

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

SECOND SECTION

CASE OF GÜMÜŞ v. TÜRKİYE

(Application no. 44984/19)

JUDGMENT

STRASBOURG

9 July 2024

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



In the case of Gümüş 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. 44984/19) 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 6 August 2019 by a Turkish national, Mr Suphi Gümüş ("the applicant"), who was born in 1998, lives in Şanlıurfa and was represented by Ms L.B. Gökkan Baran, a lawyer practising in Şanlıurfa;

the decision to give notice of the complaint concerning Article 10 of the Convention to the Turkish Government ("the Government") represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye, and to declare inadmissible the remainder of the application;

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 18 June 2024,

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

SUBJECT MATTER OF THE CASE

1. The present application concerns the criminal conviction of the applicant, resulting in a prison sentence combined with a measure of suspension of the pronouncement of the judgment. The applicant complained of a violation of his freedom of expression under Article 10 of the Convention.

2. By an indictment dated 16 January 2018, the Şanlıurfa Public Prosecutor charged the applicant with dissemination of propaganda in favour of a terrorist organisation, due to certain content he had published on his Facebook account.

3. On 19 June 2018 the Şanlıurfa 5th Assize Court convicted the applicant and sentenced him to one year, two months and sixteen days in prison. He was found guilty of dissemination of propaganda in favour of a terrorist organisation pursuant to Article 7, subsection 2, of Law no. 3713, on account of the following posts on his Facebook account on different dates from 2014 to 2016: a photograph of a victory sign with the comment "Mr Judge, write this down as well: even if I am handcuffed, I will still say 'long live President Apo'"; a post with the comment "There is State terror in Gever and Cizre, do

not remain silent"; a photograph of the applicant wearing a yellow-red-green wristband and making a victory sign; a cartoon showing a person marked "YPG" (according to the Turkish authorities, a branch of the PKK - Kurdistan Workers' Party, an illegal armed organisation) facing a tank marked "ISIS" in a town marked "Kobane"; a photograph showing armed women, believed to be members of the PKK, with the comment "Long live the Kobane resistance"; a photograph of an armed person in uniform, believed to be a member of the PKK, with the comment "Kobane is a place of resistance". The Assize Court considered that the above-mentioned posts supported and encouraged the methods of violence of the PKK and its members and that they constituted the offence of dissemination of propaganda in favour of a terrorist organisation. The Assize Court decided, however, to suspend the pronouncement of the judgment pursuant to Article 231, subsection 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 subject the applicant to three years' supervision.

4. On 21 June 2018 the applicant filed an opposition against the decision of the Şanlıurfa 5th Assize Court. On 2 July 2018 the Şanlıurfa 6th Assize Court dismissed the applicant's appeal, stating that the criteria to suspend the pronouncement of the judgment were met and that the judgment with suspension of pronouncement was in accordance with the law on both the procedure and the merits.

5. On 20 July 2018 the applicant lodged an individual appeal with the Turkish Constitutional Court, complaining that his conviction with a suspended sentence breached his right to freedom of expression. In its decision delivered on 28 May 2019, the Turkish Constitutional Court declared the applicant's individual application inadmissible for being manifestly ill-founded, noting that the allegations were not substantiated.

6. The applicant complained under Article 10 that he was convicted for sharing content on Facebook.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

A. Admissibility

7. The Government raised several preliminary objections. They first alleged that the impugned acts committed by the applicant glorified and legitimised violent acts and that they ran counter to the text and spirit of the Convention, within the meaning of Article 17. They therefore argued that the application was incompatible *ratione materiae* with the provisions of the Convention.

8. The Government also challenged the applicant's victim status, asserting that the suspended sentence had not imposed any obligations or restrictions. They argued that once the suspended sentence expired, the conviction was quashed with associated consequences; and if the judgment was delivered before the suspension ended, the applicant could appeal against it.

9. The Government finally argued that the applicant had had the opportunity to raise his complaints at national level, at which level they had, in the Government's view, been duly examined in compliance with the procedural rules and the principle of subsidiarity. They urged the Court to declare this application inadmissible, asserting that it was manifestly ill-founded.

10. Concerning the first objection, the Court considers that the content of the impugned posts published by the applicant on his Facebook account do not reveal an intent to undermine Convention rights. Notwithstanding the controversial nature of the posts published on Facebook expressing praise for the leader of the PKK and glorifying PKK or YPG, the Court considers that the litigious acts for which the applicant was convicted do not appear to incite to destroy the Convention rights and freedoms. The Court drew the same inference in the *Durukan and Birol v. Türkiye* judgment regarding similar circumstances (nos. 14879/20 and 13440/21, § 47, 3 October 2023). It considers that there is no reason to depart from that finding and concludes that this application does not constitute an abuse of rights under Article 17 of the Convention. The applicant is therefore entitled to the protection of Article 10 of the Convention in the present case. This objection is therefore dismissed.

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). Therefore, it dismisses this objection on the same grounds.

12. When it comes to determining whether the application is manifestly ill-founded, the Court considers that the arguments put forward by the Government in this connection raise issues which require an examination of the merits of the complaint under Article 10 of the Convention, rather than an examination of its admissibility (see *Durukan and Birol*, cited above, § 45 and the references therein).

13. The Court notes that the application 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

14. The applicant alleged that the acts for which he was convicted did not contain any criminal element and fell within his right to freedom of expression.

15. The Government claimed that there had been no interference with the applicant's freedom of expression, underlining the absence of any conviction added to his criminal record due to the application of the measure of suspension of the pronouncement. They thus argued that there were no negative legal consequences or deterrent effects caused by the criminal proceedings and his conviction.

16. 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 7, subsection 2, of Law no. 3713 in a manner meeting the criteria of clarity, accessibility, and foreseeability.

2. The Court's assessment

17. The Court considers that the applicant's criminal conviction with suspension of pronouncement of the judgment, which subjected him to a period of supervision of three years amount, in view of the deterrent effect it may have had, to an interference with the applicant's exercise of his right to freedom of expression (see *Durukan and Birol*, cited above, § 56, *Vedat Şorli v. Türkiye*, no. 42048/19, § 41, 19 October 2021; and *Üçdağ*, cited above, § 75).

18. In the present case the Court notes, firstly, that it is not in dispute between the parties that the applicant's criminal conviction had a legal basis, namely Article 7, subsection 2, of Law no. 3713. It also observes that the legal basis for the suspension of the pronouncement of the judgment in respect of the applicant, which constituted an interference in the present case (see paragraph 17 above), was Article 231 of the Code of Criminal Procedure.

19. The Court notes that it has already held in the above-cited *Durukan and Birol* judgment that Article 231 of the Code of Criminal Procedure, which provides for the suspension of pronouncement of judgments, did not offer the required protection against arbitrary infringement by the public authorities of the rights guaranteed by the Convention (§§ 66 and 67). The present application does not present any particularity to justify a departure from this conclusion. The interference with the applicant's right to freedom of expression by the suspension of the pronouncement of his judgment was thus not "prescribed by law" for the purposes of Article 10 § 2 of the Convention.

20. This finding is sufficient to enable the Court to conclude that there has been a violation of Article 10 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

21. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses incurred before the domestic courts and the Court. He has not presented any document in support of his claim for costs and expenses.

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

23. The Court awards the applicant EUR 2,600 in respect of non-pecuniary damage, plus any tax that may be chargeable (*Durukan and Birol*, cited above, § 73). It dismisses the applicant's claims in respect of costs and expenses as he did not provide any documents in support of his claim.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

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

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

Done in English, and notified in writing on 9 July 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Jovan Ilievski President