SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

COMMITTEE OF MINISTERS
COMITÉ DES MINISTRES

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

Date: 28/11/2023

DH-DD(2023)1460

Meeting: 1483rd meeting (December 2023) (DH)

Communication from an NGO (Ifade Ozgurlugu Dernegi (IFOD – Freedom of Expression Association)) (26/10/2023) in the case of ULKE v. Turkey (Application No. 39437/98) (appendices in Turkish are available at the Secretariat upon request).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

* * * * * * * * * * * *

Réunion : 1483e réunion (décembre 2023) (DH)

Communication d'une ONG (Ifade Ozgurlugu Dernegi (IFOD – Freedom of Expression Association)) (26/10/2023) dans l'affaire ULKE c. Turquie (requête n° 39437/98) (des annexes en turc sont disponibles auprès du Secrétariat sur demande) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

RULE 9.2 COMMUNICATION

in Ülke Group v. Turkey (no. 39437/98)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

26.10.2023

An independent non-governmental organization specialized in defending and promoting freedom of expression

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

DGI Directorate General of Human Rights and Rule of Law

Department for the Execution of Judgments of the ECtHR

F-67075 Strasbourg Cedex

FRANCE

26.10.2023

Rule 9.2 Communication from İfade Özgürlüğü Derneği ("İFÖD") in *Ülke Group v. Turkey* (no. 39437/98)

1. The submission is prepared by **İfade Özgürlüğü Derneği** ("İFÖD" – Freedom of Expression Association), a non-profit and non-governmental organization that aims to protect and foster the right to freedom of opinion and expression in Türkiye. The aim of this submission is to provide information on general measures deriving from the ***Ülke v. Turkey*** group of cases in the context of the pending individual applications before the Constitutional Court that have not yet been concluded and to determine whether the Constitutional Court has a priority policy within the scope of the relevant legislation.

I. Background

2. Applicant Osman Murat Ülke, in accordance with Türkiye's regulations at the time, was summoned for military service in 1995 by the appropriate authority. Invoking his pacifist convictions, the applicant refused to fulfil the mandatory military service and publicly burned the summons during a press conference held in Izmir. In response to his actions, several investigations and legal proceedings were launched against the applicant under the now-repealed Turkish Penal Code No. 765 and the Military Penal Code. Charges included inciting conscripts to evade military service and repeated insubordination. Throughout these proceedings, the applicant was sentenced to imprisonment on multiple occasions totalling 701 days in prison.[1]

3. *The leading Ülke v. Turkey* judgment constituted a new group along with *Buldu and Others v. Turkey, Enver Aydemir v. Turkey, Erçep v. Turkey, Feti Demirtaş v. Turkey, Savda v. Turkey* and *Tarhan v. Turkey* [2] judgments, all of which concern conscientious objectors' rights protected under the European Convention on Human Rights **("ECHR").**

4. In all *Ülke* group cases; the applicants declined the mandatory military service required by law in Türkiye. Identifying themselves as conscientious objectors, the applicants argued that the repeated prosecutions and convictions they faced for their refusal, based on their pacifist

1 *Ülke v. Turkey,* no. 39437/98, 24.04.2006,

2 *Buldu and Others v. Turkey*, no. 14017/08, 03.06.2014, *Enver Aydemir v. Turkey*, no. 26012/11, 07.06.2016, *Erçep v. Turkey*, no. 43965/04, 22.11.2011, *Feti Demirtaş v. Turkey*, no. 5260/07, 17.01.2012, *Savda v. Turkey*, no. 42730/05, 12.06.2012, *Tarhan v. Turkey*, no. 9078/06, 17.07.2012.

beliefs, amounted to torture and inhuman treatment under Article 3 of the ECHR. Furthermore, the applicants also believed that their rights to freedom of thought, conscience, and religion protected by Article 9 were violated. Additionally, they asserted that their right to a fair trial protected by Article 6 has been violated.

5. The European Court found a violation of Article 3 of the ECHR on 24.01.2006 in the *Ülke* case and this decision became final on 26.04.2006. The Committee of Ministers has been supervising the adoption and implementation of the action plans under Enhanced Procedure. As will be explained in detail below, in accordance with this monitoring process, the Conscientious Objection Watch, War Resisters' International and the European Association of Jehovah's Witnesses have issued a joint Rule 9.2 Submission.

6. In group cases, all applicants identifying as pacifists and conscientious objectors who declined compulsory military service were described as undergoing a "civil death". They were forced into secrecy and faced continuous prosecutions and convictions. The Court determined that this breached Article 3 of the Convention. In the cases of *Erçep, Savda and Feti Demirtaş, Buldu and Others and Tarhan*, the Court highlighted that Turkish authorities did not offer an effective procedure to ascertain if the applicants qualified for conscientious objector status, emphasizing that the state's positive obligations under Article 9 had not been fulfilled. In other words, there is no alternative offered to conscientious objectors who refuse mandatory military service in Türkiye. In the cases of *Feti Demirtaş, Savda*, and *Buldu and Others,* the Court further found a violation of the right to a fair trial on account of the lack of independence and impartiality of military courts when judging conscientious objectors. In the *Enver Aydemir* case, the Court ruled that the prohibition of torture under Article 3 was violated both materially and procedurally, given the applicant's ill-treatment during detention and the absence of a effective investigation into the matter.

7. Subsequent to the *Ülke v. Turkey* judgment, the Grand Chamber of the European Court rendered a significant decision in the *Bayatyan v. Armenia* case. This judgment is pivotal for all related applications on the issue of conscientious objection. In the *Bayatyan v. Armenia* case*,* paralleling the circumstances in the *Ülke v. Turkey* group of cases, the applicant faced lengthy criminal proceedings. The applicant argued that the Court's interpretation of the prohibition of slavery and forced labour under the Convention in similar applications did not adequately affirm the right to conscientious objection under Article 9 of the ECHR. In other words, the applicant felt that the Court's interpretation did not unambiguously endorse the right to conscientious objection.[3]

8. In the *Bayatyan v. Armenia* case, the Grand Chamber emphasised that the "Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today".[4] The Court therefore applied a new criterion for conscientious objection, focusing on a profound and unresolvable clash between military service obligations and an individual's genuine conscience or deeply held religious or other

[3] *Bayatyan v. Armenia,* no. 23459/03, 07.07.2011, §73-77.

[4] *Bayatyan v. Armenia,* no. 23459/03, 07.07.2011, §102.

beliefs. The Court noting that Article 9 does not explicitly refer to a right to conscientious objection, considered that "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9."[5] According to the Court, "whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case."[6] This marked a departure from the Court's prior decisions. The Court concluded that there was a breach of Article 9 of the ECHR.

II. The Action Plan of the Government

9. The Government has submitted three action plans so far and the most recent Action Plan was submitted to the Committee on 30.03.2023. The latest Action Plan provides information on the individual measures and the current status of the applicants in the *Ülke v. Turkey* Group of Cases. The plan also informs the Committee on the relevant legislative amendments and strategy papers, projects and raising awareness activities.

10. The Plan refers to reduction in the duration of the mandatory military service as well as the system of "military service by payment" becoming permanent with the introduction of the current Military Service Act. However, the Court in its recent decision of *Teliatnikov v. Lithuania* (no. 51914/19, 07.06.2022) ruled that the existence of an alternative national defence service in Lithuania "is **intrinsically linked to military service, and therefore cannot be seen as separate civilian service**" (§ 107). Therefore, the unavailability of an alternative genuine civilian service resulted with a violation of Article 9. Following *Teliatnikov v. Lithuania*, the Court will never accept "shorter mandatory military service" or "military service by payment" systems as respecting the individuals' conscientious objection to military service. In fact, in its June 2023 meeting, the Committee of Ministers also explicitly stated that "paid military service" or reduction of the length of mandatory military service" do not constitute an alternative to mandatory military service.[7]

11. However, the purpose of this submission is to evaluate the applications pending before the Constitutional Court, therefore, only the relevant part of the latest action plan will be addressed. The action plan reminds the Committee of the introduction of the individual application process before the Constitutional Court as an effective remedy referring to the *Hasan Uzun v. Turkey* case (no. 10755/13, 30.04.2013), and that any person who is a conscientious objector similar to the applicants' position has the right to apply to the Constitutional Court ("TCC"). However, the Government refrained from providing any information on how many individuals in a similar situation to that of the applicants have applied to the TCC, the outcomes of those applications or the number of applications currently pending before the TCC.

---

5 *Bayatyan v. Armenia,* no. 23459/03, 07.07.2011, §110.

6 *Ibid*.

7 See https://hudoc.exec.coe.int/eng?i=004-37268

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

III. İFÖD's Observations

12. In its action plan, the Government mentions the *Uzun v. Turkey*[8] case where the European Court had decided that an individual application must be lodged with the Turkish Constitutional Court before the case can be taken to the European Court. However, the *Uzun v. Turkey* jurisprudence cannot apply in the *Ülke v. Turkey* group cases because the Turkish Constitutional Court failed to provide an effective remedy for conscientious objectors and pacifists by not delivering a single decision since the beginning of individual application mechanism in 2012. In other words, although the individual application process to the TCC is regarded an effective remedy by the European Court, the TCC failed to issue a single decision since 23.09.2012 on this issue and currently there are no decisions of the TCC referring to the *Ülke v. Turkey* as well as *Bayatyan v. Armenia* decisions of the European Court.

13. According to data collected and submitted by the Vicdani Ret Derneği ("The Association for Conscientious Objection") to the Committee in November 2021, at least 45 individual applications were made by conscientious objectors to the Constitutional Court between 2012 and April 2021.[9] More worryingly, **individual application no. 2013/5564**, regarding a claim that freedom of religion and conscience was violated due to the imposition of an administrative fine on a conscript who, based on his religious beliefs, declared himself a conscientious objector and requested alternative civilian service instead of military service was on the agenda of the First Section of the Constitutional Court on **17.02.2016**. The First Section decided to refer the application to the General Assembly of the Constitutional Court. Since then, and **after almost 7,5 years**, the President of the Constitutional Court is yet to table the application on the General Assembly agenda. In other words, **almost 10 years after** the application no. 2013/5564 was submitted, it is yet to be decided by the TCC.

14. While the General Assembly of the Constitutional Court is yet to decide the application no. 2013/5564, the NGOs (The Association for Conscientious Objection, Freedom of Belief Initiative in Turkey, Norwegian Helsinki Committee, War Resisters' International, The European Bureau for Conscientious Objection, Connection e.V) reported in their November 2021 submission that an application by Uğur Yorulmaz was found inadmissible by the Constitutional Court without addressing the right to conscientious objection and referred solely to the right to fair trial and found the application manifestly ill founded.

15. Clearly, the lack of clarity in the TCC's prioritization process suggests a hesitancy to adopt the general measures highlighted in the *Ülke v. Turkey* group cases. Ideally, transferring a case from a section of the Court to the General Assembly should not span over 7.5 years.

---

8 *Uzun v. Turkey*, no. 10755/13, 30.04.2013.

9 See https://vicdaniret.org/the-report-conscientious-objection-to-military-service-in-turkey-ulke-group-cases-against-turkey-is-released/ . See further 1419th meeting (December 2021) (DH) - Rule 9.2 - Communication from NGOs (The Association for Conscientious Objection, Freedom of Belief Initiative in Turkey, Norwegian Helsinki Committee, War Resisters' International, The European Bureau for Conscientious Objection, Connection e.V) (04/11/2021) in the *Ulke group of cases v. Turkey* (Application No. 39437/98).

16. İFÖD believes that the observations noted in the aforementioned submissions stem from the Constitutional Court's operations, which permit the arbitrary delay of specific applications.

17. The policy that appears to prioritize the examination procedure of individual applications is outlined in article 68 of the Constitutional Court's Rules of Procedure, under the section entitled "Order of Examination of Applications":

> "(1) The individual applications shall be examined and concluded in the order in which they have been submitted. However, the Court can impose a separate examination order within the framework of the criteria it determines by taking into account the topical importance and emergency of the applications."[10]

18. While this policy stipulates that individual applications should be reviewed by the Court in the order they are received, it also allows the Court to adjust the examination sequence based on the significance and urgency of the matter. Yet, there are no established criteria to gauge the importance and urgency of the applications. Furthermore, and unlike the European Court, the Constitutional Court has not publicly declared any alternative **priority policy**. However, the TCC often refers to its "**unpublished priority policy**" when the Court provides information to the European Court via the Ministry of Justice (See **Annex I**). According to such a letter sent from the Constitutional Court to the Ministry of Justice on 01.10.2018, applications made to the Court are examined in line with the principles the Court has established based on the alleged violations. According to these principles, applications alleging violations of what the Court refers to as "**core rights**", such as the right to life, claims of torture and ill-treatment, and allegations of violations of the right to personal liberty and security, are given priority in examination.[11] According to this priority policy, the Constitutional Court gives priority to ongoing violation claims as well as applications which consist of requests of interim measures.[12] The Court cites several examples[13] of ongoing violation cases in its letter to the Ministry of Justice (See **Annex I**) but it is clear that similar applications have not been prioritised.[14] In any case, the Constitutional Court, in its decisions, fails to provide reasoning

---

[10] See https://www.anayasa.gov.tr/en/legislation/internal-regulations-of-the-court/

[11] **Turkish version**: "Mahkememize yapılan başvurular ihlal iddialarına göre belirlenen ilkelerimiz doğrultusunda incelenmektedir. Bu ilkeler uyarınca öncelikle çekirdek haklar olarak nitelendirdiğimiz yaşam hakkı, işkence ve kötü muamele yasağının ihlali iddiaları ile kişi hürriyeti ve güvenliği hakkının ihlali iddiasıyla yapılan başvurular incelenmektedir."

[12] **Turkish version**: "Anılan ihlal iddialarına ilişkin başvurular ile diğer ihlal iddialarına ilişkin başvurularda devam eden ihlal iddiasının bulunup bulunmadığı yönünden inceleme yapılarak öncelikle devam eden ihlal iddialarına ilişkin başvurular incelenmektedir. İhlalin devam ettiği iddiası varsa bu başvurularda en kısa sürede inceleme yapılmakta, tedbir talepleri varsa derhal değerlendirilmektedir."

[13] Among others see Yaman Akdeniz and others, App No: 2014/3986, 02.04.2014; Youtube Llc Corporation Service Company and others [GK], App. No: 2014/4705, 29.05.2014; Mahmut Tanal ve others [GK], App. No: 2014/18803, 10.12.2014.

[14] Compare and contrast another application which should have been an "ongoing violation case" – that of Wikimedia Foundation and others (App. No: 2017/22355, 26.12.2019) with that of the Yaman Akdeniz and others (the "Twitter case") and YouTube Llc Corporation Service Company and others (the "YouTube case"). While the TCC decided the Twitter case in 10 days and the YouTube case in approximately 45 days, inexplicitly the Court took almost 2,5 years to decide the Wikipedia case.

for the priority consideration of certain applications. This omission leaves no insight into the Court's rationale for expedited decisions.

19. As highlighted by the European Court's decisions in the *Ülke v. Turkey* group cases, it is evident that the current system in Türkiye has relegated the applicants to a state of "**civil death**." It is evident that the treatment of conscientious objectors could breach Article 3 of the Convention. Given this context, it is undeniable that such applications should be prioritized for examination due to the significance and urgency of their subject matter, as outlined in the Rules of Procedure of the Constitutional Court.

20. Considering that some of the cases as part of the Ülke group of cases involved Article 3 of the Convention, any applications by the conscientious objectors referring to Article 17 of the Constitution together with Article 3 of the European Convention should have triggered a "core rights" consideration by the Constitutional Court. However, **that has not been the case so far**.

21. İFÖD contends that the Constitutional Court arbitrarily applies its "**not so public**" priority policy. Certainly, the Court lacks a clear timetable for referrals from its sections to the General Assembly. As it currently stands, decisions seem to hinge on the whims of the Court's President, a practice that is wholly indefensible.

22. İFÖD underscores the Court's seemingly arbitrary neglect of conscientious objection applications filed since 2012.[15] As such, İFÖD seeks to underline the fact that at least 45 applications that have languished in the Constitutional Court for years without resolution. This stance by the Constitutional Court towards conscientious objectors effectively subjects applicants to a "civil death," forcing them to endure the repercussions of their convictions without any effective legal remedy.

IV. Conclusions and Recommendations

23. İFÖD considers that the issues identified by the European Court in the case of *Ülke v. Turkey* persist, with Turkish authorities wilfully overlooking the need for legislative changes to acknowledge the legal status of conscientious objectors. As detailed in this submission, the Constitutional Court exacerbates the issue by either neglecting or consistently postponing pending applications, even at the General Assembly level. This evidently results in the authorities' inability to present any relevant case-law of the Constitutional Court.

24. İFÖD recommends that the Committee should ask the Turkish authorities to report on the effectiveness of the Constitutional Court in the context of conscientious objection.

25. İFÖD also recommends that the Committee ask the Government to provide statistical information on the number of individual applications on the subject of conscientious objection before the Constitutional Court and when these applications have been lodged.

26. İFÖD also recommends that the Committee ask the Government to provide information on the delays to decide pending **individual application no. 2013/5564** at the General Assembly of the Constitutional Court (see **Annex II**).

[15] See https://www.anayasa.gov.tr/media/8846/bb_2023_2_en.pdf

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

27. İFÖD also recommends the Committee to ask the Government to provide detailed information on the priority policy of the Constitutional Court.

28. Finally, İFÖD considers that there has been no progress achieved with regard to providing necessary legal safeguards for the protection of conscientious objectors in Türkiye.

İFADE ÖZGÜRLÜĞÜ DERNEĞİ
Osmanağa Mah. Hasırcıbaşı Cad.
No:24/4 Kadıköy/İSTANBUL
Kadıköy V.D. 4700644051
Kütük No: 34-235/076

İfade Özgürlüğü Derneği – İFÖD (Türkiye)

Web: https://ifade.org.tr Twitter: @ifadeorgtr

İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 to protect and foster the right to freedom of opinion and expression. The Association envisions a society in which everyone enjoys the freedom of opinion and expression and the right to access and disseminate information and knowledge.