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

Press Release
issued by the Registrar of the Court

ECHR 057 (2018)
13.02.2018

Refusal to issue a national security certificate to a TV company without reasons breached its right to freedom of expression

In today's **Chamber** judgment[1] in the case of **Aydoğan and Dara Radyo Televizyon Yayıncılık Anonim Şirketi v. Turkey** (application no. 12261/06) 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 administrative proceedings following an application for a national security clearance certificate for the shareholders and directors of "Aydoğan and Dara Radyo Televizyon Yayıncılık Anonim Şirketi", a television company whose main purpose was to broadcast programmes in the Kurdish language.

Not having obtained the certificate in question (a prerequisite for obtaining a broadcasting licence), the applicant company was not entitled to broadcast television programmes. The grounds for the dismissal of its request were not notified to the company because of the confidentiality of the investigations.

The Court found in particular that the judicial supervision had not been sufficient because the main reason for the refusal had remained totally unknown to the applicants, thus preventing them once and for all from bringing any effective claims before the administrative courts. As the domestic courts had failed to examine, in the light of any relevant observations the applicants might have had, the veracity of the considerations transmitted to the courts alone by the administrative authorities, they were not able to fulfil their task of weighing up the various interests at stake for the purposes of Article 10 of the Convention, or their obligation to prevent any abuse on the part of the authority where it took a measure restricting freedom of expression.

Principal facts

The applicants are Türkan Aydoğan and DARA Radyo-Televizyon Yayıncılık Anonim Şirketi. Ms Aydoğan is a Turkish national who was born in 1962 and lives in Mardin (Turkey). She is the Chair of the Board of Directors of DARA Radyo-Televizyon Yayıncılık Anonim Şirketi, a Turkish broadcasting company based in Mardin (Turkey).

In January 2000 the applicant company filed its articles of association with the High Council for Radio and Television Broadcasting (*Radyo Televizyon Üst Kurulu* – RTÜK) in order to obtain permission to broadcast. A month later it applied for a national security clearance certificate for its shareholders and senior managers, this being a prerequisite for obtaining a broadcasting licence.

In August 2000 the Prime Minister's Office informed the applicant company that its application for a security clearance certificate for its shareholders and senior managers would be re-examined subject to the replacement of three of its senior managers, including Ms Aydoğan, before September 2000. However, the Prime Minister's Office refused to inform the applicant company of the reasons for its decision owing to the confidentiality of security clearance investigations.

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.

In October 2000 the applicant company appealed against that decision before the Ankara Administrative Court. The Prime Minister's Office provided the court with the information and documents that had been collected at the end of the security investigation concerning the three senior managers, in a confidential envelope marked "ultrasecret". These documents were neither added to the file nor transmitted to the appellant. In September 2001 the Administrative Court dismissed the case of the applicant company, which appealed unsuccessfully to the Supreme Administrative Court.

Not having obtained the certificate in question, a prerequisite for obtaining a broadcasting licence, the applicant company was never entitled to broadcast television programmes.

Complaints, procedure and composition of the Court

Relying on Articles 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination), the applicants complained that their application for a national security clearance certificate had been rejected by a decision of which the reasons remained unknown to them and which they had been unable to challenge effectively in the domestic courts. The Court decided to examine these complaints under Article 10 alone.

The application was lodged with the European Court of Human Rights on 13 March 2006.

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

Robert **Spano** (Iceland), *President*,
Paul **Lemmens** (Belgium),
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Valeriu **Griţco** (the Republic of Moldova),
Jon Fridrik **Kjølbro** (Denmark),
Stéphanie **Mourou-Vikström** (Monaco),

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

Decision of the Court

Article 10 (freedom of expression)

The Court found as follows.

Firstly, the refusal by the Prime Minister's Office to issue a national security clearance certificate to the applicant company and the subsequent refusal of the RTÜK to grant it a broadcasting licence constituted a substantial obstacle, and therefore an interference, preventing the applicants from exercising their right to impart information or ideas.

Secondly, the interference in question was prescribed by law (Article 4 additional of Law no. 3984, the regulations enacted on 3 February and 23 March 1999, and Articles 4 and 7 of the Circular "The Principles" issued and distributed by the Prime Minister's Office) and pursued the legitimate aims of protecting "national security" and preventing "disorder".

Thirdly, the Prime Minister's Office had refused to provide the national security clearance certificate without indicating the reasons for this refusal, invoking confidentiality. The RTÜK had rejected the application for the broadcasting licence, referring only to the refusal by the Prime Minister's Office.

Fourthly, the reasoning given in the judgment of the Administrative Tribunal had contained no assessment as to the merits of the question before it. It merely referred to the fact that the applicant company had been refused a national security clearance certificate following an

investigation by the authority and simply found that this was in accordance with the law. The confidential documents, to which the Administrative Court had had access, had not been added to the file or transmitted to the applicants, not even in summary form.

The Court took the view that even if access by the applicants to all the documents in the file could not be demanded for reasons of State security (see *Regner v. the Czech Republic*)[2], such access nevertheless constituted one of the major procedural safeguards whose absence had to be sufficiently compensated for by other procedural measures. The main reason for the refusal had remained totally unknown to the applicants, thus preventing them once and for all from bringing any effective claims before the administrative courts. Even supposing that the national security requirements were such as to prevent the transmission to the applicants of certain sensitive information, the Administrative Court did not appear to have taken any measure capable of making up for the total lack of reasoning in the rejection decision or for the complete inability for the applicants to have access to the data used as a basis for the authority's rejection decision. Nor had the Supreme Administrative Court rectified that omission. Moreover, the Turkish courts had not, as in the *Regner*[2] case, carried out an in-depth examination to ascertain whether the documents and information relied on by the Prime Minister's Office were indeed confidential, whether the three managers in question could be reasonably regarded as presenting risks for national security or whether the grounds relied on by the Prime Minister's Office could not be made available to the applicants, even in summary form.

Consequently, as the domestic courts had failed to examine, in the light of any relevant observations that the applicants might have had, the veracity of the considerations transmitted to the courts alone by the administrative authorities, they had not been able to fulfil their task of weighing up the various interests at stake for the purposes of Article 10 of the Convention, or their obligation to prevent any abuse on the part of the authority where it took a measure restricting freedom of expression. The Court further explained that the same lack of information prevented it from effectively exercising its European supervision as to whether the national authorities had applied the standards established by its Article 10 case-law, because it was unable to ascertain the main reason for the restriction imposed on the applicants' freedom of expression and on their freedom to impart information. The Court thus found that the judicial scrutiny had not been sufficient and that there had been a violation of Article 10 of the Convention.

Article 41 (just satisfaction)

The Court held that Turkey was to pay the applicants 1,500 euros (EUR) in respect of non-pecuniary damage and EUR 3,000 in respect of costs and expenses.

The judgment is available only in French.

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[2] *Regner v. the Czech Republic* [GC], no. 35289/11, ECHR 2017 (extracts).

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.