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

Press Release
issued by the Registrar of the Court

ECHR 169 (2023)
06.06.2023

The penalty imposed on the applicant, a judge and secretary-general of the judges' trade union, following an interview with a national newspaper, breached her freedom of expression

In today's **Chamber** judgment[1] in the case of Sarısu Pehlivan v. Türkiye (application no. 63029/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned a disciplinary penalty imposed by the Council of Judges and Prosecutors (CJP) on the applicant, a judge who at the relevant time was secretary-general of the judges' trade union, following the publication of an interview she had given to a national daily newspaper.

The Court noted that while the applicant had been required to comply with the duty of discretion and restraint inherent in her position as a judge, as secretary-general of a trade union of judges she also assumed a role as an actor in civil society. It found that the statements made by the applicant had clearly formed part of a debate on matters of public interest and warranted a high level of protection. The political implications of the applicant's statements on the issues concerned were not sufficient in themselves to justify restricting her freedom of expression as secretary-general of the judges' trade union in an area affecting the essence of her profession.

As to the procedural safeguards to which the applicant was entitled, the Court noted that the reasoning as such of the CJP's decision imposing the penalty did not include any arguments capable of properly balancing the applicant's right to freedom of expression against her duty of discretion and restraint as a judge. Nor was there evidence of such a balancing exercise in the decisions subsequently given by various bodies of the CJP in the context of the applicant's appeals.

Principal facts

The applicant, Ayşe Sarısu Pehlivan, is a Turkish national who was born in 1967 and lives in Izmir (Türkiye). At the relevant time she was a judge in Karşıyaka, in the province of İzmir, and was also secretary-general of the judges' trade union, an organisation aimed at promoting the rule of law and upholding the independence and impartiality of the judiciary.

On 21 January 2017 the Turkish Grand National Assembly passed Law no. 6771 amending the Constitution. The Act introduced significant changes to the organisation of the judiciary, providing, among other measures, for the abolition of the military courts and the reorganisation of the Constitutional Court and the High Council of Judges and Prosecutors (HCJP), in terms of the number of members of those bodies and the procedures for election to them. The Act was approved and entered into force following a nationwide referendum held on 16 April 2017.

On 20 February 2017 the national daily newspaper *Evrensel* published an interview with Ms Sarısu Pehlivan in its print edition and on its website.

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.

On 21 February 2017 the 3rd Chamber of the HCJP decided to forward a letter of complaint concerning the interview to an inspector for examination. On 20 June 2017, in line with the inspector's recommendation, the 1st Chamber of the Council of Judges and Prosecutors (CJP), as it became known after the entry into force of the constitutional amendments, issued an authorisation to investigate in respect of Ms Sarısu Pehlivan.

On 20 September 2018 the 2nd Chamber of the CJP first issued a reprimand to the applicant under section 65(2)(a) of the Judges and Prosecutors Act (Law no. 2802) and subsequently, under section 70 of Law no. 2802 and in view of the applicant's work, her positive record and her successive promotions, decided to reduce the penalty and imposed a deduction of two days' salary.

On 20 November 2018 Ms Sarısu Pehlivan requested the 2nd Chamber of the CJP to review the decision of 20 September 2018, relying in particular on the freedom of association and expression enjoyed by judges. On 3 January 2019 the 2nd Chamber of the CJP rejected the request. On 2 May 2019 the CJP, sitting in plenary, dismissed an appeal lodged by the applicant against the decision of 3 January 2019, finding that both the decision and its reasoning were in accordance with the procedure and the law.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicant maintained that the disciplinary penalty imposed on her for the statements she had made in an interview published by a national newspaper amounted to a breach of her right to freedom of expression.

The application was lodged with the European Court of Human Rights on 26 November 2019.

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

Arnfinn **Bårdsen** (Norway), *President*,
Egidijus **Kūris** (Lithuania),
Pauliine **Koskelo** (Finland),
Saadet **Yüksel** (Türkiye),
Lorraine **Schembri Orland** (Malta),
Frédéric **Krenc** (Belgium),
Diana **Sârcu** (the Republic of Moldova),

and also Hasan **Bakırcı**, *Section Registrar.*

Decision of the Court

Article 10

The Court noted at the outset that the applicant had been a judge when she made the impugned remarks. There was no doubt that this specific status, owing to its contribution to the proper administration of justice and thus to public confidence therein, imposed on her a duty as a guarantor of individual freedoms and the rule of law.

The Court further observed that at the material time the applicant had also been the secretary-general of the judges' trade union, an organisation active in defence of the rule of law and the independence of the judiciary, and that she had been interviewed in that capacity. Accordingly, in view of the role of that non-governmental organisation as a "social watchdog", the applicant had had not only a right but also a duty, as secretary-general of a legally established trade union which continued to engage freely in its activities, to express an opinion on questions concerning the functioning of the justice system.

Consequently, the Court noted that while the applicant had been required to comply with the duty of discretion and restraint inherent in her position as a judge, she had also, as secretary-general of a trade union of judges, assumed a role as an actor in civil society. Thus, she had had a right and a duty to give her opinion on constitutional reforms that were liable to have an impact on the judiciary and the independence of the justice system.

As to the content of the applicant's statements, the Court noted that they concerned the changes planned as part of the constitutional reform and the way in which those changes, in particular those made to the HCJP, might impact on the judiciary, the process of unionisation within the judiciary and the work carried out by the judges' unions. In the Court's view, all the remarks made had questioned the independence of the judiciary *vis-à-vis* the executive and highlighted the importance of preserving that independence. The Court therefore considered that the statements in issue had clearly formed part of a debate on matters of public interest and warranted a high level of protection. Even though reservations might be expressed about political statements made by members of the judiciary, in the present case the political implications of the applicant's statements on the above-mentioned issues were not sufficient in themselves to justify restricting her freedom of expression as secretary-general of the judges' trade union in an area affecting the essence of her profession.

Furthermore, the Court emphasised that while the penalty of deduction of two days' salary imposed in the present case could be regarded as relatively mild, the imposition of that penalty on the applicant had, by its very nature, had a chilling effect not only on the applicant herself but also on the judiciary as a whole, and in particular on those judges who wished to take part in public debates on legislative or constitutional reforms that might have implications for the judiciary or for broader issues relating to its independence.

As to the procedural safeguards to which the applicant was entitled, the Court noted that the reasoning as such of the CJP's decision imposing the penalty did not include any arguments capable of properly balancing the applicant's right to freedom of expression against her duty of discretion and restraint as a judge. Nor was there evidence of such a balancing exercise in the decisions subsequently given by various bodies of the CJP in the context of the applicant's appeals.

The Court therefore considered that the national authorities had not provided sufficient reasons to justify the measure complained of.

Lastly, the Court observed that the applicant had not had any judicial remedy in respect of the measure taken against her by the CJP. The CJP had ruled in the present case both at first instance, through its 2nd Chamber, and at last instance, in plenary session. Since the applicant's statements had raised questions as to the independence and impartiality of the CJP *vis-à-vis* the executive, the Court could not but note that the CJP had acted in the present case as both the prosecuting authority and the final decision-making authority, in a case concerning its own composition and functioning.

The Court reiterated that when disciplinary proceedings were brought against a judge, public confidence in the functioning of the judiciary was at stake. Any judge who was the subject of disciplinary proceedings was entitled to safeguards against arbitrariness. In particular, the person concerned had to have an opportunity to have the measure in question scrutinised by an independent and impartial body competent to determine the lawfulness of the measure and censure any abuse by the authorities. The Court noted that this had not been the situation in the present case.

The Court concluded that the disciplinary penalty imposed on the applicant in the circumstances of the case could not be regarded as necessary in a democratic society within the meaning of Article 10 § 2. There had therefore been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

As the applicant had not submitted any claim for just satisfaction, the Court considered that no award should be made under that head.

The judgment is available only in French.

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