



JUDICIARY OF
ENGLAND AND WALES

IN THE WESTMINSTER MAGISTRATES' COURT

THE REPUBLIC OF TURKEY

- v -

NURHAK TALAY

Ruling of District Judge Purdy dated 14/12/16. Extradition Act 2003. Conviction case: 7 years 2 months & 17 days to serve (913 days already deducted as time spent in custody). "Terrorist" related offences (5) including membership of TKP (Turkish Communist Party) and in 1998 & 1999 was implicated in planting a bomb at a police station (Istanbul) and displaying "martyrs are alive" banners.

Issues: (i) Extradition offences S.84 (ii) Abuse of process (as successfully claimed asylum on same facts & is now U.K. citizen (iii) extraneous considerations S.81 (political & ethnic origin (iv) Convention Rights: (a) Article 2 & 3 – death /torture & police & prison conditions (b) Article 6 – fair (retrial) trial given state of Turkish criminal justice system in late 2016 (post attempted coup). Article 8 – establish life here in the U.K. – mental health & limited period to serve of (perhaps) under 12 months if main penalty – membership of proscribed organisation is removed as not dual criminality.

Advocates: Pros: Toby Cadman & Benjamin Seifert
Def: Mark Summers, Q.C., & Aaron Watkins

1. Background.

The Republic of Turkey (hereafter Turkey) seeks the extradition of Nurhak Talay (d.o.b. 10/5/76) now 40 years old, a native born Turkish national but now a U.K. citizen following a successful claim for asylum on 18/2/04. Turkey seeks to enforce convictions (although now offers a guarantee of a retrial as of 20/10/16) for **5 politically motivated (terrorist) offences from 1998/99**. The complaint is of membership of a proscribed body TKP (Communist Party) planting a bomb which exploded at a police station on 21/11/98 and on 18/1/99 planting another and displaying political posters at the scene; "*martyrs are alive. TIKKO is fighting, TKP/ML TIKKO*" at Karagumruk Police Station in Istanbul. He was arrested at the scene. Detention followed with a trial in absence on 29/7/99 with judgement a decade later on 10/3/09. The sentences were (i) 7 years 6 months for being a member of an illegal (terrorist) organisation (ii) 1 year 8 months for the 1998 police station bomb blast (iii) 3 years

9 months and a 1000 (Turkish) Lira for exchanging an explosive substance (iv) 13 months and 10 days for planting the 18/1/99 bomb & (v) 3 years 9 months and a 1000 (Turkish) Lira fine for exchanging an explosive substance. The case was reviewed and the conviction upheld by the court of cassation on 2/4/12. An arrest warrant was issued 26/11/13. Being in custody 19/1/99 – 20/1/01 **some 913 days have been served** and deducted reducing 9 years 8 months and 20 days imposed by the Istanbul 13th Heavy Criminal Court authorised by Article 250 of the Turkish Criminal Justice Procedure Code as **7 years 2 months and 17 days outstanding**. This Request is dated 17/11/15 and is certified (per S.70) by the Secretary of State 8/1/16 with a (S.71) warrant by Judge Zani of this court being granted on 25/1/16. Arrest followed on 10/5/16 at the shop owned and run by Nurhak Talay in Hastings, East Sussex being produced before Judge Williams 11/5/16. The procedural formalities of this Part 2 Extradition Act 2003 Request were found to be in order and unchallenged. Consent was not forthcoming. The case was opened and adjourned with directions for the preparation of the Defence case. Conditional bail was granted by Judge Williams but appealed to the High Court by Turkey. Blake, J. upheld the grant of bail on 13/5/16. On 19/10/16 I rejected an application to adjourn until 28/10/16 for a Turkish Government reply to Defence evidence, all served as per directions. Accordingly I heard the case 20/21 October 2016 adjourning for this ruling. As a fact the detailed 11 page reply arrived on the morning of 20/10/16 and became part, without objection, of the case.

2. Issues/Representation.

Mr Mark Summers, Q.C., and Mr Aaron Watkins act for Nurhak Talay and advance the following challenges: (i) **extradition offence** – S.84; (ii) **abuse of process** based on the contention Nurhak Talay having put the same complaints of serious mistreatment amounting to persecution (not prosecution) before the Secretary of State in a successful asylum claim in 2004 and now a U.K. citizen should not face these proceedings; (iii) **extraneous considerations** per S.81 being a political activist of Kurdish extraction; (iv) **Convention Rights**: (a) **Articles 2/3 ECHR**, a real risk of death and/or torture in police/prison custody. (b) **Article 6 ECHR** – no fair retrial (following guarantee a retrial given in the Turkish reply of 20/10/16) given the current and (since 2014) purge of independently minded judges and prosecutors especially since the failed coup earlier in 2016; (c) **Article 8 ECHR**: established UK family unit come grant of asylum in 2004, previous and ongoing mental health (caused by Turkish prison experience) which could/would return if surrendered and the contention (if the longest term outstanding fails the dual criminality test) under 12 months remains which would, therefore, be disproportionate to extradite. Mr Toby Cadman and Mr Aaron Watkins, for Turkey, do not abandon this Request despite the onslaught from the Defence. Essentially Turkey concedes the membership of a terrorist organisation must fail dual criminality as the group (TKP) was not proscribed at the material time under U.K. anti-terrorist legislation. Otherwise the position is those who plant bombs at police stations or are accused thereof must be expected to face the criminal courts. A retrial is now promised. While the Turkish system, both criminal justice and penal, may have its real difficulties, this individual can be safely and fairly returned.

3. Material Considered.

I have the formal Request and the 11 page detailed further information of 20/10/16 from Turkey as well as written and oral submissions by learned counsel on its behalf. Nurhak Talay, via counsel, produces a significant volume – 4 large files – of materials including a skeleton argument of 11/10/16 running to 39 pages. Some material from the 2004 asylum

claim is reproduced. Additionally a huge amount of expert and open source material, much of it very recent, although Mr Summers made much of his ability to demonstrate serious concerns – to be neutral – go back many years and have got worse (again) in late 2016. Given that Turkey did not seek the attendance of any witness I have heard no live evidence. Most able, as one expects, oral submissions by both leading counsel were advanced and all has been considered.

4. Complaint.

I have already summarised this. Extensive detail is unnecessary. The Request (page 2/3) outlines the case. TKP is regarded as an *“armed terror organisation”* intent on *“abolishing the constitutional order of the Republic of Turkey with a civil rebellion and replacing it with an order based upon Marxist-Leninist principles”* thus it has engaged in *“... attacks on public institutions and organisations under the name of memorial revolutionary martyrs”*. Nurhak Talay joined TKP when a *“student at Uludag University in Bura Province and used the code name Umit”*. He and Dilek Ozturk *“provided intelligence for the purpose of throwing a bomb at Balat police station in Fatih County... on 21/11/98... They threw the bomb by igniting the fuse at Balat police station... and hanged a banner written “we paid you back and will pay you back for communist leader Mehmet Demirbag”.* They then attempted an attack of a similar nature on Karagumnik police station but *“was arrested and the bomb and banner captured”*. The Request states (page 3). *“The convict was interrogated and arrested on the date of 22/1/99 by Istanbul No 5 State Security Court. He was released on the date 20/7/01”*. That said judgement was made in the *“absence”* of Nurhak Talay but presence of *“his lawyer Adrian Ozcanan”* on 10/3/09. At page 5 the Request states *“... it is clear that Nurhak Talay’s actions are not political, they are conventional terror actions”*. Subsequent pages give more detail as to movements and actions. There is an acceptance a confession to all matters obtained by police he *“did not accept”* as true before the Public Prosecutor claiming innocence and that (page 7) his signed confession followed being *“exposed to torture”*. Nevertheless, he was convicted and that finding and sentence upheld on appeal as stated. Provisions of Turkish criminal law are adduced.

5. Further Information 20/10/16.

The author is Judge Omer Faruk Altintas *“on behalf of the Justice Minister & the Judicial Authorities”* from the *“Turkish Embassy in London”* where, Mr Cadman confirmed orally, Judge Altintas is currently based. He stresses the mutual trust treaties and conventions underpinning extradition arrangements. At page 3 *“I can confirm that Mr Talay provided his Defence statement against the accusations levelled against him in the indictment before the court, and that his trial never can be deemed to be held in absentia in terms of our jurisdiction. Be that as it may, however, if your authorities are of the opinion that Mr Talay was convicted in absentia, by virtue of my position and on behalf of the appropriate Turkish Judicial authorities I give my assurance that Mr Talay shall be afforded a retrial in the event of his extradition to Turkey”*. His *“position”* (footnote page 3) is described as *“a senior judge”* based at the Turkish Embassy in London as *“Legal Advisor”* dealing *inter alia “extradition matters”*.

Having raised the extent to which the judge can bind the system to permit a retrial in oral submissions I afforded Mr Cadman 24 hours to clarify the claim made (in writing) and Mr Summers time to reply if he so wished (also in writing). That resulted in a document dated

24/10/16. 25 questions posed by the CPS are answered. *Inter alia* the document states Nurhak Talay was released on 18/7/10 “...after he notified the authorities that his life was under serious threat under the conditions of the prison.” Further he “...was not required to be present during the hearings.” There is no “...information indicating he was tortured.” Release was conditional upon an obligation to “notify” any change of address. Capital punishment “is not possible “in this case. An “Addendum” document produced by Messrs Cadman and Seifert of 27/10/16 asserts the response is (at para 13) “Mr Talay is guaranteed a retrial” following the High Court, in Istanbul’s, decision to that effect of 24/10/16.

Reference-in the document dated 20/10/16- is made to the provision of medical care and that Turkey is “sorry to hear” Nurhak Talay suffers from “*Wernicke-Korsakoff Syndrome*”. Facilities ensure “*medical services without any interruptions*” are provided with “*necessary doctors and dentists... provided by the Provincial Health Directories*”. The Judge says any allegation of torture can be submitted “*to the Chief Public Prosecutor’s Office*” (foot page 5) with torture, by whomsoever, being contrary to various provisions of the Criminal Code. Reference is made to Turkey as one of the “*founding members of the Council of Europe*” and being deemed “*eligible*” to join the E.U.. Expressly (page 7) “*Turkey is a democratic, secular and social state governed by rule of law*” with an independent judiciary. The judge deals (page 9) with the “*attempted coup of 15/7/16 and the state of emergency*” stating “*...treachery and high treason was prevented by military troops loyal to both the Government and the Turkish nation... To make matters worse, the government of the Republic of Turkey has been had to be fighting against the other cross border terrorist organisations such as PKK, PYD and DAESH (ISIL) at the same time*”. Going on (foot page 10) “*It is again a great pity that some public prosecutor and judge colleagues have been involved in this terrorist organisation...*” An extract from a judge (now arrested) from the 18th Criminal Court of Istanbul of 4/7/16 is provided to illustrate the extent to which some judges have (been said) to go astray. However, the information is emphatic Turkey has adequate “*international and domestic constitutional and judicial safeguards against all kinds of human rights violations in times of peace and war and emergency*”. Concluding Mr Talay shall be afforded a retrial “*with all necessary measures*” given his “*health condition*” making clear “*the recent coup attempt will never detrimentally impact upon his retrial case... will be absolutely able to obtain a fair trial in the Turkish jurisdiction*”.

6. Defence Material. (outline)

As stated a significant volume of material has been adduced. Some relates to Nurhak Talay’s asylum claim to confirm *inter alia* that in seeking asylum his complaints of ill treatment were made and upheld then i.e. 2004; thereby seeking to rebut any suggestion of recent fabrication. Much is open source with Mr Summers stressing a lot of that relied upon is from international bodies and of recent origin. Further that although there had been a general improvement in human rights concerns matters had reverted to be as bad as was once the case. Specific reports are from experts on Turkey: (i) Dr William Jones (1/9/16) of Amnesty; (ii) Mr Muhawem Erbey (2/9/16) a Turkish (human rights) lawyer; (iii) Dr Quinton Deeley (19/9/16) a psychiatrist on Nurhak Talay’s mental health; (iv) opinion on behalf of the Bar Human Rights Committee (Bar of England & Wales) specifically on this case (dated 14/10/16). Given that no witness was required to attend I do not need to engage in extensive recital or fact finding following cross examination. However, I pause to stress, these being extradition proceedings with a long established extradition treaty state, following basic principles of mutual trust and respect the material provided by Turkey is to be accorded, absent challenge, due respect; see Lord Brown in *Government of Trinidad & Tobago v*

Gomes & Goodyer [2009] UKHL 21 @ para[36]. None of that stopped Mr Summers from taking me through the various documents referred to emphasising a trend in findings of an adverse nature against Turkey its police and prison regimes and criminal justice system.

7. Nurhak Talay.

Various documents are relied upon some from 2003/4 and the asylum's claim and also his current domestic, business and health position. He accepts his family is from the "*most rebellious Kurdish province in Turkey*" (asylum statement 30/9/03 @ para 1). Since a child left wing politics was a subject of family and village life. "*I have been a sympathiser of TKP/ML since I was a student at Lycee in 1991*" (same statement @ para 10). Involvement in "*various political activities*" followed (@ para 15) although "*not ready*" to join the armed unit of the communist party (para 16). He spent 4 months in prison from May 1996 after being arrested and tortured for alleged assistance to TKP/ML being "*forced to sign a statement prepared by the police*" (para 24). A hunger strike in prison by political prisoners including him ran for 35 days before a break of 10 days; then 15 days more (para 26) necessitating "*medical treatment*" (para 27) due to being "*very weak*". Other arrests/detentions followed in 1996 – 1999 some 3/4 times "*on each occasion I was verbally and physically abused by the gendarmes*" (para 32). In January 1999 he was arrested by anti-terrorist branch police. "*The torture that I was subjected to included beating, punching, kicking, hanging, being forced to lay on big ice cubes, squeezing my testicles, stripping off my clothes and being subjected to pressured cold water*" (para 36). Ultimately he was charged with bombing a police station in Istanbul "*I denied all the charges*" (@ para 41) being thereafter in prison January 1999 – 19th December 2000 with "*short periods*" (para 43) of hunger strikes. In December 2000 a sustained hunger strike against "*Type F*" prisons was brutally suppressed between 19th -22nd December 2000 resulting in 30 prisoner deaths. He was injured by being beaten with "*rifle butts*" (para 48). He required hospital admission being transferred to Haseki Hospital on 18/5/01 as Izmit Hospital "*was not able to provide the treatment I needed*" (para 51) until 15/6/01 when 18/7/01 "*The Institute of Foreign Sick Medicine*" prepared a report "*certifying that my life would be in danger if I continued to be kept in prison*" (para 53). He was released 21/7/01 but had medical treatment afterwards. An attempt was made to secure his admission into the Turkish Army to undertake military service. Essentially he went on the run to avoid this fearing "*too ill to survive the military service*" (para 65). In July 2003 his lawyer told him a warrant was out for his arrest for the 1998/99 bomb offences. He hid in Istanbul July – September 2003- before his father paid €4000 to a people trafficker to secure an exit in the back of a lorry using a bogus Belgian passport arriving at Waterloo by train 20/9/03 applying for asylum that day. He maintains being "*detained, tortured and imprisoned in Turkey as a result of my political activities. I was framed with an offence I did not commit...*" (@ para 76). He produces his [REDACTED] - [REDACTED] (asylum statement dated [REDACTED]/03. This recounts harrowing treatment from the authorities for actual or alleged involvement in TKP activity including being "*[REDACTED]*" (para 8) while being held in custody and tortured including a cigarette burn in the letter "*H*" being the name of a police officer "*Haci*". A Home Office letter dated [REDACTED]/04 confirms a grant of asylum. A further statement by Nurhak Talay is dated 22/7/16 confirming his current circumstances. He says he married in [REDACTED] 2004 and has [REDACTED] children [REDACTED] and [REDACTED]. They moved to [REDACTED] in [REDACTED] in [REDACTED] working in an [REDACTED] leading to the purchase of his own store in [REDACTED] employing two people. In [REDACTED] 2014 the family purchased a three bedroomed property subject to mortgage. The boys attend a [REDACTED] School and English (not Turkish) is the language used at home. Another [REDACTED] lives

“an anonymous life in Ankara with her husband” while Evrim is now a U.K. citizen in London with another brother also in Hastings. Their father remains *“politically involved”* in Turkey and has a 6 year sentence outstanding which he is *“appealing”*.

8. Dr William Jones.

Amnesty International Report 1/9/16. He speaks of being the chair of the Turkey monitoring group for 7 years and has an extensive knowledge. Torture and ill treatment *“has long been endemic in Turkey”* (para 2). Reference is made to a failure by courts to investigate allegations of torture and that statements so obtained were *“frequently”* admitted at trials (@ para 5). Well documented accounts of suspects being tortured *“including rape and sexual assault”* (para 9 (c)) exist including *“senior military officers in detention”* following the failed 2016 coup. Since then no independent monitors have been permitted access to prisoners. In his view if returned Nurhak Talay faces *“serious ill treatment”* (para 10) given his political party is considered a terrorist organisation. Some *“2847 judges and prosecutors”* have been *“dismissed”* (para 11) with it being *“safe to assume”* their *“replacements”* would be *“closely tied”* to the *“agenda”* of the President. The view of Amnesty is Nurhak Talay’s claims in his 2003 asylum *“were credible”* but that now – 2016 – he is *“at even greater risk”* if returned to the control of the Turkish authorities.

9. Muharrem Erbey.

A local Turkish lawyer’s report dated 2/9/16. He reiterates in a 29 page document very similar sentiments to those of Amnesty International. At present the political situation makes it *“not safe in Turkey for anyone to speak”* (page 5). He documents post attempted coup arrests of 7000 police officers, 2700 judges & prosecutors suspended with 450 actually arrested, this being *“almost”* 20% of *“the whole judiciary”* (page 15). The situation Nurhak Talay faced in 1999 and now in 2016 is *“far worse than ever he faced in 1999”* (p 29) as *“Turkey is becoming a country where principles of democracy, law and fair trial are not followed anymore”* (page 29). If Nurhak Talay is returned he will be deemed an *“enemy of the state”* (page 30).

10. Dr Quinton Deeley Report 19/9/16.

He is a consultant psychiatrist who examined Nurhak Talay on 5/9/16. There is a recital of previous torture and hunger strikes indicating post traumatic stress disorder was diagnosed in 2003. Now – 2016 – Dr Deeley’s opinion is of suffering, following this extradition arrest, *“significant exacerbation of symptoms of PTSD”* (p21) but not suicidal intentions *“imminently”* (p25). Given previous history he feels *“Mr Talay is therefore likely to pursue a death fast which is specific to extradition and detention by the Turkish state and therefore is likely to be medically unmanageable as long as he perceives himself to be unjustly treated by the Turkish State”* (p25).

11. Opinion of the Bar Human Rights Committee 14/10/16.

This follows very similar lines as to grave concerns as to police/prison conditions and a lack of independent judges and fair trial process. The Report states the BHRC as *“deeply concerned”* (page 6) at a fair trial.

12. Facts Found.

Notwithstanding the presumption of mutual trust and respect with a longstanding extradition treaty state, on the material before me only one conclusion is possible. Nurhak Talay was the victim of sustained and repeated serious ill treatment on previous arrests in Turkey amounting to torture. Confessions extracted under torture are unreliable yet seemingly used in judicial proceedings whatever the actual truth may be. Nurhak Talay was and remains, as does his family, politically left wing and unambiguously opposed to previous and the instant Turkish government. The State regards him as a terrorist activist, perhaps accurately. Decline in the independence of the Turkish judiciary is well documented since 2012 and since the failed 2016 coup has become near impossible given arrests of very many judges and prosecutors. A fair retrial, albeit fervently asserted by Turkey, can in no way be assured given the comprehensive nature of the very recent internationally acknowledged sources presented to this court.

13. Submissions.

Given the factual position I can take the submissions more briefly than would otherwise do them justice. The law is largely agreed between the parties.

14. Extradition Offence (S78/138).

Mr Summers challenges “*being a member of an armed terrorist organisation*” is not meeting the dual criminality test as the relevant organisation has never been prescribed in U.K. law and certainly not in the 1990’s. Mr Cadman accepts this. Accordingly that offence and 7 years 6 months imprisonment cannot be the subject of any extradition. No challenge is made to the bomb/explosive conduct. I find that conduct does meet the dual criminality test.

15. Abuse of Process.

Mr Summers argues if the Secretary of State, as was the case in 2004, granted asylum on the instant facts how can, now Nurhak Talay is a U.K. citizen, it be other than an abuse to permit extradition process absent a revocation of the grant of asylum. Mr Cadman relies on a first instance ruling of Judge Zani of 20/7/16 in *Turkey v Rouhy* and a decision of mine *India v Velu* 26/2/15. To my mind, unusual though it may be, Mr Summers is wrong in law. The extradition process affords a U.K. citizen, like any other, safeguards which do not make out any abuse of process even for someone previously granted asylum on essentially the same facts. I reject this challenge.

16. Extraneous Considerations (S.81).

Nurhak Talay's overt political role is accepted and his previous prosecution for membership of an alleged terrorist organisation. Mr Summers relies on both limbs of S.81 i.e. previous prosecution for political/ethnic activity and mistreatment if returned because of that background. The facts as found leave me in no doubt the challenge is properly established and made out as a *very real* risk. Accordingly I discharge this Request per S.81.

17. Convention Rights (S.87).

I take Article 2, 3 and 6 together. Mr Cadman argues, valiantly, Turkey has given clear and specific assurances as regards Nurhak Talay's treatment notwithstanding any previous wrongdoing, not in any way accepted, by the Turkish penal/judicial authorities. The parties agree this is a forward looking exercise if (potentially) informed by historical events. Is there, therefore, a *real risk* of a breach of Article 2/3 and/or an unfair retrial. I cannot ignore the overwhelming nature of very recent (effectively current) material which is all one way. Torture will be and is routinely used and in no way challenged by the courts both to simply dehumanise prisoners and extract (questionable) confessions. Further the independence of the judiciary since 2012 and particularly the failed 2016 coup in a political/terrorist case is completely fanciful. Accordingly I discharge this Request per Article 2, 3 and 6.

18. Article 8 ECHR.

With the removal of 7 years 6 months from consideration and an acceptance 12 months (or less) remains outstanding Article 8 ECHR becomes a seriously arguable ground when previously it would not. I have squarely in mind *H.H. v Italy* [2012] UKSC 25 and *Celinski v Poland* [2015] EWHC 1274. Nurhak Talay has an established domestic and work life in the U.K. which would be very adversely impacted if extradition is ordered. He has led a blameless and positively productive existence since arrival in 2003. There is but 12 months of a long sentence, much already served, outstanding. That said enforcing cross border criminal justice treaties is a very high priority and the offences are most serious. However, balancing all the competing factors I am of the firm view extradition on these facts would be disproportionate to Article 8 ECHR. Therefore per S.87 (3) I "*must*" discharge this Request per S.87/Article 8.

19. Health (S.91).

Lastly Mr Summers argues Nurhak Talay's health – especially mental- if returned is at risk of death from starvation in a hunger strike as previously undertaken. Both the prison regime's general stance and the woefully inadequate medical treatment would not prevent this per Dr Deeley's opinion. I am therefore bound to conclude it would be "*unjust*" to order extradition per S.91 on the facts found.

20. Conclusion.

This case involves a long history and a very significant – 4 lever arch files worth – of material. A powerful body of well-respected international entities express previous and very current detailed concerns about police, prison and judicial processes in Turkey late 2016. For the reasons given I reject any suggestion of an abuse of process as wrong in law. However, I find there is a *very real* risk of a breach of Articles 2, 3 and 6. Article 8 I find would be disproportionately interfered with, on the instant facts, if extradition is ordered. Turkey accepts the longest sentence (7 years 6 months) for membership of a named organisation fails the dual criminality test S.78/138 for that offence. I find S.81 both limbs extraneous considerations – political motivation – established in favour of the Defence. Lastly on the facts S.91 – health – makes extradition unjust. Accordingly on each of those grounds I discharge this Request, subject to the right of Turkey to seek leave to appeal my decision to the High Court (14 days). I conclude by seeking to emphasise that Turkey can have no complaints at the resolve and efforts of those who have represented it in these proceedings.

Request discharged.