ECtHR: *Baldassi and others v. France*

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In a case concerning freedom of political expression and the right to protest, the European Court of Human Rights (ECtHR) found that the conviction of pro-Palestine activists had violated their right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). The activists were convicted for incitement to economic discrimination on account of their campaign aimed at boycotting products imported from Israel.

The 11 applicants in this case are members of the "Collectif Palestine 68", which is a local relay for the international campaign "Boycott, Divestment and Sanctions" (BDS). This campaign was launched following an appeal from Palestinian non-governmental organisations a year after the opinion issued by the International Court of Justice which stated that the construction of the wall being built by Israel, the occupying Power, and its associated regime, was contrary to international law. By distributing leaflets and presenting a petition to be signed at a hypermarket, supported by a campaign on the Internet, the BDS-activists had been calling for a boycott of Israeli products. They were prosecuted and finally convicted for incitement to discrimination on the basis of section 24 (8) of the French Law on Press Freedom of 29 July 1881 and the French Criminal Code. The Court of Appeal imposed on each of the activists suspended fines of EUR 2 000 and ordered them to jointly pay EUR 4 000 in respect of non-pecuniary damages to each of the four civil parties (the International League against Racism and Antisemitism, the Lawyers without Borders association, the "Alliance France-Israel" association and the "Bureau national de vigilance contre l'antisémitisme"), and to pay another EUR 6 000 for the civil party expenses. The Criminal Division of the Court of Cassation dismissed the appeals lodged by the activists, who had alleged, in particular, a violation of Article10 ECHR. The Court of Cassation was of the opinion that the sanctions imposed on the activists were necessary in a democratic society for the prevention of disorder and the protection of the rights of others.

The BDS-activists lodged applications with the ECtHR complaining of their criminal conviction on account of their actions calling for a boycott of articles produced in Israel. The ECtHR first observed that the call for a boycott combined the expression of protest with incitement to differential treatment. Such a call can, depending on the circumstances, amount to incitement to discrimination against others. Incitement to discrimination is a form of incitement to intolerance, which, together with calls for violence and hatred, is one of the limits which should never

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be overstepped in exercising freedom of expression. Nevertheless, incitement to differential treatment is not necessarily the same as incitement to discrimination. The Court clarified that a distinction had to be drawn between the present case and *Willem v. France* (16 July 2009), in which the ECtHR had found that a conviction for a call to boycott Israeli products had not violated Article 10 ECHR. In that case, the ECtHR had found that a mayor, in asking the municipal catering services to boycott Israeli products, had used his mayoral powers to impose such a boycott and that he could not claim to have encouraged the free discussion of a subject of public interest. In the case at hand, however, the activists were ordinary citizens who were not restricted by the duties and responsibilities arising from a mayoral mandate and whose influence on consumers was not comparable to that of a mayor's influence on his municipal services. Moreover, the BDS-campaign by the activists had aimed to trigger or stimulate debate among supermarket customers. Furthermore, the ECtHR observed that the applicants had not been convicted of making racist or antisemitic remarks or of inciting hatred or violence. Nor had they been convicted of being violent themselves or causing damage during their actions. The ECtHR did not wish to call into question the interpretation of section 24 of the Law of 29 July 1881 on which the activists' conviction was based, to the effect that by calling for a boycott of products from Israel the activists had, within the meaning of that provision, incited people to discriminate against the producers or suppliers of those products on grounds of their origin. However, the ECtHR noted that French law, as interpreted and applied in the present case, prohibited any call for a boycott of products on account of their geographical origin, whatever the tenor, grounds and circumstances of such a call. The ECtHR also found that the domestic courts had failed to establish that the activists' conviction on account of their call to boycott products from Israel had been necessary in a democratic society to attain the legitimate aim of the protection of the rights of others. The ECtHR emphasised the lack of detailed reasons given for the conviction of the activists, especially since the actions and remarks imputed to them had concerned political and militant expression on a subject of public interest, leaving little scope for restrictions on freedom of expression. The fact that political speech can be controversial or virulent does not diminish its public interest and high level of protection under Article 10, provided that it does not cross the line and turn into a call for violence, hatred or intolerance. The ECtHR concluded that the activists' conviction was not based on relevant and sufficient grounds, that the domestic courts had not applied rules consonant with the principles set out in Article 10, and that they had failed to conduct an appropriate assessment of the facts. Therefore, it found, unanimously, a violation of Article 10 ECHR.

Arrêt de la Cour européenne des droits de l'homme, cinquième section, rendu le 1er juin 2020 dans l'affaire Baldassi et autres c. France, requêtes nos 15271/16 et 6 autres

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Judgment by the European Court of Human Rights, Fifth Section, in the case of Baldassi and others v. France, Application Nos. 15271/16 and 6 others, 11 June 2020

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