**Summary and Outcome**

The European Court of Human Rights found that the Republic of Turkey had violated Article 10 of the European Convention on Human Rights (ECHR) by convicting Messrs. Ümit Erdoğdu and Selami İnce of disseminating propaganda against the indivisibility of the State after the aforementioned published an interview to a sociologist in which the latter made an analysis of the situation involving the Workers‘ Party of Kurdistan (PKK) and its advance against Turkish forces. The first applicant, Mr. Erdoğdu was the responsible editor of the monthly review *Demokrat Muhalefet! (*“Democratic Opposition!”) was charged under section 8 of the Prevention of Terrorism Act 1991 and sentenced to five months imprisonment and a fine of 41,666,666 Turkish liras (TRL); the second applicant Mr. İnce was the journalist who conducted the interview with the Turkish sociologist Dr. İ.B. he was charged under the same provisions and convicted to one year, one month and ten days‘ imprisonment and a fine of TRL 111,111,110. Mr. Erdoğdu’s conviction was deferred and Mr. İnce’s was suspended due to his good behavior.

The Court held that the conviction and sentencing of the applicants were disproportionate and therefore not “necessary in a democratic society“, thus the interference with the applicants‘ right to freedom of expression was unjustified. To substantiate its conclusion the Court considered that the content of the incriminated interview could not be described as an attempt to incite violence or to advocate the PKK’s role in the Kurdish struggle for independence, but as a sociological analysis of this situation in the face of the Turkish state, therefore, by punishing the applicants in a criminal-law matter for publishing this interview, the domestic authorities failed to have sufficient regard to the public’s right to be informed of perspectives different to those of the government, irrespective of how unpalatable that perspective may be for them.

**Facts**

The case developed in the context of “serious disturbances” in south-east Turkey between State security forces and members of the PKK that meant a heavy loss of life and the imposition of emergency rule in much of the region. [para. 52]. The conflict has at its core the struggle of the government to maintain the indivisibility of the State and prevent the strengthening of separatist movements at odds with the interests of the Kurdish people of becoming independent and autonomous in the Kurdistan region.

The first applicant, Mr. Erdoğdu was the responsible editor of the monthly review *Demokrat Muhalefet! (*“Democratic Opposition!”) published in Istanbul. In the January 1992 issue of the review, an interview which the second applicant, Mr. Selami İnce, had conducted to the sociologist Dr. İ.B., was published. [para. 8]

In the aforementioned interview, the second applicant had asked for the sociologist’s viewpoint regarding the political situation that enveloped Turkey. In summary, the sociologist shared his perspective regarding the political position in which the Kurdistan people, as well as the State, were in as a result of the conflict and the gradual recognition of Kurdish interests: “The essence of the ideas and action of the PKK, for example, is such as can change the official ideology, reduce the influence of the appointed bodies of Turkey’s political scene, and increase the weight of parliaments elected by the people. In my opinion, *de facto*, the influence of the Kurds and, in particular, that of the PKK, will grow further. [...] There has been very widespread support amongst the people for Kurdish guerrilla fighters ever since 15 August 1984. National awareness is now growing in Kurdish society and this process is spreading rapidly. And we see that, within this process, the political establishment has been used for Kurdish interests, for the move towards autonomy and independence.” [para. 9]

Following the publication of the interview, the public prosecutor at the Istanbul National Security Court charged the applicants with “having disseminated propaganda against the indivisibility of the State “. The charges were brought under section 8 of the Prevention of Terrorism Act 1991 (“the 1991 Act”). The first applicant, Mr. Erdoğdu was convicted and sentenced to five months imprisonment and a fine of 41,666,666 Turkish liras (TRL), whilst the second applicant was sentenced to one year and eight months imprisonment and a fine of TRL 41,666,666 [para. 12]. The applicants’ appeal was dismissed by the Court of Cassation and upheld the National Security Court’s assesment of the evidence and its reasons for rejecting the applicants’ defense. [para. 14]

Section 8 of *The Prevention of Terrorism Act* prohibited “Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation [...]” whilst employing the definitions of “periodicals” and “publication“ set out on *The Press Act:* “[...] newspapers, press agency dispatches and any other printed matter published at regular intervals“ and “[...] the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it” respectively. [para. 18]

After amendments to the provisions under which the applicants were convicted, the Istanbul National Security Court *ex officio* re-examined the applicants’ cases and sentenced the first applicant to five months’ imprisonment and a fine of TRL 41,666,666 and the second applicant to one year, one month and ten days’ imprisonment. The applicants appealed against these sentences. The Court of Cassation struck down the National Security Court’s judgment arguing that concerning Mr. Erdoğdu as he had been prosecuted in his capacity as responsible editor his sentence should have been converted into a fine, as it was not the case, the sentence was unlawful. Regarding Mr. İnce the Court of Cassation found that his lawyer had not been properly notified about the date of the hearing. In light of these circumstances, the National Security Court held a hearing and decided to defer the imposition of a final sentence on Mr. Erdoğdu, whilst maintaining Mr. İnce’s sentence, however, this sentence was suspended in light of his good conduct during the trial.

Notwithstanding the deferment of a final sentence on Mr. Erdoğdu and the execution of the sentence imposed on Mr. İnce being suspended, the applicants lodged two applications with the European Commission of Human Rights (hereinafter “the Commission “) alleging a violation of Articles 9, 10 and 7 § 1 of the ECHR.

In the procedure before the Commission, it found that the State had violated Articles 10 of the ECHR and submitted the case to the Court.

**Decision Overview**

The main issue before the court was whether the publication of an interview with a sociologist concerning the political and social context of conflict in the south-eastern region of Turkey between State security forces and the Workers‘ Party of Kurdistan (PKK) was a legitimate exercise of the right to freedom of expression and if the interference on the said right carried out by the authorities through the conviction and sentencing of the applicants was proportionate and “necessary in a democratic society”.

As there was no dispute regarding the interference with the applicants‘ right to freedom of expression on account of their conviction and sentence, the court considered it unnecessary to review whether there was an interference. The main subject of discussion then came to be whether the aforementioned interference was justified under the convention.

The Court highlighted that the interference carried out by the authorities contravened Article 10 of the Convention unless the government could prove that its actions complied with the requirements enshrined in the second paragraph of the above-mentioned Article, namely that the interference must be “’prescribed by law ‘, had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was ‘necessary in a democratic society‘ for achieving such aim or aims”. [para. 35]

Regarding the first requirement, that the interference with freedom of expression is prescribed by law, the applicants did not directly comment on whether the government had complied. however, in their arguments as to why the government had violated Article 7 § 1 the applicants stated that their conviction could not have been foreseeable as the incriminated interview could not be considered to have furthered violence, thus, “the crime of propaganda“ under section 9 of the 1991 Act was not precise enough to be able to conform their conduct to its content and distinguish between permissible and prohibited behavior.

The Government, in turn, pointed out that the measures taken against the applicants were based on section 8 of the 1991 Act. Meanwhile, the Commission considered that the wording of section 8 of the 1991 Act was sufficiently specific to enable the applicants, if necessary after taking legal advice, to regulate their conduct and conform to the content of the norm. as a result, in the Commission’s view, the interference with the applicants’ rights laid down in Article 10 had been prescribed by law. The Court adopted the reasoning of the Commission and stated that since their convictions were based on the mentioned section of the 1991 Act, the interference could be regarded as “prescribed by law”. [para. 39]

Having established that the interference carried out by the authorities complied with the first requirement of Article 10 § 2, the Court proceeds to analyze whether it pursued a legitimate aim recognized by the Convention.

The applicants argued that the aim of section 8 of the 1991 Act was to silence all ideas which were incompatible with the official views of the State. The Commission and the Government, in turn, argued that the prohibition of separatist propaganda under section 8 of the 1991 Act and the conviction of the applicants were part of the authorities’ efforts to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2.

The Court recalled the political and social context that envelops the case, and as such, the need for the authorities as such to be alert to acts capable of fueling additional violence, as such, the measures taken against the applicants “can be said to have been in furtherance of [...] the protection of national security and territorial integrity and the prevention of disorder and crime.“ Especially when the separatist movement had recourse to methods that rely on the use of violence. [para. 43]

As a result of the Court’s conclusion, in the Court’s view, the Government’s measures against the applicants complied with the second requirement in Article 10 § 2 of the ECHR,

 and as such, the Court proceeded to evaluate whether the interference was necessary in a democratic society.

The applicants stressed that their prosecution and conviction was a disproportionate interference with their right to freedom of expression. Indeed, they argued that other press organs which communicated ideas contradicting the official ideas of the State were accused of disseminating propaganda in favor of terrorist organizations and were punished under the very same aims of protecting national security and territorial integrity. The applicants argued that the incriminated interview had the opinion of a researcher and sociologist, taking the form of an analysis of the situation of the Kurds, as such, it did not aim to further violence.

The Government replied that the language employed during the interview had appealed to the feelings, intellect, and will of citizens of Kurdish origin and could be seen as a call for violence and to establish a national assembly. The Government argued that in the interview the PKK was depicted as a liberation army that would win the armed conflict with the Republic of Turkey.

The Government also argued that it was the duty of Turkish authorities to prosecute and convict the applicants due to the possibility of further violence as the statements that formed part of the interview were bound to serve as an incitement to enmity and violence and endanger human rights and democratic principles and institutions. It also argued that especially due to the situation of violence in Turkey, the Government enjoyed a margin of appreciation concerning the applicants‘ prosecution and conviction under section 8 of the 1991 Act.

In the Commission’s view, the content of the incriminated interview could not be considered an act of separatist propaganda but as an analysis of the political situation. The interviewee expressed his view of the Kurdish question in moderate terms and in no way could it be proven that he associated himself with the use of violence in the context of the Kurdish separatist struggle, as such, the Commission concluded that the Government’s actions deterred public discussion on important political issues and for these reasons found that there had been a violation of Article 10 of the Convention.

Regarding the last standard enshrined in Article 10 § 2 of the ECHR, namely that any interference on the right to freedom of expression must be “necessary in a democratic society” the Court recalled that the right to freedom of expression “constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment.“ This right is not only applicable to “information “ or “ideas” that are viewed favorably but also to those that offend, shock, or disturb. However, this right is subject to exceptions and States have the authority to establish restrictions, provided that they comply with the requirements set on the Convention. [para. 47]

In this opportunity, the Court considers that the conviction of the applicants came as a result of an interview published in a monthly review of which they were the editor and a journalist respectively, and as such, the case must be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy. Indeed, the Court recalls that the public has a right to receive the information and ideas the press has to give, and although the press must not overstep the interests of national security or territorial integrity, it’s the press‘ duty to impart information and ideas on political issues, including divisive ones. [para. 49]

The Court also stressed that there is little scope under Article 10 § 2 of the ECHR for restrictions on political speech or debate on matters of public interest. It highlighted that in a democratic system the actions or omissions of the government must be subject to close scrutiny not only of legal and judicial authorities but also of public opinion.

Taking this into account the Court noted that in the instant case, the content of the interview was in fact of analytical nature and it did not contain any passages which could be described as an incitement to violence. In the Court’s view, the interviewee analyzed, mainly from a sociological perspective, the political situation in the face of the reactions of the Turkish State. Notably, the Court stressed that the State authorities failed to take into account, not only the fact that the content of the interview could not be read as an incitement to violence, nor that they could be construed as liable to incite to violence but also that the public, in general, has a right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.

In light of all the above considerations, the Court concluded that the conviction and sentencing of the applicants were disproportionate to the aims pursued and therefore not “necessary in a democratic society” and as a result, there had been a violation of Article 10 of the ECHR. [para. 55]

Regarding the arguments laid down by the applicants on the alleged violation of Article 7 § 1 of the ECHR, the Court recalled the previous arguments concerning the compliance with the provisions under which the applicants were charged, convicted, and sentenced and found that there had been no violation of Article 7.

**Joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall, and Greve**

In their concurring opinion judges Palm, Tulkens, Fischbach, Casadevall and Greve state that they share the conclusion that there had been a violation of Article 10 by the Republic of Turkey, however, they distance themselves from the main argumentation by assessing that the Court had taken the wrong approach to reach its conclusion. The judges stressed that a more contextual approach must have been taken, one that is more in keeping with the wide protection afforded to political speech in the Court’s case-law as “even ‘fighting’ words may be protected by Article 10”. [pag. 26]

In this contextual approach, the judges urged that a more appropriate standard could have been to ask whether the language intended to inflame or incite to violence, whether there was a genuine risk that it might do so, or whether the author occupied a position of influence on society or his or her opinion was given a degree of prominence that enhanced the influence of the speech. It is with an approach like this one that the judges considered that the distinction between language which is shocking and offensive (which is protected by Article 10) and that which forfeits its right to tolerance in a democratic society could be drawn.

**Concurring opinion of Judge Bonello**

In Judge Bonello’s view, the Court did well in concluding that there had been a violation of Article 10, however, the judge noted that the Court’s primary test on whether the interference by the domestic authorities with the applicant’s freedom of expression was justifiable in a democratic society.

Judge Bonello considered that the standard applied by the Court in which it examined whether the speech incited violence was inappropriate. Instead, the judge believes that the punishment by the national authorities of those encouraging violence would only be justifiable if they were such as to create “a clear and present danger”, a menace so imminent that there would be no time to reduce the effects of the speech through more speech, but only through the enforcement of the law.

As a result of the application of this standard, the judge noted that it would show that there was no incitement of violence through the expressions of the sociologist, nor that if the speech were to be suppressed, this would be indispensable for the salvation of Turkey.

**Decision Direction
Mixed Outcome**

The decision has a mixed outcome regarding freedom of expression. On the one hand, the decision effectively protected and guaranteed the right to freedom of expression by holding that concerning an interview that touches sensitive political topics, State authorities have to take into consideration the public’s right to be informed of opinions other than those held by the Government, even in the face of a State of emergency and in the middle of conflict, as such, protecting the democratic institutions of freedom of the press and freedom of expression under such extreme circumstances. On the other hand, though, the decision applied a reduced level of scrutiny to the interference of freedom of expression; Although the Republic of Turkey at the time of the case was in the middle of conflict against the PKK, by establishing so much importance to the analytical nature of the content of the interview the Court did not take seriously enough the Government’s assertion that, in brief, the interview conveyed a political message that had to be controlled and repressed due to the probability of it inciting violence.

For the Court, the interview, in this case, could not be proven to incite violence, nevertheless, the Court gave too much emphasis on the fact that the interview was a sociological analysis of the political situation surrounding Turkey. One look at the interview’s content relevant to the case informs that the interview had in it a political message that was not necessarily part of the sociological analysis, for instance, the interviewer asks the sociologist: “What should be done to counteract the wave of chauvinist Turkish nationalism encouraged by the right-wing press and the MCP [Nationalist Workers’ Party]? [...]” To which the interviewee answers: “... Kurds are dying for their nation. What are the Turks dying for? What are they doing in Kurdistan?”

From this brief, passage it’s shown that the interviewee has an opinion regarding the topic and appeals to the people looking to convey his own opinion to the public, who he understands, is already looking at the Kurds with more positive eyes. In essence, he is arguing to the public questioning the position of the Turkish government in its constant opposition to the efforts of independence carried out by the Turks. This is also stressed by the Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve when they mention that in a democracy “even ‘fighting’ words may be protected by Article 10“.

Although his message cannot possibly be read as an incitement of violence, as it questions and moderately maintains a certain position, it is still a political statement, a point of view different from that of the government that is too protected by the Convention. As a result, when the Court restricts the protection of the message contained in the interview to the analytical aspects of it, the Court leaves dissidence at risk during States of Emergency and national crises.

**Global Perspective**

**Table of Authorities**

**Related International and/or Regional laws.**

* **ECHR, art. 10**
* **ECtHR, Zana v. Turkey, Reports of Judgments and Decisions 1997-VIII (1997)**
* **ECtHR, Fressoz and Roire v. France App. no. 29183/95 (1999)**
* **ECtHR, Lingens v. Austria Series A no. 103 (1996)**
* **ECtHR, Incal v. Turkey Reports of Judgments and Decisions 1998-IV (1998)**
* **ECtHR, Sürek v. Turkey App. no. 26682/95 (1999)**

**National Standards, law and jurisprudence.**

* **Tur., The Press Act Law no. 5680 (1950)**
* **Tur, The Prevention of Terrorism Act Law no. 3713 (1991)**