

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

PROCEDURAL ORDER NO. 3

Members of the Tribunal

Professor Campbell McLachlan QC, President of the Tribunal
The Hon. L. Yves Fortier QC, Arbitrator
Dr Laurent Lévy, Arbitrator

Secretary of the Tribunal

Ms Jara Mínguez Almeida

Date of dispatch to the Parties: 13 March 2019

Procedural Order No. 3

Whereas:

(1) On 21 December 2018, the Tribunal issued Procedural Order No. 2 (“**PO No 2**”), in which it admitted the Claimant’s Request for Provisional Measures in the redacted form (the “**Request**”) into the record, excluding exhibits C-42¹ and C-43.² The Tribunal invited the Claimant to indicate by 7 January 2019 whether it wished to file these exhibits as an expert report and a witness statement, respectively. In addition, if the Claimant wished that the evidence of Witness A be given anonymously, it should apply by 14 January 2019.

(2) On 7 January 2019, the Claimant notified its request that the Witness A Statement be treated as a witness statement and announced that it would submit an application by 14 January 2019 requesting that Witness A’s evidence be given anonymously.

(3) By the established deadline, the Claimant submitted an application for Witness A’s evidence in support of the Request to be given anonymously (the “**Application**”), together with Appendix A and legal authorities CL-29 – CL-30.

(4) On 28 January 2019, after an agreed extension by the Parties to the original deadline, the Respondent filed its Response to the Application (the “**Response**”), requesting that the Tribunal dismiss it in full. The Response was accompanied by Appendix 1 and an expert report by Jeffrey Waincymer (with exhibits JW-1 – JW-37) (“**Waincymer Report**”). The Respondent also requests that the Tribunal strike from the record Appendix A to the Claimant’s Application as it was an excerpt of Exhibit C-43, which had been excluded from the record pursuant to PO No. 2.

(5) Further to a request from the Claimant, on 30 January 2019, the Tribunal invited both Parties to file a second round of submissions on the Application.

(6) By letter dated 4 February 2019, the Claimant filed its **Reply**.

(7) On 7 February 2019, the Respondent submitted its **Rejoinder**.

The Tribunal, having deliberated, now decides as follows:

1. The issue raised by the Application is whether the evidence of a witness of fact, which a party desires to adduce before it, may be given without disclosure of the identity of the witness to the other Party.
2. In other respects, save in order to preserve the identity of the witness, the evidence would be subject to the same disciplines as that of other witnesses of fact, namely: his/her evidence in chief would be admitted by way of a written witness statement and the witness would, if the other party so requested, be tendered for cross-examination.
3. The Tribunal now summarises the submissions of the Parties. It then proceeds to determine:

¹ C-42: Expert Report of Professor Sir Jeffrey Jowell KCMG QC in the Matter of an Extradition Request from Turkey (the “Jowell Report”).

² C-43: Anonymous witness statement of Witness A (“Witness A Statement”).

Procedural Order No. 3

- (a) Whether it is entitled to review the Witness A Statement in order to determine the Application; and,
- (b) The appropriate disposition of the Application in the present circumstances.

Submissions of the Parties

4. In its Application, the Claimant advances the grounds on which Witness A should be granted leave to testify anonymously and proposes the conditions for that testimony. According to the Claimant, Witness A, who no longer lives in Turkey, formerly held a senior position in the Turkish judiciary before becoming a target of the Turkish Government, which included the issuance of warrants for his/her arrest for alleged membership of an alleged terror organization. Witness A fears severe reprisals for him/herself and for his/her family members if he/she were to testify on behalf of the Claimant.
5. The Claimant adds that Witness A was found to be a reliable witness in the extradition proceedings against Mr. Akin Ipek and others before the Westminster Magistrates' Court. In support, it submits the Judgment of the Westminster Magistrates' Court dated 28 November 2018, refusing Turkey's extradition request in respect of Mr Ipek and others and discharging the defendants ("**Extradition Judgment**").³
6. The Claimant submits that Witness A's testimony is necessary and relevant to the Request. Moreover, according to the Claimant there is no reason to believe Witness A's testimony would not be objective. It concludes that if the Respondent is permitted to exclude evidence from anyone likely to criticize it, it would effectively preclude any adverse witness testimony.
7. As to the conditions for the testimony, the Claimant suggests that Witness A would reveal his or her identity and background to the Tribunal, but this should not be revealed to the Respondent or its representatives. The Claimant argues that this would not cause the Respondent any significant prejudice as the Respondent will have enough information on Witness A's background, it may produce witness statements in response and it may cross-examine Witness A.
8. The Claimant proposes the following conditions for cross-examination of Witness A: the location of his/her testimony to be held within the UK and only shared with the Respondent's King & Spalding representatives (provided they are qualified to practice in England and Wales) who would sign a confidentiality agreement; Witness A's face would be screened; and, interpreters or court reporters present would also sign a confidentiality agreement and would not be able to see Witness A.
9. The Respondent stresses that allowing anonymous testimony is an extraordinary remedy and only one publicly known ICSID case has dealt directly with the issue.⁴ It further argues that Witness A's testimony is not necessary or material for the Claimant's case as it has filed other evidence, including an expert report, which addresses the same matters as Witness A would address. In addition, there is a lack of causal connection between the alleged risks for Witness A and his/her testimony in this case. The Respondent also

³ *Government of the Republic of Turkey v Buyuk, Celik & Ipek* (Judgment) 28 November 2018 (CL-29).

⁴ *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 (*Kim v Uzbekistan*) (CL-30).

Procedural Order No. 3

questions Witness A's capability to provide impartial testimony. Finally, the practical arrangements proposed by the Claimant are unreasonable and disproportionate and would cause a serious prejudice to the Respondent's due process rights.

10. The Respondent maintains that if no one from the Respondent's team is allowed to know who Witness A is, it cannot effectively challenge his/her evidence. However, if the Respondent's counsel knew Witness A's identity they would be obliged to disclose such identity to their client under Turkish criminal law.
11. The Respondent notes that the Parties are agreed on three out of the four factors it suggested for deciding the Application, notably: the testimony must be relevant and material, it must be shown that there is a compelling reason to find risk or danger if anonymity is denied, and the Tribunal must balance the Parties' due process rights. The Respondent contends that the Claimant's Application does not satisfy these criteria and must therefore be denied.
12. The Respondent argues that the Tribunal should not review the Witness A Statement until it decides the Application. It adds that it should also not review the Extradition Judgment either as it cites materially to Witness A testimony. It submits a redacted version of the Extradition Judgment for the Tribunal's use that omits the portions referring to Witness A: Response, App 1.
13. The Claimant submits that it is necessary for the Tribunal to review both the Witness A Statement and the Extradition Judgment in order to decide the Application. It submits that 'it is impossible for the Tribunal to make a determination as to anonymity without reviewing the testimony of Witness A:' Reply, [6]; while the Extradition Judgment is on the public record and the portions concerning the testimony of Witness A are relevant to the Tribunal's determination of the trustworthiness of Witness A.

Documents to be reviewed for purpose of Application

14. The Parties' submissions raise a preliminary question: whether the Tribunal ought to review the Witness A Statement (together with the portions of the Extradition Judgment referring to it) prior to rendering its decision on whether Witness A may give his/her evidence anonymously.
15. The Tribunal has considered this question in the light of the procedural framework for adducing witness evidence in this arbitration, whilst taking full account of the fundamental rules of procedure, notably the equality of the parties.
16. No issue of equality arises in respect of the Tribunal's review of either the Witness A Statement or the unredacted Extradition Judgment:
 - (a) Both Parties have received and reviewed the Witness A Statement. Further, the Respondent's expert, Professor Waincymer, reviewed the Statement for the purpose of preparing his Report on anonymous witness evidence in arbitration: Waincymer Report, [5.5].
 - (b) The Extradition Judgment is a public judgment of the English court to which the Respondent and Mr Ipek are parties.
17. It follows that both Parties are in the same position as regards the text of the Witness A Statement and of the Extradition Judgment. (The same does not of course apply to the identity of Witness A, which is the subject of the Claimant's Application).

Procedural Order No. 3

18. So far as concerns the present status of the Witness A Statement in these proceedings, the position is as follows.
19. In PO No 2, the Tribunal ruled that:
- (a) The Witness A Statement could not be treated as documentary evidence. It constitutes the evidence of a witness as to matters of fact that are in issue in the Claimant's Request for Provisional Measures. It has to be treated as such: [19].
 - (b) Accordingly, the Claimant's Request was initially admitted into the arbitration excluding the Witness A Statement: [26](1). The Tribunal provided that the Claimant could elect to submit the Witness A Statement as a witness statement. In that event, the provisions pertaining to witness statements in these proceedings would apply, save only as varied by [26](3).
 - (c) The Claimant could then apply that Witness A's evidence be given anonymously, in which event the Tribunal would, having received the written submissions of both Parties, determine the application: [26](4)–(7).
20. In accordance with this Order, the Claimant:
- (a) Filed the Witness A Statement as a witness statement on 7 January 2019; and,
 - (b) Made its present Application that such evidence be given anonymously on 14 January 2019.
21. The present status of the Witness A Statement is (subject to any provision for the giving of such evidence anonymously) the same as that of any witness statement submitted by either party in the proceedings, namely:
- (a) All witness statements and expert reports must be filed together with the Parties' pleadings: PO No 1 [17.1]–[17.2].
 - (b) Prior to the hearing, each Party shall notify the other which witnesses it wishes to cross-examine at the hearing: PO No 1 [18.1].
 - (c) The witness statement stands in lieu of direct examination, save for such supplemental evidence of that witness as the Parties have agreed: PO No 1 [18.5].
 - (d) The Tribunal is entitled, if it so decides, to disregard the testimony of a witness or expert called to testify at the hearing who fails to appear at the hearing without justification: PO No 1 [18.3].
22. The purpose of these provisions, which are commonly found in international arbitral practice, is to ensure that each Party and the Tribunal have advance notice of the direct evidence that the other Party proposes to adduce at the hearing so as to facilitate preparation. The ultimate question of whether the evidence of any such witness or expert forms part of the arbitration record or is excluded and thus disregarded cannot be finally decided until the hearing, since it depends upon whether the witness is called for cross-examination and whether, having been called, the witness appears or fails to appear.
23. The Tribunal is empowered 'to be the judge of the admissibility of any evidence adduced and of its probative value:' ICSID Arbitration Rule 34(1).
24. The result of these provisions is that the Tribunal is entitled to examine the text of the Witness A Statement in order to determine the Application. The Tribunal is empowered by Arbitration Rule 34(1) to judge the admissibility of the Statement as the witness testimony

Procedural Order No. 3

of Witness A. It is a necessary consequence of this power that the Tribunal is entitled to review the Statement in order to make that judgment.

25. If it grants the Application, the Statement will become the direct evidence of Witness A when he/she confirms that evidence at the hearing. If the Tribunal denies the Application, and Witness A, having been called for cross-examination fails to appear, the Tribunal will be entitled to disregard the testimony. If it does so, the Statement will be excluded from and form no part of the arbitration record on the basis of which the Tribunal will render its decision on the Application for Provisional Measures.
26. The Tribunal rejects the Respondent's submission that such a step 'irreparably prejudices the Republic's due process rights and renders the process for deciding the Application futile. Simply, the Tribunal cannot un-see what it has reviewed.' Rejoinder, [15].
27. The due process rights of both the Respondent and the Claimant require a fair process for the determination of the present Application. It is for that reason that the Tribunal has proceeded step-by-step in relation to the treatment of the Witness A Statement.
28. The review of a statement or other document that a party has adduced in order to decide whether or not it is admissible, and if so on what terms, is a necessary part of that process. If the statement or document is excluded from the record, the Tribunal will disregard it, neither Party will be entitled to advance submissions based upon it, and it will form no part of the Tribunal's decisional process.
29. In the present case, the Tribunal considers that it would be unfair for it to reach its decision on anonymity without considering the substantive subject matter of the evidence that Witness A intends to give. Both Parties accept that the relevance and materiality of the evidence of the proposed witness is an essential factor that the Tribunal should take into account in determining whether to grant anonymity: Response, [24]–[33]; Reply, [2].
30. Professor Waincymer opines that 'the evidence proposed to be given under conditions of anonymity...would be probative and compelling.' Waincymer Report, [103.4]. He adds that the Tribunal's analysis of this factor 'should be undertaken after the Tribunal is given...sufficient particulars of what evidence the witness intends to give...:' [103.5.2].
31. The Tribunal agrees. In order to undertake this task, it must review the Witness A Statement itself. It does not consider that it can evaluate the likely relevance of the evidence on the basis of a summary alone, when both Parties have advanced their submissions having reviewed the text of the Witness A Statement.
32. So far as concerns the Extradition Judgment, the Tribunal considers that this must be admitted into the record in its complete version including the portions referring to the evidence of Witness A, which the Respondent submits should be excised prior to the Tribunal's decision on the present Application.
33. The reason that the Extradition Judgment must be admitted in its entirety is different to that which applies to the Statement itself. The Extradition Judgment is a public document. The fact that it has been rendered and the reasons for the decision constitute a datum in the present proceedings. The Request hinges, in material part, on the outcome of the Extradition Proceedings. This means that it is essential for the Tribunal to be able to understand what the English Court has decided and for what reasons.
34. This does not make the findings of fact in the Extradition Judgment binding on this Tribunal. Nor indeed do those findings constitute evidence of the underlying facts in the

Procedural Order No. 3

present proceedings. It is the Claimant's responsibility to prove such facts as are necessary to its case in this arbitration by direct evidence adduced before the present Tribunal. It was precisely for reasons of this kind that the Tribunal decided in PO No 2 that, if the Claimant wished to rely on the evidence of Witness A before the present Tribunal, it must tender him/her as a witness.

35. Accordingly, the Tribunal decides as a first step to review the Witness A Statement and the complete text of the Extradition Judgment in the light of the issues raised by the Request.

Relation of evidence of Witness A to the Request

36. The Witness A Statement sets forth the evidence and opinions of the witness on the motivation of the criminal proceedings against the defendants, including Mr Ipek, and the likely treatment of the defendants if they are extradited to Turkey.
37. The Claimant relies on the Statement to establish 'the deficiency of the indictment' on which the Extradition Request is based and the likely consequences for the conduct of the arbitration in the event that Mr Ipek is extradited: Reply, [8]–[9].
38. As such it is specifically directed to the first prayer for relief in the Claimant's Request, which seeks an order from the Tribunal enjoining the Respondent to:
- '(a) in the event that extradition of Mr Akin Ipek is granted by the English courts and confirmed by an order of the Secretary of State, suspend its request for extradition submitted to the Home Office of the United Kingdom on 2 February 2017 until a final award is issued in these proceedings:' Request, [126](a).
39. The Claimant alleges that: 'Should he be extradited to Turkey, Mr Akin Ipek will presumably remain in prison for life with limited (if any) access to counsel or justice:' Request, [8]. It contends that, as a result, without instructions from Mr Ipek, it will be unable to prosecute its claim in the arbitration and that Mr Ipek will also be the primary witness in the arbitration: Request, [9].
40. The Tribunal observes that, in these circumstances, it would have expected Mr Ipek to proffer his own evidence in support of the Request, including as to the other relief requested in terms of preservation of documents; prevention of dissipation of assets and protection of other witnesses: Request, [126](c)–(e).
41. Nevertheless, the Claimant's principal claim in its Request—to enjoin the Respondent to suspend any ordered extradition—is at present moot. When the Claimant first intimated and then filed its Request, the Westminster Magistrates' Court had not yet rendered its decision on the Extradition Request. The Request was filed in order to protect the Claimant against a risk that might or might not materialise.
42. In the event, the Court rendered its Extradition Judgment on 28 November 2018. It dismissed Turkey's Extradition Request, refusing to order the extradition of Mr Ipek and the other defendants.
43. According to the Respondent, the Westminster Magistrates' Court has not, as of 1 March 2019, granted Turkey permission to appeal the Extradition Judgment 'or suggested that it would:' Respondent's Response to Provisional Measures, 1 March 2019, [34].
44. As a result, the primary relief that the Claimant seeks in its Request relates to an event that does not currently arise.

Procedural Order No. 3

45. It follows from this that the Tribunal need not at present decide the difficult issues that it would have to confront in relation to the question whether the evidence of Witness A may or may not be given anonymously, and, if so, under what conditions. This question raises important points of principle. At the same time, both Parties accept that a decision on it must be taken in light of the specific circumstances of the particular case and witness.
46. The Tribunal well understands that the position may change in the event that permission to appeal the Extradition Judgment were to be granted. In the meantime the Parties' respective positions as regards the Request for provisional measures concerning the possibility of extradition are protected and neither Party is prejudiced.
47. The present Application has been made on good notice. It is fully briefed and the Tribunal will determine it in the event that there is a compelling necessity to do so.

* * * *

* *

*

Order

48. Now therefore the Tribunal orders:

- (1) The Extradition Judgment of the Westminster Magistrates' Court dated 28 November 2018 in *Government of the Republic of Turkey v Buyuk, Celik & Ipek* (CL-29) is admitted into the arbitration record;**
- (2) The Parties are to apprise the Tribunal forthwith in the event of any further developments regarding the appeal from that Judgment that may affect the likelihood of the extradition of Mr Akin Ipek;**
- (3) In the meantime, the Tribunal's decision on the Claimant's Application that the evidence of Witness A be given anonymously is adjourned;**
- (4) In the event that there is a further material development under paragraph (2) above, the Claimant has leave to renew its Application by notice to the Respondent and the Tribunal.**



Professor Campbell McLachlan QC
President of the Tribunal
13 March 2019