European Court of Human Rights: *Şık v. Turkey* (No. 2) and *Sabuncu and others v. Turkey*

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In one of the numerous cases brought against Turkey in relation to the right to freedom of expression and the rights of journalists, the European Court of Human Rights (ECtHR) found that the arbitrary pre-trial detention of an investigative journalist had violated the European Convention on Human Rights (ECHR). In *Şık v. Turkey*, the ECtHR found that a series of articles published on the website of *Cumhuriyet*, in the newspaper's print edition, and in items posted on social media from the journalist's Twitter account, had produced no sufficient basis for a reasonable suspicion that the journalist had disseminated terrorist propaganda. The judgment in *Şık v. Turkey* of 24 November 2020 is analogous to the reasoning and outcome of the judgment in *Sabuncu and others v. Turkey* of 10 November 2020, another case where the ECtHR found that the Turkish authorities had violated the rights of journalists and the managers of the newspaper *Cumhuriyet*.

The applicant, Ahmet Şık, is an investigative journalist working for the national daily newspaper *Cumhuriyet* (*The Republic*). The newspaper is known for its critical stance towards the current Turkish Government under the presidency of Recep Tayyip Erdogan. On 29 December 2016, Şık was arrested and taken into police custody by the Istanbul police. He was held in pre-trial detention by court order, based, according to the Istanbul Magistrate's Court, on "strong suspicions" that the journalist had committed the offence of disseminating propaganda in favour of terrorist organisations such as the PKK (the Kurdistan Workers' Party), the FETÖ/PDY (Fethullahist Terror Organisation/Parallel State Structure), and the DHKP/C (People's Revolutionary Liberation Party/Front). The pre-trial detention was extended on several occasions; it ended in March 2018, when the Istanbul Assize Court ordered Şık's release pending trial. In a judgment of 25 April 2018, the Istanbul Assize Court found the journalist guilty of assisting the terrorist organisations PKK, DHKP/C and FETÖ. The Assize Court concluded that Şık's articles and Twitter posts constituted acts seeking to legitimise violent actions and amounted to assisting terrorist organisations by arguing that it was the state that was a mafia and a murderer. Furthermore, rather than informing the public or pursuing the public interest, the articles and posts were seen to portray terrorist organisations as legitimate and innocent. Şık was sentenced to seven years and six months' imprisonment. After a judgment by the Court of Cassation, the Assize Court confirmed Şık's conviction, and again the case was referred to the Court of Cassation. In the meantime, Şık's application before the Constitutional Court

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claiming a breach of his right to liberty and security and his right to freedom of expression and freedom of the press, failed.

Şık complained before the ECtHR that his initial and continued pre-trial detention had been arbitrary and devoid of any concrete evidence grounding a reasonable suspicion that he had committed a criminal offence. According to Şık, his right to liberty and security under Article 5, section 1 ECHR had been violated. He also argued that the facts on which the suspicions against him had been based related solely to acts falling within the scope of his activity as a journalist and, hence, of his right to freedom of expression under Article 10 ECHR. Şık's application was supported by third-party interventions from the Council of Europe Commissioner for Human Rights, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and a range of NGOs, such as ARTICLE 19, the Committee to Protect Journalists, the European Centre for Press and Media Freedom, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute, PEN International and Reporters Without Borders.

The ECtHR found unanimously that there had been a violation of Article 5, section 1 ECHR on account of the lack of a reasonable suspicion that Şık had committed a criminal offence. The ECtHR observed that the articles and posts in question constituted contributions by Şık, in his capacity as an investigative journalist, to various public debates on matters of general interest; they contained his analysis and criticism of various actions taken by government bodies, and his point of view on the legality and compatibility with the rule of law of the administrative and judicial measures taken against the alleged members or sympathisers of the illegal organisations. The topics addressed in these articles and Twitter posts had already been the subject of wide-ranging public debate in Turkey and beyond, involving political parties, the press, non-governmental organisations, groups representing civil society and public international organisations. The ECtHR also noted that the articles and posts at issue did not contain any incitement to commit terrorist offences, did not condone the use of violence and did not encourage insurrection against the legitimate authorities. While some of the published material may have reported the points of view voiced by members of prohibited organisations, it remained within the bounds of freedom of expression, which stipulates that the public has the right to be informed of the different ways of viewing a situation of conflict or tension, including hearing the point of view of illegal organisations. Hence, the posts and articles were the result of the legitimate activities of an investigative journalist or a political opponent, and fell within the exercise of Şık's freedom of expression and freedom of the press, as guaranteed by the Turkish law and the ECHR.

The lack of a reasonable suspicion that Şık had committed a criminal offence coupled with the finding of a violation of Article 5, section 1 ECHR, formed the

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basis for the finding of a violation of Sik's right to freedom of expression under Article 10 ECHR. First, the ECtHR considered that Sik's pre-trial detention in the context of the criminal proceedings brought against him for offences carrying a heavy penalty and directly linked to his work as a journalist, amounted to an actual and effective constraint, and thus constituted "interference" with the exercise of his right to freedom of expression. On that basis, the ECtHR dismissed the Turkish Government's objection as regards the journalist's lack of victim status. The ECtHR further observed that the requirements of lawfulness under Articles 5 and 10 ECHR are aimed in both cases at protecting the individual from arbitrariness, and that the detention measure, which was not lawful, could not be regarded as a restriction prescribed by national law. Accordingly, the interference with Şık's rights and freedoms under Article 10, section 1 ECHR could not be justified under Article 10, section 2, since it was not prescribed by law. Since the violation of the journalist's rights had indisputably caused him substantial damage, the Turkish State was ordered to pay Şık EUR 16 000.

However, Şık's complaint under Article 18 ECHR (limitation on use of restrictions on rights) was dismissed by the ECtHR, as it had not been established beyond reasonable doubt that the journalist's pre-trial detention was ordered for a purpose not prescribed by the ECHR within the meaning of Article 18. The ECtHR did not reach unanimity on this point however, as one of the judges strongly dissented, arguing that there was massive evidence that the detention and prosecution of the journalists and managers of *Cumhuriyet* was part of the Turkish authorities' political persecution of their opponents, and part of the government's general strategy to silence dissenting voices after the attempted military coup in 2016.

Judgment by the European Court of Human Rights, Second Section, in the case of Şık v. Turkey (No. 2), Application No. 36493/17 of 24 November 2020

https://hudoc.echr.coe.int/eng?i=001-206411

Judgment by the European Court of Human Rights, Second Section, in the case of Sabuncu and others v. Turkey, Application No. 23199/17 of 10 November 2020

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