

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AÇIKGÖZ v. TÜRKİYE

(Application no. 45123/20)

JUDGMENT

STRASBOURG

8 October 2024

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Açıkgöz v. Türkiye,

The European Court of Human Rights (Second Section), sitting as a Committee composed of:

Jovan Ilievski*, President*,
Diana Sârcu,
Gediminas Sagatys*, judges*,

and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 45123/20) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 21 September 2020 by a Turkish national, Ms Jinda Açıkgöz ("the applicant"), who was born in 1992, lives in Adana and was represented by Mr K. Altıparmak, a lawyer practising in Ankara;

the decision to give notice of the application to the Turkish Government ("the Government"), represented by their then Agent, Mr Hacı Ali Açıkgül, former Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye;

the parties' observations;

the decision to reject the Government's objection to the examination of the application by a Committee;

Having deliberated in private on 17 September 2024,

Delivers the following judgment, which was adopted on that date:

SUBJECT MATTER OF THE CASE

1. The application concerns the criminal conviction of the applicant, under Article 299 of the Turkish Criminal Code, on the charge of insulting the President of the Republic on account of the content of some of her posts on Facebook. The applicant's criminal conviction was accompanied by a measure of the suspension of the pronouncement of the judgment. She complained that there had been a violation of Articles 6 and 10 of the Convention.

2. By an indictment dated 8 February 2019, the Adana public prosecutor charged the applicant with insulting the President of the Republic, on account of certain posts that she had made on her Facebook account.

3. On 27 June 2019 the Adana 16th Criminal Court of First Instance Adana convicted the applicant and sentenced her to one year, two months and seventeen days' imprisonment on the charge of insulting the President of the Republic, under Article 299 of the Criminal Code, on account of posts that she had made on her Facebook account on 18 August 2015 and 27 December 2017. The Criminal Court of First Instance decided, however, to suspend the pronouncement of the judgment, under Article 231 § 5 of the Code of Criminal Procedure (see for the text of this provision *Durukan and Birol*

v. Türkiye, nos. 14879/20 and 13440/21, § 23, 3 October 2023), and to apply a five-year supervision period.

4. On 16 September 2019 the Adana 9th Assize Court dismissed the objection lodged by the applicant, stating that the impugned judgment with suspension of pronouncement was in accordance with both the procedural and substantive law.

5. On 1 October 2019 the applicant lodged an individual application with the Constitutional Court to contest her criminal conviction accompanied by a measure of the pronouncement of the judgment. Relying on Article 10 of the Convention and Articles 25 and 26 of the Constitution, she complained that she was convicted with a final judgment accompanied by the measure of suspension of the pronouncement of the judgment. She further argued that the disputed posts on Facebook had not contained any insult or defamatory comment and therefore had remained within the scope of freedom of expression. In support of her argument, she referred to a judgment of this Court and applied the principles derived from it to the context of her criminal conviction. Her individual application form contained a summary of each step taken in the criminal proceedings in question and was accompanied by copies of all the relevant decisions handed down in that context, including the bill of indictment filed by the public prosecutor, the decision of the criminal court to suspend the pronouncement of the judgment, the case file relating to her appeal against that decision and the decision dismissing the objection.

6. On 3 July 2020 the Constitutional Court declared the individual application of the applicant inadmissible as being unsubstantiated and thus manifestly ill-founded.

7. Relying on Article 10 of the Convention, the applicant alleged that she had been convicted, with a suspension of the pronouncement of the judgment, for expressing her critical opinions on social media. She further complained under Article 6 of the Convention about the allegedly insufficient reasoning in the decision of the Constitutional Court.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

A. Admissibility

8. The Government raised two preliminary objections. They first stated that the applicant had not duly exhausted domestic remedies. They argued, in that connection, that the applicant had not substantiated her claims before the Constitutional Court, hence that court's inadmissibility decision on the grounds that the application had been manifestly ill-founded.

9. Secondly, the Government challenged the applicant's victim status, asserting that the suspended sentence had not imposed any obligations or

restrictions on the applicant and that therefore the application was incompatible *ratione personae* with the provisions of the Convention.

10. As for the objection concerning the non-exhaustion of domestic remedies, the Court considers that, in submitting the above-mentioned individual application form, the applicant communicated all the relevant information to the Constitutional Court and formulated sufficiently reasoned complaints to allow that court to examine her allegations of a violation of the right to freedom of expression (see paragraph 5 above). The Court further emphasises that it has already examined and dismissed similar objections (see *Durukan and Birol v. Türkiye*, nos. 14879/20 and 13440/21, § 42, 3 October 2023).

11. Regarding the objection raised concerning the applicant's victim status, the Court notes that it has already examined and dismissed similar objections (see *Durukan and Birol*, cited above, § 43, and *Üçdağ v. Turkey*, no. 23314/19, § 58, 31 August 2021). It therefore dismisses this objection on the same grounds.

12. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

13. The applicant alleged that the comments that she had posted, which had been the subject of the criminal proceedings brought against her, and which had resulted in a suspended sentence, had not been intended to insult the President of the Republic, but to express critical opinions. She argued that even though her conviction had been accompanied by a suspension of the pronouncement of the judgment, it had not removed the breach of her right to freedom of expression given the intimidating and dissuasive nature of that measure. She also submitted that Article 299 of the Criminal Code, which had constituted the legal basis of her conviction, did not provide the guarantees required by Article 10 of the Convention.

14. The Government contended that there had been no interference with the applicant's freedom of expression, emphasising that no conviction had been added to her criminal record because of the suspension of the pronouncement of the judgment. They accordingly argued that no negative legal consequences or deterrent effects had been caused by the criminal proceedings and her conviction.

15. If the Court were to find that there had been an interference, the Government submitted that the interference in question had been provided for by Article 299 of the Criminal Code in a manner meeting the criteria of clarity, accessibility and foreseeability.

2. The Court's assessment

16. The Court considers that the applicant's criminal conviction with suspension of the pronouncement of the judgment, including a five-year supervision period, amounted to an interference with the exercise of her right to freedom of expression in view of the deterrent effect it may have had (see *Üçdağ*, cited above, § 75; *Vedat Şorli v. Turkey*, no. 42048/19, § 41, 19 October 2021; and *Durukan and Birol*, cited above, § 56).

17. In the present case, the Court notes, firstly, that it was not disputed between the parties that the applicant's criminal conviction had had a legal basis, namely, Article 299 of the Criminal Code. It also observes that Article 231 of the Code of Criminal Procedure provided the legal basis for the suspension of the pronouncement of the judgment imposed on the applicant, which constituted an interference in the present case (see paragraph 16 above).

18. In *Durukan and Birol* (cited above, §§ 63-69), the Court stated that Article 231 of the Code of Criminal Procedure, which provides for the suspension of pronouncement of the judgment, did not offer the required protection against arbitrary infringement by the public authorities of the rights guaranteed by the Convention.

19. The present application does not present any special features justifying a departure from that conclusion. The interference with the applicant's right to freedom of expression by the suspension of the pronouncement of her judgment was thus not "prescribed by law" for the purposes of Article 10 § 2 of the Convention.

20. There has accordingly been a violation of Article 10 of the Convention.

II. OTHER COMPLAINTS

21. The applicant also complained under Article 6 of the Convention of a lack of relevant and sufficient reasoning in the Constitutional Court's decision, in which the court had dismissed the applicant's complaints under Article 10 as being unsubstantiated and therefore manifestly ill-founded. Having regard to the facts of the case, the submissions of the parties and its findings above, the Court considers that it has dealt with the main legal questions raised by the case and that there is no need to examine the remaining complaint (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

22. The applicant claimed 3,000 euros (EUR) in respect of pecuniary damage as a result of the administrative investigations that had been initiated following the criminal proceedings, which had led to the loss of her monthly salary. She did not present any documents in support of her claim. She also claimed EUR 5,000 in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses incurred before the Court. She submitted an invoice drawn up for the indicated amount by her lawyer for representation fees before the Court.

23. The Government contested the applicant's claims as unsubstantiated and excessive.

24. The Court considers that the applicant failed to substantiate the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 2,600 in respect of non-pecuniary damage, plus any tax that may be chargeable (see *Durukan and Birol*, cited above, § 73). It also awards EUR 1,000, plus any tax that may be chargeable to the applicant, in respect of costs and expenses.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 10 of the Convention admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there is no need to examine the admissibility and merits of the complaint under Article 6 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 2,600 (two thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 October 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Jovan Ilievski President