The Force of Recognition and the Limits of Remedy

The Atalay v. Türkiye Case

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On November 17 2026, the European Court of Human Rights (ECtHR) ordered Türkiye to put an end to the detention of Şerafettin Can Atalay and enable him to take up his seat in the Parliament. Elected in May 2023, Atalay remains behind bars despite two Constitutional Court judgments ordering his release. The ruling is unlikely to change Atalay's fate. Yet it confirms that the Constitutional Court can no longer provide him with effective protection and that his continued detention serves a political purpose.

An Unprecedented Refusal to Comply

Atalay was sentenced to 18 years' imprisonment in April 2022 for aiding and abetting an attempt to overthrow the government. His case was still pending before the Court of Cassation when he was elected to Parliament in May 2023. Despite the parliamentary immunity guaranteed under Article 83 of the Constitution, the Third Criminal Chamber of the Court of Cassation rejected his claim to immunity on 13 July 2023 and refused to order his release. Atalay lodged an application with the Constitutional Court on 20 July. While his individual application was pending before the Constitutional Court, the Third Criminal Chamber of the Court of Cassation upheld Atalay's conviction on 28 September. On 25 October, the Constitutional Court ruled that Atalay's right to be elected and to engage in political activity as well as his right to liberty and security of person had been violated. It further ordered his immediate release.

The Third Criminal Division of the Court of Cassation, however, refused to comply with the Constitutional Court's judgment, holding that it has no "legal value or validity". Atalay filed a second application with the Constitutional Court on 24 November. On 21 December, the Constitutional Court again found a violation of his rights, and ordered a retrial, the suspension of the execution of the prison sentence, and Atalay's immediate release. On 3 January 2024, the Third Criminal Division of the Court of Cassation once again refused to comply. Atalay lodged a third individual application with the Constitutional Court on 11 January 2024. While the application was pending, the Grand National Assembly revoked his parliamentary mandate on 30 January. In its judgment of 22 February, the Constitutional Court held that the revocation of Atalay's parliamentary mandate was *null and void.*

In April 2024, Atalay brought his case before the ECtHR. In its judgment of 17 November 2026, the Court found violations of Article 5 §§ 1 and 4 (right to liberty and security), Article 3 of Protocol No. 1 (right to free elections), and Article 18 (limitation on the use of restrictions on rights) of the Convention. As the ECtHR made clear in its judgment of 17 November, the Third Criminal Chamber of the Court of Cassation's twice refusing to implement the Constitutional Court's judgment was simply "unprecedented".

The Logic of Defiance

In refusing to comply with the Constitutional Court's judgment, the Third Criminal Chamber of the Court of Cassation advanced two lines of reasoning, both unlawful. First, it argued that only the Constitutional Court's decisions on the constitutionality of laws are binding. It maintained that ordinary courts are not obliged to comply with judgments in individual applications and may decide at their own discretion whether to give effect to them. This interpretation, however, is incompatible with Article 153 of the Constitution, which makes no distinction between decisions arising in norm review and individual applications, and renders all the Constitutional Court's

decisions binding on the legislative, executive and judicial branches.

Second, the Court of Cassation rejected the Constitutional Court's decision on Atalay's parliamentary immunity and advanced its own interpretation. It maintained that Article 83 sets out exceptions to parliamentary immunity, one of which concerns offences falling within the scope of Article 14 of the Constitution. Article 14 provides that *none of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, or of endangering the existence of the democratic and secular Republic founded on human rights*. The article is ambiguous, as it does not specify the offences excluded from parliamentary immunity. The Constitutional Court held that this lack of clarity could not be remedied through judicial interpretation, but only by the legislature through statutory regulation. The Court of Cassation, by contrast, maintained that the determination of the scope of Article 14 had been deliberately left to the courts in the course of applying the law. Accordingly, the general framework of Article 14 precludes parliamentary immunity for persons accused of offences targeting the existence of the government or the state. On this basis, for the Third Criminal Chamber of the Court of Cassation "there is no doubt" that Atalay, having been convicted of offences under Article 312 of the Turkish Criminal Code, entitled "Crimes Against the Government", fell within the scope of Article 14 and could not benefit from parliamentary immunity. The Third Chamber's move amounts to nothing less than amending the Constitution to permit political discrimination, without any legislative intervention of the parliament.

Ineffective Judgments and Protections

The Court of Cassation's refusal to give effect to the Constitutional Court's judgments called the latter's authority into question. By violating Article 153, the Court of Cassation seriously undermined the constitutional hierarchy between the courts. This defiance has been variously characterised as a judicial coup against the constitution, an open challenge to the constitutional order, an attempt to abolish the Constitutional Court and dismantle the constitution, and a process of deconstitutionalisation.

In this regard, the ECtHR's finding of a violation of Article 5 § 4 is particularly telling, as the provision guarantees the right to have the lawfulness of detention reviewed by a court. The Court had previously found the same violation in *Selahattin Demirtaş v. Türkiye* (No. 4), where an individual application had remained pending before the Constitutional Court for approximately five years. In Atalay's case, however, less than three years had passed since his third and most recent application, lodged on 11 January 2024.

By finding a violation of Article 5 § 4, the ECtHR effectively established that Atalay was not required to await the Constitutional Court's decision to obtain judicial review of the lawfulness of his continued detention. According to the ECtHR's assessment, the key issue was not the duration of the proceedings, but the lack of effect given to the Constitutional Court's judgments. Despite repeatedly finding violations of Atalay's right to liberty and security and ordering his release, the Constitutional Court proved to have no force over the Assize Court and the Court of Cassation. A similar consideration underpinned the ECtHR's finding of a violation of Article 18: limited to Atalay's case, the Constitutional Court's judgments had effectively lost their enforceability, depriving the Constitutional Court of the capacity to provide an effective domestic remedy for Atalay, even though it otherwise remained effective and continued to function as such.

Political Stance of the Court of Cassation

On 4 April 2023, just three months before refusing to order Atalay's release, the Third Criminal Chamber of the Court of Cassation had itself acknowledged the binding nature of Constitutional Court judgments on individual applications under Article 153 of the Constitution. Emphasising the importance of redressing violations of fundamental rights and upholding the principle of the unity of the legal order, the Chamber held that the scope of the exceptions to parliamentary immunity under Article 83 must be interpreted in accordance with the Constitutional Court's binding

case-law. The Third Criminal Chamber had previously applied the same principles in several decisions, including its judgment of 26 October 2022.

Against this background, the ECtHR found that the Court of Cassation's refusal to implement the Constitutional Court's judgment in Atalay's case could not be explained solely by differences in legal interpretation between the courts. In examining this discrepancy between the Court of Cassation's earlier acceptance and subsequent rejection of the Constitutional Court's rulings on individual applications, the ECtHR looked beyond the legal grounds for Atalay's continued detention to consider its underlying purpose. It took into account statements by the President of the Republic and his Chief Adviser, as well as public discussions of Atalay as a terrorist. The ECtHR concluded that the ulterior purpose of Atalay's detention was political: to silence him and stifle pluralism, in violation of Article 18 of the Convention.

Indeed, the Third Criminal Chamber of the Court of Cassation's political stance against Atalay's release and his assumption of parliamentary office was evident not only in its contradictory position on the binding force of the Constitutional Court's judgments in individual applications, but also in its overt hostility towards the Constitutional Court itself. On 9 November 2023, the Chamber filed a criminal complaint against the Constitutional Court justices who had ruled in Atalay's favour. It also called for the Constitutional Court judgments to be reviewed, alleging that the Constitutional Court had failed to safeguard the constitutional order.

A Remedy Awaiting Enforcement

The ECtHR's judgment in Atalay's case rests on a dilemma. For Atalay to take up his seat, the Constitutional Court's judgment of 22 February 2024, which declared the revocation of his parliamentary mandate *null and void*, must be implemented. Yet the ECtHR also acknowledged that the Constitutional Court's judgments had effectively lost their enforceability in his case, and related to that, ordered Türkiye under Article 46 of the Convention to take all necessary measures to ensure the full implementation of Constitutional Court judgments and prevent similar violations. Whether this requirement offers any meaningful prospect for the future remains debatable. The prospect of the Strasbourg ruling bringing about meaningful change in Atalay's current situation, however, is slim. The domestic response to *Kavala v. Türkiye* (No. 2) is instructive in this regard. On 25 August 2026, the Grand Chamber of the ECtHR ruled that Türkiye must secure Kavala's immediate release and eliminate the legal consequences of his conviction. Nevertheless, the Assize Court refused to give effect to the ECtHR's judgment. The Council of Judges and Prosecutors did not initiate disciplinary proceedings against the judges who declined to comply with the Strasbourg ruling, nor did the Ministry of Justice publicly condemn their refusal. There is little reason to expect a different outcome in Atalay's case.

However, the ECtHR's judgment of 17 November matters beyond the violation of Atalay's individual rights and freedoms. His continued detention also deprives his constituents of parliamentary representation. While the ruling is unlikely to change his situation, it places on judicial record the political motives behind his detention and, more broadly, the repression of political opposition in Türkiye.

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