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

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ECHR 272 (2023)
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Conviction of applicants "with judgment suspended" in freedom of expression cases was in breach of Convention

In today's **Chamber** judgment[1] in the case of Durukan and Birol v. Türkiye (applications nos. 14879/20 and 13440/21) 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 the applicants' convictions and prison sentences, with the effects of the judgments being suspended (Article 231 of the Code of Criminal Procedure), on account of content they had shared on social media.

The Court held that, in view of their potentially chilling effect, the criminal convictions, together with the decisions to suspend the judgments (subject to probation periods of three and five years respectively) constituted an interference with the applicants' right to freedom of expression. It noted in that connection that the Turkish Constitutional Court, in its *Atilla Yazar and Others* judgment of 5 July 2022, had taken the view that, in the absence of adequate procedural safeguards to regulate the discretion granted to the domestic courts in applying the "suspension of judgment" measure, the provision in question did not afford the requisite protection against arbitrary abuse by the public authorities of the rights guaranteed by the Convention. The Court saw no reason to find otherwise and considered, as the Turkish Constitutional Court had done, that the legal basis for the interferences complained of failed to define the scope of the suspension of judgment, and the manner in which that measure was applied, with sufficient clarity to afford the applicants the degree of protection required by the rule of law in a democratic society.

Principal facts

The applicants, Baran Durukan and İlknur Birol, are Turkish nationals who were born in 2000 and 1965 respectively and live in Bolu and Istanbul (Türkiye).

In July 2018 Mr Durukan (application no. 14879/20) was sentenced to a prison term of one year, one month and ten days for propaganda in favour of a terrorist organisation as a result of content he had shared on his Facebook account, in particular photographs and texts containing the words "Long live the Kurdistan resistance", "Long live Abdullah Öcalan" (the imprisoned leader of the Workers' Party of Kurdistan (PKK), an illegal armed organisation) and "Long live the Kobane resistance". The Assize Court found that these messages condoned organisations that resorted to duress, violence and threats, namely the PKK and the YPG ("People's Protection Units", an organisation based in Syria and characterised as a terrorist organisation by Türkiye on account of its alleged links to the PKK), praised their leader, and legitimised their practices.

In May 2019 Ms Birol (application no. 13440/21) was sentenced to a ten-month prison term for insulting the Turkish President in a tweet she had posted on her Twitter account in June 2015, in which she had stated – in connection with anti-corruption operations conducted in December 2013

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.

– "Tayyip Erdoğan [you] filthy thief (*hırsız edepsiz*)". The Criminal Court considered that, although the applicant claimed to have posted the tweet without any intention of insulting the President, the use of the term "thief" constituted the offence of insult.

At the end of the respective proceedings, the domestic courts decided to "suspend the judgments" against the two applicants in accordance with Article 231 of the Code of Criminal Procedure. They decided to subject the applicants to probation periods (three years for Mr Durukan and five years for Ms Birol), explaining that, if they did not commit any intentional offences during those periods, the convictions would lapse and the proceedings would be struck out, and that otherwise the judgments would take effect.

Between 2018 and 2020, the applicants' objections against those decisions and their individual applications to the Constitutional Court were dismissed by the courts of competent jurisdiction.

Then in 2022, in a different case (*Atilla Yazar and Others*, 5 July 2022), the Constitutional Court delivered a judgment in which it held that breaches of fair trial safeguards observed in the application of the legislation providing for a suspension of judgment meant that it did not satisfy the requirement of lawfulness.

Complaints, procedure and composition of the Court

Relying on Article 10 of the Convention (freedom of expression), the applicants alleged that the criminal proceedings brought against them and the resulting suspended judgments had infringed their right to freedom of expression.

The applications were lodged with the European Court of Human Rights on 4 March 2020 and on 25 February 2021 respectively.

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

Arnfinn **Bårdsen** (Norway), *President*,
Jovan **Ilievski** (North Macedonia),
Pauliine **Koskelo** (Finland),
Saadet **Yüksel** (Türkiye),
Lorraine **Schembri Orland** (Malta),
Frédéric **Krenc** (Belgium),
Davor **Derenčinović** (Croatia),

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

Decision of the Court

Article 10

The Court considered that, in view of their potentially chilling effect, the criminal convictions with decisions to suspend the judgments – which had subjected the applicants to probation periods of three and five years respectively – constituted an interference with the applicants' right to freedom of expression. It noted that these criminal convictions (under Law no. 3713 or Article 299 of the Criminal Code, depending on the case) and suspensions (under Article 231 of the Code of Criminal Procedure) had a basis in law.

The Court observed that the Constitutional Court, sitting as a full court, had held in its *Atilla Yazar and Others* judgment of 5 July 2022 that breaches of fair trial safeguards observed in the application of the legislation providing for the "suspension of judgment" measure meant that it did not satisfy the requirement of lawfulness. It had further held that the legal provisions in question posed

systemic problems that were such as to entail recurring violations of freedom of expression, and that a legislative amendment was necessary to put an end to such violations. In this connection, the Constitutional Court had found that, in domestic court practice, decisions to suspend judgment were not based on appropriate and sufficient reasons, that the courts failed to give due consideration to the defendants' arguments in their defence and rejected requests for the gathering and examination of evidence on irrelevant grounds, and that those concerned had neither the help of a defence lawyer nor the necessary time and facilities to prepare their defence adequately. It had further noted that the objection procedure, which was the only remedy available to the defendants in the event of a decision to suspend a judgment, was ineffective in practice in so far as the courts that ruled on such applications often relied on insufficient, formulaic reasoning while only conducting a merely formal examination, on the basis of the case file, without weighing up the interests at stake, and that the practice of asking an accused person to consent to a suspended judgment at the very outset of criminal proceedings – before his or her guilt had been decided – was likely to exert pressure on him or her and to give rise to a perception of his or her guilt in the judge's mind, without being counterbalanced by any fair trial safeguards. Moreover, the Constitutional Court had observed that the problems arising from the application of such suspensions could not be remedied under the rule providing for suspension of judgment any more than under the applicable legal provisions, the Court of Cassation's case-law or first-instance court practice. It had added that the legislation in force could not systematically prevent the chilling effect produced by the measure in question with regard to various fundamental rights of the accused, such as the right to freedom of expression and the right to freedom of assembly. Consequently, it had considered that the provisions governing the suspension of judgment measure had to be amended in order to eliminate the systemic problems observed in court practice in connection with that measure, and it had set out specific recommendations to that end for the legislature.

The Court endorsed the Constitutional Court's findings with regard to Article 231 of the Code of Criminal Procedure as to the fact that, in the absence of adequate procedural safeguards to regulate the discretion granted to the domestic courts in applying the suspension of judgment measure, the provision in question did not afford the requisite protection against arbitrary abuse by the public authorities of the rights guaranteed by the Convention. It saw no reason to find otherwise in the present case.

It considered, as the Constitutional Court had, that the legal basis for the interferences complained of failed to define the scope of the suspension of judgment measure, or the manner in which it was to be exercised, with sufficient clarity to afford the applicants the degree of protection required by the rule of law in a democratic society. It followed that the interferences in question had not been "prescribed by law" within the meaning of Article 10 of the Convention. There had therefore been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court held that Türkiye was to pay each applicant 2,600 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in 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.