WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights

in the

Kenneth Arthur Wiest v. Turkey

(Case no. 14436/21)

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1. Kenneth Wiest is an American Protestant who has resided legally in Turkey without interruption since 1985. After a trip in June 2019, he was refused entry to Turkey on the basis of article 9 of the Turkish Law on Foreigners and International Protection (n°6458), which prohibits the entry of foreigners posing a risk to public security, order or health. This ban on return to Turkey was decided by the Turkish administration based on information transmitted by the National Intelligence Organization (*Millî İstihbarat Teşkilatı)* to which Mr. Wiest and his lawyer do not have access. After challenging this inadmissibility before the domestic courts, Mr. Wiest lodged an application with the Court on March 12, 2021, invoking several provisions of the Convention, including Articles 6, 8, 9, 13 and 14.

2. In its communication of the application on May 27, 2024, the Court focuses on the alleged violation of Mr. Wiest's right to respect for his family life (art. 8), given that he has lived exclusively in Turkey for 34 years with his wife and their three children, born in 1984, 1987 and 1990. The Court also cites the alleged violation of procedural rights (arts. 6 and 13), as the Turkish authorities have provided no evidence to show that Mr. Wiest would constitute a threat to national security and have not allowed him to consult and thus refute the grounds for his expulsion. However, in communicating the application, the Court ignores the alleged violation of Mr. Wiest's right to freedom of religion (art. 9) and freedom from discrimination on grounds of religion (art. 14).

3. Admittedly, it is likely that the complaints under Article 8 would be sufficient for the Court to order Turkey to readmit Mr. Wiest to its territory. But the European Centre for Law and Justice (ECLJ) would like to place greater emphasis on the importance of also examining the application under Articles 9 and 14, for two reasons. On the one hand, the ban on Mr. Wiest's entry into Turkey can be explained by a more general desire on Turkey's part to hinder the missionary work of Christians and Christian worship. Secondly, in cases similar to Mr. Wiest's, such as *Nolan and K. v. Russia*[1] and *Corley and others v. Russia,*[2] the Court has examined the applications under Article 9.

4. These observations show that the violation of Mr. Wiest's rights to freedom of religion (I) and to non-discrimination based on his religion (II) are at the heart of this case. Only in a complementary way do these observations examine the application from the angle of Article 8, showing that the applicant's right to respect for his family life has also been violated (III).

[1] *Nolan and K. v. Russia*, n°2512/04, February 12, 2009.
[2] *Corley and others v. Russia*, n°292/06 and 43490/06, November 23, 2021.

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I- Violation of Mr. Wiest's freedom of religion (art. 9)

The *Nolan* (2009) and *Corley* (2021) precedents

5. In 2009, in *Nolan and K. v. Russia*, the Court condemned the respondent state for refusing to allow the applicant, an American member of the "Moon sect", to re-enter the country on his return from a trip. Russia claimed that Mr. Nolan's religious activities constituted a danger to "national security." The Court found that the applicant's rights under Article 9 had been violated. The Court considered the examination under Article 9 to be a priority and of the utmost importance, even though Article 8 was invoked by the applicant and a serious question arose in this respect, as the applicant had been physically separated for a period of ten months from his newborn child, of whom he had sole custody.

6. In its reasoning under Article 9, the Court emphasised that Russia had not accused the applicant of any activities other than the religious activity of promoting the doctrine of his minority spiritual movement.[3] The Court criticised Russia's approach to "*any activities of foreign religious missionaries as harmful to the national security.*"[4] In the case of Mr. Nolan, the Court recalled the principle *affirmanti, non neganti, incumbit probatio* (the burden of proof lies upon him who affirms, not upon him who denies).[5] Applying this principle, the Court held that Russia had not provided satisfactory justification for any concrete danger to national security, or for the need to maintain absolute confidentiality of information on this subject.[6]

7. In addition, the Court recalled that "*unlike the second paragraphs of Articles 8, 10, and 11, paragraph 2 of Article 9 of the Convention does not allow restrictions on the ground of national security. Far from being an accidental omission, the non-inclusion of that particular ground for limitations in Article 9 reflects the primordial importance of religious pluralism as "one of the foundations of a 'democratic society' within the meaning of the Convention" (...) It follows that the interests of national security could not serve as a justification for the measures taken by the Russian authorities against the applicant.*"[7] The protection of national security is therefore not a legitimate objective to justify interference with the rights recognised in Article 9.

8. In a similar, more recent case decided in 2021, *Corley and others v. Russia,*[8] the Court made the same choice of examining the applications under Article 9, although the applicants, each married and fathers of minor children, also invoked Article 8. In *Corley*,

[3] *Nolan and K. v. Russia*, op. cit, §§ 63-64.
[4] *Ibid*, § 65.
[5] *Ibid*, § 69.
[6] *Ibid*, §§ 69-72.
[7] *Ibid*, § 73.
[8] *Corley and others v. Russia*, op. cit.

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the Court confirmed all the *Nolan* principles relating to Article 9. These principles can therefore be regarded as part of the Court's established case law. They have also been invoked in other cases on different facts.[9]

9. The jurisprudence of the United Nations Human Rights Committee aligns with that of the Court in this area. The Committee issued findings in January 2023 in a case concerning Mr. Kvaratskhelia, a Georgian Jehovah's Witness expelled from Azerbaijan because he had taken part in a religious meeting considered illegal.[10] Although Mr. Kvaratskhelia invoked both his right to respect for his private life (article 17 of the Covenant on Civil and Political Rights, known as "Covenant II") and his freedom of religion (article 18) against this expulsion, it was only on the basis of article 18 that the Committee examined the complaint and concluded that there had been a violation of Covenant II.[11]

Application of the principles in this case

10. The case of *Wiest v. Turkey* is very similar to the *Nolan* and *Corley* cases and should therefore be examined under Article 9, ultimately leading to a finding of a violation. On the one hand, Mr. Wiest is not accused of any activity other than a religious one, which indicates an infringement of his right to freedom of religion. On the other hand, Turkey provides no justification that he constitutes a real threat to national security. Consequently, the interference cannot be considered as prescribed by law within the meaning of article 9-1. Lastly, in the alternative, the "national security" invoked by Turkey is not one of the legitimate objectives justifying a restriction on freedom of religion under article 9-2.

II- Discrimination based on Mr. Wiest's religion (art. 14)

11. The above-mentioned *Nolan* and *Corley* cases are classified as "repetitive" by the Committee of Ministers, as they relate to a general, structural problem in Russia. As far as Turkey is concerned, the *Wiest* case also relates to a structural problem, that of the violation of the rights of foreign Christian missionaries and, more generally, of all Christians, including Turkish Christians.

[9] See for example: *Perry v. Latvia*, n°30273/03, January 18, 2007.
[10] Human Rights Committee, *Rovshan Mursalov and others v. Azerbaijan*, CCPR/C/136/D/3153/2018, January 13, 2023.
[11] *Ibid*, §§ 9.6. and 9.9. See also on this subject: *Viktor Leven v. Kazakhstan*, CCPR/C/112/D/2131/2012, January 5, 2015.

The ban on entry suffered by many foreign Christians

12. Christian missionaries are frequently banned or expelled from Turkey, notably through the application of the "N-82" and "G-87" codes, an administrative measure used to control the presence of foreigners who would pose a threat to national security.[12] 115 foreign Christians were banned from entering or remaining on Turkish territory between 2019 and 2023, which also affected 46 spouses and 66 minor children.[13] In June 2024, a further nine foreign Christians whose expulsion was validated by the Turkish Constitutional Court even though they were legally resident in Turkey were added to the list. The Turkish political regime's mistrust of foreign Christians is not a new problem. In 2010, the Parliamentary Assembly of the Council of Europe (PACE) called on Turkey to "*come up with constructive solutions concerning (...) the granting of work permits for foreign members of the clergy.*"[14]

13. Unlike Christians, no foreign Muslims have been expelled or banned from Turkish territory for their religious or proselytizing activities.[15] This shows that it is not the manifestation of any religion, but that of Christianity in particular, that is considered a threat to national security. For this reason, it would be useful for the Court to examine Mr. Wiest's application from the angle of Article 14 in conjunction with Article 9.

Anti-Christian Turco-Islamic nationalism

14. The present case is just one example of the latent persecution suffered by Christians in Turkey, victims of an ethnic-religious nationalism promoting the homogeneity of a Turkish-Muslim nation. ECLJ denounced this persecution in its contribution to the October 2024 Universal Periodic Review of Turkey at the United Nations Human Rights Council.[16] The ECLJ has also submitted observations in several cases concerning violations of Christian rights by Turkey, such as *Fener Rum Patrikliği v. Turkey* (n°14340/05), *Arnavutköy Rum Ortodoks Taksiarhi Kilisesi Vakfi v. Turkey* (n°27269/09), *Arhondoni v. Turkey* (n°15399/21) and *Mavrakis v. Turkey* (n°12549/23).

15. As a result of the discrimination suffered by Christian minorities, their strong emigration has considerably reduced their presence in Turkey. In 1920, there were still two million Christians in Turkey;[17] today there are just 169,000, representing 0.2% of the population.[18] In particular, while the Greek Orthodox represented 100,000 citizens in

[12] See Protestant Kiliseler Derneği (Association of Protestant Churches), "Human Rights Violation Report", June 4, 2024, pp. 2 and 8.
[13] *Ibid*, pp. 7-8.
[14] PACE, "Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (Eastern Greece)", Resolution 1704, January 27, 2010, § 19.1.
[15] See Mr. Wiest's request, p. 9.
[16] ECLJ, Universal Periodic Review 2024 of Turkey, October 2024.
[17] Daniel Pipes, "The disappearance of Christians in the Middle East", *Middle East Quarterly*, Winter 2001.
[18] Open Doors, *dossier Turkey 2024*, 2024.

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1923, today they number less than 2,000.[19] This extremely low number threatens the survival of Greek Orthodoxy in Anatolia.[20] There are also 90,000 Armenian Orthodox and 25,000 Syriac Orthodox.[21] These figures are only estimates, as some Christians hide their identity for fear of discrimination and, in some cases, harassment.

16. These difficulties are linked to a cultural and religious problem. Christians in Turkey, for the most part, predate and are alien to the Turkish nation, and therefore perceived as a threat to the country's unity. Even more profoundly, the oppression of Christian minorities in Turkey has an eschatological dimension, as evidenced by a speech by the Turkish president on March 19, 2019, three months before Mr. Wiest was banned from returning. At the time, Recep Tayyip Erdoğan declared that "*With the help of Allah, neither the remnants of the Crusaders nor those nostalgic for Byzantium will divert us from our path*"[22] and, regarding Istanbul's Saint Sophia Basilica, "*we have been here for a thousand years and, God willing, we will stay here until the Apocalypse.*"[23] In contrast, many Christians venerate the *Virgin of the Apocalypse*, crowned with twelve stars and holding a crescent moon and a serpent under her feet.

III- Violation of Mr. Wiest's right to respect for his family life (art. 8)

17. The Turkish authorities consider, but do not demonstrate, that the ban on Mr. Wiest is necessary for national security. It is possible that, as in the *Nolan* and *Corley* cases cited above,[24] the Court will examine Mr. Wiest's application under Article 8 after finding a violation of Article 9. In any case, the difference between these two articles, already set out in Part I of these observations, is that national security is a legitimate ground for restricting the rights recognised in Article 8, unlike those recognised in Article 9. An analysis of the application from the angle of Article 8 therefore implies an examination of proportionality.

The Court's "guiding principles"

18. In order to examine the proportionality of an inadmissibility affecting respect for family life, the Court formalised "guiding principles" in 2001 in *Boultif v. Switzerland*[25] and

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[19] United States Commission on International Religious Freedom, "Examination of Threats to Religious Sites in Turkey", November 2023.
[20] Elizabeth Prodromou, Rome and Constantinople, *A Tale of Two Cities: The Papacy in Freedom, the Ecumenical Patriarchate in Captivity*, Berkley Center for Religion, Peace and World Affairs, March 22, 2013.
[21] U.S. Department of State, "2017 Report on International Religious Freedom - Turkey", May 29, 2018.
[22] *Le Temps*, "La campagne à outrance du président turc, Recep Tayyip Erdogan", March 27, 2019, (free translation).
[23] *Agence France-Presse*, "New Zealand attack actually targets Turkey, says Erdogan", March 19, 2019, (free translation).
[24] *Nolan and K. v. Russia*, op. cit., §§ 80-89; *Corley and others v. Russia*, op. cit., §§ 90-104.
[25] *Boultif v. Switzerland*, n°54273/00, August 2, 2001, op. cit., § 48.

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then supplemented them in 2006 by the Grand Chamber in *Üner v. Netherlands.*[26] The ECLJ analysed these criteria in greater depth in its previous observations in *Al-Bayati v. Germany* (n°12538/19), *Johansen v. Denmark* (n°27801/19), *Savuran v. Denmark* and *Sharafane v. Denmark* (n°3645/23 and 5199/23), *Al-Habeeb v. Denmark* (n°14171/23) and *Demirci v. Hungary* (n°48302/21).

The proportionality test in this case

19. In this case, it should be noted that the criteria to be applied tilt the proportionality test in favour of the applicant. On the one hand, the criteria for assessing the danger to national security are based on the commission of criminal offences; however, Mr. Wiest has not committed any offences. On the other hand, with regard to Mr. Wiest's family life, the Court's criteria favour the length of his stay in the country (35 years), the duration of his marriage (36 years in 2019) and the fact that his three children are from it.

[26] *Üner v. Netherlands* [GC], n°46410/99, October 18, 2006, op. cit., §§ 57 and 58.