private and family life was substantially affected as a consequence of premature termination of their positions at the Council of State and the Court of Cassation.

36. As presented above premature termination of their positions at the Supreme Courts entailed direct pecuniary effects such as a reduction in salary or a loss of allowances. This gave rise to a civil right or obligation. Also, the long-term negative effects and sufferings of the premature termination of the applicants' private and family life can constitute a basis for finding that it affected their civil rights and obligations.

37. Moreover, bearing in mind the presumption that Article 6 applies to "ordinary labour disputes" and taking into account that the premature termination of applicants' position at the HCJP had considerable effects on their professional life and career and that it was a unilateral statutory measure relating to the employment relationship which was neither insignificant nor a mere formality, is should be concluded that it would be artificial to exclude the dispute at issue from the protection of Article 6 for any reason and the dispute concerned relates to their civil rights and obligations. (Baka, §§ 34 and 107-11, and Denisov, §§ 25, 47-48 and 54)

38. With regard to the question of whether the applicants had access to a court within the meaning of Article 6 § 1 of the Convention, in order to obtain a decision regarding the premature termination of their mandate due to the adoption of Law no. 6723, it should be noted that the premature termination of applicants' positions were the direct and automatic result of the entry into force of the said law. Articles 1 and 22 of Law no. 6723 impose the termination of all judges' positions with the entry into force of the Law concerned.

39. In cases of employment disputes concerning civil servants, the Court applies a two-tier test, which it established in its Grand Chamber judgment in Vilho Eskelinen ("Eskelinen test"). In order for the respondent State to be able to rely before the Court on the applicant's status as a civil

servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest.

40. In the present case, Law no 6723 did not foresee any possibility to appeal or to have access to a court in order to obtain a decision in relation to premature termination of their mandate. As this outcome was not the result of an ordinary administrative act but the result of a legislation enacted by the Parliament it is not possible to bring a case in any court against the premature termination.

41. In other words, the applicants were prevented from exercising their functions by way of a parliamentary law allegedly diminishing the number of chairs at the Supreme Courts. The courts of general jurisdiction in Turkey did not have power to set aside laws as being unconstitutional and individuals do not have right of individual petition to the Constitutional Court, which is the sole court empowered to repeal a statutory provision. Therefore, as the applicants' complaint directly concerned a statutory provision, it should be concluded that applicants had no judicial remedy and did not have a right of access to a court under national law in relation to their claim which is at issue in the present case.

42. Even if the Court rules in the present case that the first condition of Eskelinen test referring to "express exclusion" of access to court was satisfied, in any event, there are grounds to rule that the second condition of Eskelinen test was not satisfied. Law No 6723 does not state any reason for the premature termination of mandates of all members of the Supreme Courts with the entry into force of the law.

43. However, Law No. 6723 had nothing to meet the need for judges in the courts of appeal in line with rule of law principle. It rather aimed at further politization of the Supreme Courts and consolidation of executive control over the judiciary.

44. In summary, the premature termination of mandates of the applicants took place under abovementioned circumstances. Therefore, the lack of a judicial remedy to challenge the applicants' removal from their mandates at the Supreme Courts could never be justified under the Eskelinen test and exclusion of access to a court resulted from a legislation as such aimed at the

dismantling of independence of judiciary and consolidating political power over the Courts could never be regarded as consistent with the rule of law.

45. Whether the applicants obtained a right of access to a court to have their complaint under Article 6 § 1 of the Convention examined as a result of the fact that the Constitutional Court annulled the Articles 1 and 22 of Law no. 6723 on the grounds that it was contrary to Constitution is the question answer of which will be sought by the Court in examining the present case.