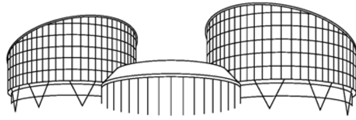

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
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ECHR 079 (2021)
09.03.2021

Disciplinary sanction imposed on judicial officer for exercising freedom of expression: several violations of the Convention

The case concerned the imposition on a judicial officer of a disciplinary sanction (post relocation), decided by the Council of Judges and Prosecutors, on account of statements and criticisms that he had made to the media about certain high-profile court cases. At the material time the applicant was also the Chairman of Yarsav, an association of judges and prosecutors.

In today's **Chamber** judgment[1] in the case of Eminağaoğlu v. Turkey (application no. 76521/12) the European Court of Human Rights, unanimously, found the following violations.

A violation of Article 6 (right to a fair hearing: right to a court) of the European Convention on Human Rights.

The Court found that the civil aspect of Article 6 § 1 of the Convention applied in the present case, in the light of the second condition of the *Vilho Eskelinen and Others v. Finland*[2] case-law. The Court further held that the sanction imposed on Mr Eminağaoğlu by the competent disciplinary authority had not been examined by another body exercising judicial powers or by an ordinary court.

A violation of Article 8 (right to respect for private and family life)

The Court noted that intelligence gleaned through the tapping of Mr Eminağaoğlu's telephone in the context of a judicial investigation had also been used in the context of the disciplinary proceedings against him. In *Karabeyoğlu v. Turkey*[3] it had found that the use of such data outside the purpose for which they had been collected did not comply with national law.

A violation of Article 10 (freedom of expression)

The Court found that, having regard in particular to the fact that the decision-making process had been defective and had not been surrounded by the guarantees that were indispensable for the applicant's status as judicial officer and chairman of an association of judges and prosecutors, the restrictions imposed on Mr Eminağaoğlu's right to freedom of expression under Article 10 of the Convention had not been accompanied by effective and adequate safeguards against abuse.

Principal facts

The applicant, Ömer Faruk Eminağaoğlu, is a Turkish national who was born in 1967 and lives in Ankara (Turkey). At the relevant time he was a judicial officer and also the Chairman of Yarsav, an association of judges and prosecutors.

Mr Eminağaoğlu began his judicial career in 1989. In 1998 he was appointed as public prosecutor at the Court of Cassation. In 2011 he became a judge in Istanbul.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

2 *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II).

3 *Karabeyoğlu v. Turkey*, no. 30083/10, 7 June 2016.

On 13 June 2012, when he was a judicial officer of the first grade, he was transferred to a post in Çankırı by the Second Chamber of the High Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu* – "the HSYK") by way of disciplinary sanction on account of his statements and criticisms, particularly about high-profile cases in the media. The Chamber took the view that, by his statements, Mr Eminağaoğlu had undermined the dignity and honour of the profession and had forfeited his personal dignity and esteem.

Mr Eminağaoğlu appealed against that decision, but the disciplinary sanction in question was upheld by the HSYK's Plenary Assembly, which nevertheless dropped some of the accusations against him. As the disciplinary sanction became final, the applicant was transferred to his new posting.

On 15 April 2015, following the entry into force of Law no. 6572, the HSYK re-examined the disciplinary sanction against Mr Eminağaoğlu and decided to replace it with a reprimand, but without amending the accusations against him.

Complaints, procedure and composition of the Court

Relying on Article 6, Mr Eminağaoğlu complained in particular about the disciplinary sanction imposed on him, alleging that he had not had a right of access to a court as there had been no possibility of judicial review of the disciplinary procedure.

Mr Eminağaoğlu also alleged that his right under Article 8 (right to respect for private and family life) had been breached by the use of telephone intercept evidence, and that his Article 10 right (freedom of expression) had not been protected either.

The application was lodged with the European Court of Human Rights on 17 September 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Jon Fridrik **Kjølbro** (Denmark), *President*,
Marko **Bošnjak** (Slovenia),
Aleš **Pejchal** (the Czech Republic),
Egidijus **Kūris** (Lithuania),
Carlo **Ranzoni** (Liechtenstein),
Pauliine **Koskelo** (Finland),
Saadet **Yüksel** (Turkey),

and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 6 (right to a fair hearing)

Applicability of civil aspect of Article 6

According to the *Vilho Eskelinen and Others* case-law, disputes between a State and its civil servants fell in principle within the scope of the civil aspect of Article 6 unless the following two conditions were fulfilled: first, the State in its national law must have expressly excluded access to a court for the post or category of staff in question; second, the exclusion must be justified on objective grounds in the State's interest.

As to the first condition, the Court noted that under Turkish law, since the constitutional reform of 2010, there had been a right of appeal against the sanction of dismissal imposed by the HSYK.

As to the second condition, at the end of the disciplinary proceedings in question, the applicant had been punished by the HSYK for statements he had made to the media. The subject-matter of the dispute was therefore essentially whether those statements had been compatible with the

applicant's duty of discretion, given his position at the time. Admittedly, this was a question which required the weighing in the balance of the various interests at stake. However, in the light of the reasons given for the HSYK's decisions, the Court had not identified any aspect of the subject-matter of the dispute which could give rise to "objective grounds in the State's interest" within the meaning of the *Vilho Eskelinen and Others* judgment, or grounds related to the exercise of governmental authority. In addition, the special bond of trust and loyalty required from civil servants and the independence of the judiciary could not be easily reconciled, since members of the judiciary enjoyed specific guarantees which were considered essential to the exercise of judicial authority and they were bound by the duty, *inter alia*, to review acts of government. The complex nature of the working relationship between members of the judiciary and the State required that the judiciary be sufficiently distant from other branches of the State in the exercise of its powers so as to enable its members to make decisions which were based to a greater extent on the requirements of law and justice, without fear or favour.

The Court took the view that the Government were not in a position to demonstrate that the exclusion from access to a court was justified on grounds in the State's interest or that the subject-matter of the dispute was connected with the exercise of governmental authority, or called into question the "special bond of trust and loyalty" between Mr Eminağaoğlu and the State as employer. Given the special status of members of the judicial professions and the importance of judicial review of disciplinary proceedings concerning them, it could not be said that a special bond of trust between the State and Mr Eminağaoğlu justified excluding Convention rights. Article 6 § 1 of the Convention was thus applicable in the light of the second condition of the *Vilho Eskelinen and Others* test.

Violation of the right of access to a court

Firstly, the HSYK was a non-judicial body. Secondly, while Mr Eminağaoğlu faced very harsh sanctions, it was difficult to say that the proceedings before the Second Chamber of the HSYK complied with the requirements of the procedural safeguards under Article 6 of the Convention: they were in fact mainly written proceedings and afforded very few safeguards to the judge/prosecutor concerned. In this connection, the relevant legislation did not contain any specific rules on the procedure to be followed, on the safeguards afforded to judges and prosecutors before the HSYK, or on the manner in which evidence was to be admitted and assessed. Moreover, the Second Chamber of the HSYK did not hold hearings, nor did it summon or hear witnesses. Lastly, the decisions handed down by this Chamber contained only rudimentary reasoning, giving no indication of the grounds which led it to rule as it did.

In addition, the decisions of the Second Chamber of the HSYK, which heard disciplinary cases, could be challenged by way of an appeal lodged with its Plenary Assembly. However, there was no evidence to suggest that the latter afforded the guarantees of a judicial review. The previous finding as to the lack of procedural safeguards before the Second Chamber was also valid for the Plenary Assembly. Therefore, neither the Second Chamber nor the Plenary Assembly of the HSYK could be characterised as a "tribunal" within the meaning of Article 6 § 1 of the Convention. Nor had the proceedings been subject to subsequent control by a judicial body with full jurisdiction and providing Article 6 § 1 safeguards, and the Government had not put forward any grounds which could justify excluding the disciplinary sanction in question from judicial review.

Therefore the impugned sanction imposed on Mr Eminağaoğlu by the competent disciplinary authority had not been reviewed by another body exercising judicial functions or by an ordinary court, such that the respondent State had impaired the very essence of his right of access to a court. Accordingly, there had been a violation of Article 6 § 1 of the Convention on account of the breach of the principle that a case must be examined by a tribunal established by law.

Article 8 (right to respect for private and family life)

The applicant complained about the use of records of his telephone conversations, obtained during a separate criminal investigation, in the disciplinary proceedings against him.

The Court in *Karabeyoğlu v. Turkey* had found a violation of Article 8 of the Convention, observing that telephone intercept evidence gathered in criminal proceedings had been used for the purposes of a disciplinary investigation and that such interference was not "in accordance with the law" within the meaning of Article 8 § 2.

In the present case the Court was of the view that the Government had failed to present any factual element or argument that would lead to any other conclusion. While the Istanbul public prosecutor in charge of the investigation had sent the applicant an information note on the discontinuance of the criminal proceedings and the destruction of material gathered during the surveillance, a copy had undoubtedly remained in the hands of the judicial inspectors, who used this data as part of the disciplinary investigation against the applicant. As noted in the case of *Karabeyoğlu* (cited above), the use of these data outside the purpose for which they had been collected was not in conformity with domestic legislation. The Court therefore found a violation of Article 8 of the Convention as regards the use, in the context of a disciplinary investigation, of recordings of the applicant's telephone conversations that had been obtained in a criminal investigation.

Article 10 (freedom of expression)

The disciplinary investigation and the sanction imposed on Mr Eminağaoğlu had constituted an interference with his right to freedom of expression. That interference had a legal basis, namely section 68(2)(a) of Law no. 2802, and pursued at least one of the aims recognised as legitimate by the Convention, namely to maintain the authority and impartiality of the judiciary.

The post held by Mr Eminağaoğlu. At the material time Mr Eminağaoğlu had been a member of the public prosecutor's office attached to the Court of Cassation. This specific status gave him a central role within the judicial professions in the administration of justice, and that role imposed a duty on him to act as a guarantor of individual freedoms and the rule of law, through his contribution to the proper functioning of the justice system and thus to public confidence in that system. He was also the chair of the association Yarsav, which defended the interests of members of the judicial professions and the principle of the rule of law. In this connection, the Court had previously accepted that when an NGO drew attention to matters of public interest, it was exercising a public watchdog role of similar importance to that of the press and could thus be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press. Consequently, Mr Eminağaoğlu had not only the right but also the duty, as chair of this legally established association, which continued to engage freely in its activities, to express an opinion on questions concerning the functioning of the justice system. Even if such issues had political implications, this was not in itself sufficient to prevent a judge from making a statement on the matter. Accordingly, Mr Eminağaoğlu was, first, bound by the duty of discretion inherent in his position as judge/prosecutor and, secondly, as the chair of an association of judges and prosecutors he had a role as a stakeholder in civil society. Thus his role and duties included expressing his views on the legislative reforms which were likely to have an impact on the courts and on judicial independence. The Court referred in this connection to the Council of Europe instruments, which recognised that each judge was responsible for promoting and protecting judicial independence and that judges and courts should be consulted and involved in the preparation of legislation concerning their profession and, more generally, the functioning of the justice system.

The content of Mr Eminağaoğlu's statements. Mr Eminağaoğlu had been disciplined mainly on account of three series of statements.

The first set of statements had consisted mainly of criticisms aimed at certain measures taken during the criminal investigation against the organisation known as “Ergenekon”. Even though the Court found it significant that the applicant had not played any role in the conduct of the investigation or the prosecution in question, it could not be overlooked that his remarks did involve criticism of the judicial handling of an ongoing case. Seen from that perspective and having regard to the principles stemming from the duty of discretion on the part of members of the judiciary, the Court also attached weight to the reasons put forward by the Government to justify the interference with the applicant’s right to freedom of expression, reasons which could be considered relevant to this series of statements.

The second series of statements had related mainly to remarks made by the applicant on the various aspects of criminal proceedings brought against a Turkish journalist of Armenian origin (Hrant Dink, assassinated in 2007[4]). In those statements Mr Eminağaoğlu had criticised the wording of Article 301 of the Criminal Code and the manner in which that case had been dealt with by the domestic courts, stating that, in his capacity as public prosecutor at the Court of Cassation, he was of the opinion that the offence of which the journalist was accused had not been committed. The Court noted that his remarks concerned a case that had already been decided. It also pointed out that cases relating to that provision of the Criminal Code had given rise to findings of a violation by the Court[5]. It therefore failed to see how the criticisms at issue could be regarded as an action or statement undermining the dignity of Mr Eminağaoğlu’s profession. He had thus expressed his opinion and criticisms on a provision affecting freedom of expression and his statements were clearly part of a debate on matters of general interest. His freedom of expression should thus have enjoyed a high level of protection and the interference with the exercise of that freedom should have been strictly scrutinised, with only a narrow margin of appreciation being afforded to the authorities of the respondent State.

The third series of statements had dealt with certain topical issues. Some had criticised statements by the President of Religious Affairs on judicial decisions relating to compulsory religious education; constitutional reform; and the appointment of the former Secretary to the Ministry of Justice as Minister of Justice during the election period. Others had taken a position on the importance of the separation of powers and the principle of secularism, and on politicians’ speeches directed at the courts and the justice system in general. All these statements largely concerned issues relating to the justice system. Those statements had clearly been part of a debate on matters of general interest and called for a high level of protection of the applicant’s freedom of expression. In addition, some of his statements related to topical issues which were not directly relevant to questions concerning the justice system. In this connection, it was important that, while their participation in public debate on major societal issues could not be ruled out, members of the judiciary at least had to refrain from making political statements of such a nature as to compromise their independence and undermine their image of impartiality. However, in its decision on the merits, the HSYK had made no distinction between the applicant’s statements which related directly to the judicial system and those concerning other issues. Furthermore, account should have been taken of the fact that the applicant was also speaking in his capacity as chairman of an association of judges and prosecutors. The HSYK had not explained how the political statements in question were such as to undermine “the dignity and honour of the profession” and to cause the applicant to forfeit his “dignity and personal esteem”. In fact only a minority of the statements at issue had not directly concerned the justice system and those statements had not contained any gratuitous attacks on politicians or other judicial officers. The Court could not find sufficient grounds in the HSYK’s decision to justify the conclusion that, by his statements, the applicant had undermined the dignity and honour of the judicial professions.

[4] See *Dink v. Turkey*, nos. 2668/07 and 4 others, 14 September 2010.

[5] See, among other authorities, *Altuğ Taner Akçam v. Turkey*, no. 27520/07, 25 October 2011.

Procedural safeguards: The disciplinary sanction imposed on Mr Eminağaoğlu had not been reviewed by one of the ordinary courts of the respondent State's justice system. Article 159 of the Constitution provided that disciplinary sanctions imposed on judges and prosecutors were not subject to judicial review except for the sanction of dismissal. The role of the courts in a democratic State was to guarantee the very existence of the rule of law. When disciplinary proceedings were brought against a judge, public confidence in the functioning of the justice system was at stake. The Court was of the view that any judge and prosecutor who faced disciplinary proceedings had to be afforded safeguards against arbitrariness. He or she must in particular be able to have the measure in question scrutinised by an independent and impartial body competent to review all the relevant questions of fact and law, in order to determine the lawfulness of the measure and censure possible abuse by the authorities. Before that review body the person concerned must have the benefit of adversarial proceedings in order to present his or her views and counter the arguments of the authorities. In addition, the HSYK had given its decision without seeing fit to address the arguments of the applicant, who was relying on the protection of Article 10 of the Convention. The HSYK had failed to weigh in the balance the applicant's right to freedom of expression, in an appropriate manner and in accordance with the above-mentioned relevant criteria. In those circumstances, the Court was not persuaded that sufficient grounds had been put forward in the present case in order to justify the impugned measure.

Consequently, the Court concluded that the Government's submissions about the duty of discretion of members of the judiciary were relevant, especially as regards the first and third series of statements. However, particularly in view of the fact that the decision-making process followed in the present case had been highly defective and had not afforded the safeguards that were indispensable to the applicant's status as a judicial officer and as the chair of an association of judges and prosecutors, the impugned restrictions on the applicant's right to freedom of expression under Article 10 of the Convention had not been accompanied by effective and adequate safeguards against abuse. There had accordingly been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

Mr Eminağaoğlu had not made any claim for just satisfaction at the communication stage, therefore there was no call to award him any sum on that basis.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.