Bulletin No 2

Latest developments in the case-law of the European Court of Human Rights on freedom of expression

Freedom of expression and freedom of the media

http://horizontal-facility-eu.coe.int

Funded
by the European Union
and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Implemented
by the Council of Europe

Bulletin No 2

Latest developments in the case-law of the European Court of Human Rights on Freedom of Expression

Author: Cesare Pitea

The Bulletin was prepared in the framework of the European Union and Council of Europe joint programme "Horizontal Facility for the Western Balkans and Turkey 2019–2022", and its action on "Freedom of Expression and Freedom of the Media in South-East Europe (JUFREX)".

This document was produced with the financial support of the European Union and the Council of Europe. The views expressed herein are responsibility of the author and can in no way be taken to reflect the official opinion of the either party.

Contents

INTRODUCTION 5

REVIEW OF MOST IMPORTANT FREEDOM OF EXPRESSION CASES 6

Karastelev and others v. Russia, judgment of 6 November 2021, application no. 16435/10 6

Jecker v. Switzerland, judgment of 6 October 2020, application no. 35449/14 7

Gafiuc v. Romania, judgment of 13 October 2020, application no. 59174/13 8

İmrek v. Turkey, judgment of 10 November 2020, application no. 45975/12 9

Panioglu v. Romania, judgment of 8 December 2020, application no. 33794/14 10

Schweizerische Radio– und Fernsehgesellschaft et publisuisse SA v. Switzerland, judgment of 22 December 2020, application no. 41723/14 11

Société Editrice de Mediapart and Others v. France, judgment of 14 January 2021, application nos 281/15 and 34445/15 13

IN-DEPTH ANALYSIS OF SELECTED CASES 15

Sabuncu and Others v. Turkey, judgment of 10 November 2020, application no. 23199/17 15

Selahattin Demirtaş v. Turkey (no. 2) [GC], judgment of 22 December 2020, application no. 14305/17 18

Introduction

The Bulletin is prepared within the framework of the joint initiative of the European Union and the Council of Europe "Horizontal Facility for the Western Balkans and Turkey 2019–2022" and its Action on "**Freedom of expression and freedom of the media in South-East Europe (JUFREX)**".

In order to continue cooperation with the legal professionals, JUFREX certified trainers and contribute to further improvement of knowledge in the field of freedom of expression and freedom of the media, we have prepared this Bulletin as an additional tool for sharing information on new trends and developments in the case-law of the European Court of Human Rights (ECtHR, Court).

While Bulletin No 1 covered the period April 2019 – July 2020, this one, in front of you presents some of the relevant judgements delivered from August 2020 to January 2021.

In the analysed period of time, the European Court of Human Rights delivered significant judgments in different areas of art. 10 of the European Convention of Human Rights. The most relevant stream of case law deals with the intertwined requirements for the protection of freedom of expression and the liberty and safety of journalists and members of parliaments, especially in connection with the legitimate fight against terrorism and political violence. Other cases concerned preventive measures curbing freedom of political speech, restrictions on the access to information on matters of public interest, the protection of journalistic sources, the responsibilities of journalists and members of the judiciary in exercising their freedom of expression, and the scope of access to given media outlets to convey political opinions. In the judgments selected, the Court clarifies and elaborates on the requirements of freedom of expression in these areas, with a specific focus on the requirements of the legality of interferences and on the need for careful scrutiny and proportionality assessment by domestic authorities. Overall, the case selected stress, at once, the importance of freedom of expression in the context of the rule of law and the need to advance freedom of expression legislation and practices at the domestic level, in keeping with the principle of subsidiarity.

In the first part of this Bulletin, you will be provided with a short description of selected cases, in the second part, an in-depth analysis of two crucial cases would be provided.

Review of most important freedom of expression cases

Karastelev and others v. Russia, judgment of 6 November 2021, application no. 16435/10

Facts of the case

Mr Karastelev and Ms Karasteleva (the first and second applicant) were the managing officers of the NGO NHCR (*Novorossiysk Committee for Human Rights*, the third applicant). In 2009, they staged two public, static protests against the 2008 regional law for the protection of minors, considering that it was too restrictive and unconstitutional, in that it severely curbed the freedoms of adolescents. During the first protest, the applicants held a poster that stated "Freedom is not granted, it has to be taken". During the second protest, the applicants were approached by two minors and engaged in a conversation with them. The prosecutor's office considered that these conducts amounted to spreading extremist propaganda and encouraging adolescents to participate in future demonstrations, in breach of the Suppression of Extremism Act. They classified the applicants' actions as having the potential to lead to "extremist activity" and to obstruct the lawful activities of the State authorities. The prosecutor issued warnings to the first two applicants, in their capacity as officials of the NGO, whose non-compliance would result in personal administrative liability. A caution was further made to the NGO, whereby the continuation of the activities could result in its dissolution. Finally, an order was addressed to one of the applicants to remedy the violations. In substance, they required the applicants to refrain from future protests, at the risk of facing liability and the dissolution of the NGO. The applicants resigned from the positions at the NGO and unsuccessfully appealed the decision of the prosecutor.

The first two applicants complained before the ECtHR of the violation of their freedom to impart information and ideas, under Article 10. The first applicant also complained of a violation of his right to access justice under Article 6. The complaint by the applicant NGO was declared inadmissible by the Court in a Single Judge decision of 2016.

ECtHR's reasoning

At the outset, the Court rejected the contention by the Government that, since the second applicant died after applying, her son did not have the standing to continue the case due to the strictly personal nature of the claim. It reiterated that the complaint before it had a "moral dimension" and that the next-of-kin of the deceased victim had a legitimate interest in pursuing it.

While the Government did not dispute that there was an interference with freedom of expression, the Court nevertheless made clear that the applicants were affected individually, albeit indirectly, also by the acts directed towards the NGO.

The salient issue for the Court to address was the quality of the law on which the interference was based. The issue was two-fold. Firstly, whether the applicants could foresee that their con-

duct could entail the application of measures under the anti-extremism legislation. Secondly, whether Russian law afforded them with *ex-post* sufficient safeguards against arbitrariness in its application. The Court reiterated that recourse to preventive measures curbing freedom of expression should be limited to cases disclosing a real risk of commission of specific and serious offences, by specific persons. No evidence suggested that the law provided or that the prosecutor used any ascertainable and foreseeable criteria to differentiate between acts amounting to a legitimate exercise of freedom of expression and those that could entail warnings. Nor was there a clear guideline on the types of actions that could warrant a warning as opposed to criminal liability. The resulting uncertainty adversely affected the foreseeability of the regulatory framework, conducive to a chilling effect on freedom of expression, and left too much discretion to the executive.

The Court further reiterated its findings in previous cases (*Lashmankin and Others v. Russia*, judgment of 7 February 2017 application nos. 57818/09 and 14 others, § 356) that domestic law confined the power of review by domestic courts to a far too narrow scope, limited to the "lawfulness" of the impugned measure. No room was left for the domestic courts to assess its reasonableness and, ultimately, to carry out the necessity and proportionality assessment required by Article 10 and the Court's jurisprudence. The prosecutor was consequently given an unfettered power to issue preventive measure interfering with freedom of expression.

Finally, the Court ruled that – even on the facts invoked by the prosecutor – the applicants' conduct could not reasonably fall under those described as extremist activity by the law, as it did not entail the planning of any criminal activities, nor was it capable of directly or indirectly leading to violent actions against public authorities. Therefore, article 10 had been violated.

Note: The case highlights the need for domestic law to strictly define the circumstances in which a behaviour not entailing criminal liability may exceptionally justify the taking of preventive measures impinging on the exercise of freedom of expression. It also confirms that, in order to ensure protection against the arbitrary use of discretion, the action by non-judicial authorities in taking such measures must be accompanied by strict judicial review, allowing the courts to conduct a proportionality assessment, in keeping with the requirements of Article 10.

Jecker v. Switzerland, judgment of 6 October 2020, application no. 35449/14

Facts of the case

The applicant is a journalist who published an article about a man who had been a dealer of cannabis for ten years.

Following the publication, the prosecutor opened an investigation for drug trafficking and requested the applicant to testify, maintaining that she could not assert her right to protect her source. The request by Ms Jecker not to disclose her sources was initially allowed by the Cantonal Court but was refused by the Federal Supreme Court on appeal.

The Federal Court's decision was essentially based on two factors: that trafficking in soft drugs was a serious offence listed among those justifying an exception to the protection of journalistic sources and that the applicant's testimony was the only way of identifying the perpetrator. The Federal Court considered that no particular reason emerged from the facts of the case to give prevalence to either the public interest in prosecuting the offence or the applicant's interest in protecting her source. It thus deferred to the balance struck by the legislature, with the former outweighing the latter.

Before the Court, the applicant complained that she was compelled to reveal the identity of confidential sources in violation of Article 10.

ECtHR's reasoning

The Court's analysis focused on the sufficiency of the arguments put forward by the Federal Court to justify the exception to the applicant's right to the protection of sources. The Court recalled that review by a judge or other independent and impartial decision-making body is one of the most important safeguards that must surround any infringement of the right to protection of journalistic sources. The competent court must be able to determine whether there is an imperative public interest overriding the principle of protection of journalistic sources. Otherwise, it should have the power to prevent unnecessary access to information capable of disclosing the sources' identity (*Sanoma Uitgevers B.V. v. the Netherlands* [GC], judgment of 14 September 2010, application no. 38224/03, § 51).

The Court observed that the necessity of disclosing the identity of a source cannot be established by merely arguing that, in the absence of such disclosure, it would not be possible to pursue the criminal investigation. The seriousness of the offences must be taken into account. The Federal Court failed to consider the actual danger to the users' health and essentially relied on the classification made by the legislature, which it had previously characterised as "inconsistent".

The Court considered it immaterial that the article did not openly criticise the criminal activity, a fact to which the Federal Court attached some weight. The Court underlined that the Federal Court had failed to consider that the article was likely to contribute to a debate of general interest on the effectiveness of crime prevention and repression. Similarly, it overlooked that the disclosure order could have had a detrimental impact on the newspaper's reputation and ability to perform its task in the future, as well as on the interest of the members of the public in receiving information imparted through anonymous sources.

Accordingly, the reasons given by the Federal Court were not sufficient to show an overriding requirement in the public interest justifying the disclosure of journalistic sources. The Court found a violation of Article 10.

Note: The decision shows the primary importance of the protection of sources to preserve journalistic freedom under Article 10 (*Goodwin v. the United Kingdom* [GC], judgment of 27 March 1996, application no. 17488/90). It also highlights that the balance between the competing interest cannot be made in abstract terms by the legislature, leaving to the judiciary the sole task of ascertaining whether the situation at hand was caught by a legal rule formulated in general terms (*Perinçek v. Switzerland* [GC], judgment of 15 October 2015, application no 27510/08, § 275. Rather, the Convention require a thorough assessment by a judge of the existence, in the circumstances of the specific case, of an overriding imperative public interest for an exception to be compatible with the requirements of freedom of expression.

Gafiuc v. Romania, judgment of 13 October 2020, application no. 59174/13

Facts of the case

The applicant was a sports journalist for a national newspaper. In 2005 he was accredited by the National Council for the Study of Securitate Archives (CNSAS) to access its archives, with the stated purpose of researching on sport during the communist era. The applicant published a series of articles disclosing personal information about individuals involved with the activities of the political police as informants or persons under surveillance.

In 2009, the CNSAS Management Board withdrew the applicant's accreditation, on the ground that he had failed to respect the privacy of persons persecuted by the State security organs and had used the information for a purpose other than that justifying the accreditation in the first place. The applicant's request for an internal review to the CNSAS Panel was rejected.

The applicant unsuccessfully sought judicial review to the Court of Appeal and the High Court of Cassation. The latter upheld the lower court's judgement that the applicant was under an obligation to protect the private life of those who had been

persecuted in the communist era. It held that the CNSAS had conducted the necessary examination of the published material and applied the relevant objective legal test, which does not require the prior complaint by the individuals affected.

The applicant complained before the ECtHR that the withdrawal of his accreditation infringed on his right to exercise his profession as a journalist as it constitutes a refusal of access to information, depriving the public of the possibility of acquiring information of general interest, as granted by Article 10.

ECtHR's reasoning

The respondent Government argued that the complaint was inadmissible under Article 35 § 3 b), since the applicant allegedly did not suffer a "significant disadvantage" from the facts complained of. The Court rejected this contention, reiterating that in cases concerning freedom of expression the criterion must be applied carefully (*Margulev v. Russia*, judgement of 8 October 2019, application no. 15449/09). In particular, since the application concerned a restriction to the press on access to information potentially contributing to a public debate, it raised important human rights issues that required an examination on the merits.

The national courts' interpretation of the legal provisions obliging the applicant to protect personal data (under the general law on data protection) and to use the information obtained for exclusively scientific purposes (under the law regulating access to the archives) had been neither arbitrary nor unforeseeable. The applicant could reasonably foresee that his actions were likely to result in the withdrawal of his accreditation, as provided for by the CNSAS Regulations.

The Court noted that the interference aimed to protect the right to respect of private life of those whose personal information had been made public. Even in the absence of complaints from the aggrieved persons, the action of public authorities pursued legitimately this aim, since they must enact safeguards for the protection of the sensitive data in their possession.

In analysing the necessity and proportionality of the interference, the Court recalled that sensitive data must be handled with caution and a critical eye. The applicant had neither filtered the sensitive information nor carried out an academic analysis in line with the purpose stated. He rather published raw materials, divulging details of the personal life of the people concerned, including their full names. The articles did not focus at all on the relationship between the sportspersons and the political police, a matter of general interest thus failing to contribute to a public debate in this area. The applicant was able to submit its case for review to domestic courts, whose decision did not disclose arbitrariness.

While the Court recognised that the interference affected the applicant's ability to research this area, it did not prevent him from continuing to work as a journalist and was proportionate to the breach he had committed.

Note: The judgment is interesting in two respects. First, it underlines the importance of journalistic freedom by excluding, at least in principle, that its violation can be considered a minor one, not deserving examination by the Court (compare with *Sylka v. Poland*, decision of 3 June 2014 application no. 19219/07). Secondly, it makes clear that public authorities may *proprio motu* limit freedom of expression for the protection of others against the dissemination of sensitive personal information. Indeed, the domestic courts did not expressly weigh privacy against freedom of expression and the Court balanced the two rights, giving prevalence to the former.

İmrek v. Turkey, judgment of 10 November 2020, application no. 45975/12

Facts of the case

The applicant was the secretary of a local branch of the EMEP (Labour Party). As such, he organised and participated in two political events in March 2006. In April he was remanded into custody on a charge of dis-

seminating propaganda in favour of a terrorist organisation (the PKK, Workers' Party of Kurdistan). This stemmed from two counts: his responsibility for allegedly illegal acts (shouting slogans and waving flags and posters) committed by the participants of the first event and a speech he allegedly made at the second event.

Upon release, he was sent to trial. In his defence, he claimed that he had acted diligently to prevent any illegal actions at the first event and that his speech at the second had been incorrectly reproduced in the transcript filed by the police as evidence. In September 2008, Adana Assize Court found Mr İmrek guilty as charged and sentenced him to one year's imprisonment. The Court of Cassation upheld the judgment in January 2012.

As per Law no. 6352 of 2012 (aimed at bringing domestic law in line with the Court's jurisprudence by suspending proceedings and sentences given in cases of "crimes of opinion"), the execution of the applicant's sentence was suspended, the judgment of 2008 was set aside, and further proceedings against the applicant were stayed.

Before the Court, the applicant complained of the unfairness of the criminal proceedings, invoking Article 6 of the Convention, and a breach of his right to freedom of expression under Article 10.

ECtHR's reasoning

The Court analysed the case exclusively under the angle of Article 10.

About the applicant's responsibility as an organiser of the first event, the Court pointed out that organisers cannot be held criminally liable for acts to which they do not participate directly unless they have encouraged or been lenient towards them. They should be absolved when they act as peace-makers, issuing warnings to the crowd (*Mesut Yıldız and Others v. Turkey*, judgment of 18 July 2017, application no. 8157/10, § 34). Moreover, the domestic courts should have explained how the applicant's conduct could concretely be regarded as inciting violence, armed resistance or uprising, or constituting hate speech (*Mart and Others v. Turkey*, judgment of 19 March 2019, application no. 57031/10, § 32). As to the impugned statements, the Court recalled that the fairness of the proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression (*Baka v. Hungary* [GC], judgment of 29 March 2016, application no. 20261/12, § 161). Consequently, the Court must be satisfied with the overall fairness of the criminal proceedings in the framework of the proportionality assessment. In the 2008 judgment, the Adana Assize Court based its finding on a single piece of evidence, contested by the applicant, without looking for corroborating evidence. Nor did it seek to confirm or refute the applicant's claim of errors or evidence doctoring in decrypting and transcribing the video file. These shortcomings showed the unfairness of the criminal proceedings and, therefore, led to a finding of a violation of Article 10.

Note: The decision, although being part of a well-established stream of case-law, is important as it highlights how freedom of expression works as a safeguard of the personal liberty and security of political activists. It also clarifies the standard of criminal liability for organising or taking part in an event aimed at exercising freedom of expression during which criminal activities have allegedly taken place.

Panioglu v. Romania, judgment of 8 December 2020, application no. 33794/14

Facts of the case

The applicant is a judge in the Bucharest Court of Appeal. In 2012, she published in a national newspaper and on an internet news site an article about the then President of the Court of Cassation. In lyrical and provocative terms, the article criticised the recent appointment in this position of a former Prosecutor in the communist era, calling her "Comrade Prosecutor" and alluding to her use of case files as weapons

of the regime. The Judges' Section of the Superior Council of the Judiciary (SJCSM) held that the applicant had breached the Code of Conduct for Judges and Prosecutors. The applicant appealed unsuccessfully up to the Court of Cassation.

The applicant lodged an application to the ECtHR claiming that the penalty imposed was preventing her professional advancement and violated her freedom of expression under Article 10.

ECtHR's reasoning

The Court found that there was no violation of Article 10. It was accepted that the interference with freedom of expression had a legal basis. However, the applicant challenged the foreseeability of the relevant provision of the Code of Conduct for Judges, as it did not define precisely either the concepts of "opinion expressed on the moral and professional integrity" or "colleague".

The Court observed that the impugned provision regulated the conduct of judges, a specific and restricted group with professional knowledge of interpreting the law and had been in force for several years. The applicant therefore could not claim to have been unaware of its content and, in case of doubts as to its scope, could have shown prudence by refraining from publishing the article.

The Court analysed the necessity of the restriction legitimately aimed at protecting the rights and reputation of others and maintaining the authority of the judiciary. It accepted that the article questioned whether a former prosecutor under the communist regime was fit for presiding over the Court of Cassation and focused on professional aspects of the latter's life, thus contributing to a larger public debate on the reformation of the judicial system. The subject of the article, a public servant holding an apical position in the judiciary, was exposed to more criticism and public scrutiny than ordinary persons. However, the Court stressed the peculiar prudence and restraint that judges must display in exercising their freedom of expression when the need to maintain the integrity of the judiciary and to ensure public confidence in the judiciary is at stake.

The Court found that the national authorities did not overstep their margin of appreciation as they conducted appropriately the balancing test between the competing rights. Indeed, the article contained specific allegations of unlawful or unethical conduct by the person concerned without any supporting evidence. Further, the penalty imposed was not excessive as it was not shown that it had prevented the applicant from participating in career opportunities and it was a matter of speculation whether it could do so in the future.

Note: This case indicates that the integrity of the judiciary is a prominent counter-interest in the exercise of freedom of expression (*Morice v. France* [GC], judgment of 23 April 2015, application no. 29369/10, §§ 124–31). However, it shows that this is so especially when the criticism is formulated by members of the judiciary themselves, who should use the utmost care in exercising their freedom of expression when calling into question this integrity (compare with *Baka v. Hungary* [GC], judgment of 23 June 2016, application no. 20261/12, §§ 158–67).

Schweizerische Radio– und Fernsehgesellschaft et publisuisse SA v. Switzerland, judgment of 22 December 2020, application no. 41723/14

Facts of the case

The first applicant, *Schweizerische Radio– und Fernsehgesellschaft* (SSR), a private-law association, is the national public-service TV and radio broadcaster licenced by the Swiss Confederation. The second (*publisuisse SA*) was an advertising sales company.

In 2011, *Verein gegen Tierfabriken*, an association for animal and consumer protection, booked advertising space through the second applicant, to broadcast on national television a short commercial promoting its website. The claim read: "What the other media do not mention". Shortly after,

the association requested to broadcast a second version of the commercial with the claim "What Swiss Television [i.e. the first applicant] does not mention". The second applicant refused this request, considering that it was contrary to its general terms and conditions, as it was prejudicial to the commercial interests and image of the first applicant.

In 2012, the association was unsuccessful in its complaint with the Independent Radio and Television Appeal Board (AIEP). Subsequently, it challenged the decision before the Federal Supreme Court, which found in its favour. The Federal Court held that SSR enjoyed less autonomy in advertising matters, a means to finance a public service, than it did in editorial contents and that it did not equate in this respect to a purely private broadcaster. Both applicants had thus assumed a "task of the State" ("*tâche de l'État*") which meant that they were bound to respect fundamental rights, under Article 35(2) of the Federal Constitution, which defines the personal scope of the obligation to uphold fundamental rights.. The Federal Law on Radio and Television Broadcasting did not mention the protection of commercial interest and reputation as a ground to deny the broadcasting, which constituted a restriction to the association's right to freedom of expression. SSR was therefore under an obligation to balance objectively the interests involved, also accepting a certain degree of criticism itself.

The applicants complained before the Court of the violation of their rights to freedom of expression under Article 10.

ECtHR's reasoning

In line with the case-law on the standing of public-service broadcasting companies (*Radio France and others v. France*, decision of 23 September 2003, application no. 53984/00), the Court confirmed that the first applicant falls within the definition of "non-governmental organisation" under Article 34 of the Convention (*Schweizerische Radio– und Fernsehgesellschaft SRG v. Switzerland*, judgment of 21 June 2012, application no. 34124/06).

The obligation to broadcast the second version of the commercial constituted an interference with the applicants' rights under Article 10, based on Article 35(2) of the Federal Constitution. The Court held that its applicability to advertising by the applicants was foreseeable, taking into account the inherent generality of constitutional provisions (*Rekvényi v. Hungary* [GC], judgment of 20 May 1999, application no. 25390/94), the special care that professionals are expected to display in assessing the risks and responsibilities of their activities (*Delfi AS v. Estonia* [GC], judgment of 16 June 2015, application no. 64569/09), and the case-law of the Federal Supreme Court. It distinguished the present case from precedents (*Animal Defenders International v. United Kingdom* [GC], judgment of 22 April 2013, application no. 48876/08), in that the Federal Law did not prevent in principle the broadcasting of the commercial, as the protection of the commercial interest and reputation of others was not listed among the statutory grounds for refusal.

The Court held that the obligation imposed on the applicants to run the commercial had not amounted to a disproportionate interference with their freedom of expression. The Court saw no compelling reason to depart from the domestic courts' assessment. It noted that the commercial was aimed at promoting the activity of the Association in the field of animal and consumer protection, rather than soliciting the public to purchase a particular product, and thus constituted an exercise of freedom of expression on matters of general interest. It reiterated that SSR, which holds a particular position in the Swiss media landscape, offered a platform to inform the public which was not comparable to that of other televisions. The first applicant was thus required to accept critical opinions and to provide an outlet for them on its broadcasting channels, even if this involved information or ideas that offended, shocked or disturbed. Also, the message of the commercial, while presented in a very provocative manner, was recognisable as the expression of an opinion of a third party. There had been no violation of Article 10.

Note: The Court's decision, in this case, is interesting as it contributes to the ongoing debates on the existence and limits of a right of access to specific media, on the role of freedom of expression in advertising, and on the line to be drawn between the responsibilities of purely private media operators and those performing some kind of public function. This is an issue that has attracted considerable attention concerning internet intermediaries and platforms (see, *mutatis mutandis*, *Delfi AS v. Estonia* [GC], judgment of 16 June 2015, application no. 64569/09, and *Magyar Tartalomszolgáltatók Egyesülete v. Hungary*, judgment of 2 February 2016, application no. 22947/13). The judgment underlines that in this field different solutions to balance the interests at stake can be acceptable under the Convention, as long as they are sufficiently backed by clear domestic regulation and careful judicial assessment, in keeping with the principle of subsidiarity.

Société Editrice de Mediapart and Others v. France, judgment of 14 January 2021, application nos 281/15 and 34445/15

Facts of the case

The case concerned an injunction against *Mediapart*, an online news website, its director and a journalist, to remove from the newspaper's website, and refrain from further publication, of excerpts from illegal recordings secretly made at the home of Ms Bettencourt, the then main shareholder of the *l'Oréal* group. The recordings had been filed as evidence in a criminal investigation over an alleged criminal activity to take financial advantage of her vulnerability by some individuals, including P.D.M., her wealth manager, and prominent politicians (eventually exonerated from responsibility). The ensuing criminal proceedings resulted in P.D.M. and another person being found guilty for the offence of undue influence.

The applicants complained before the Court that this constituted a violation of their freedom of expression under Article 10.

ECtHR's reasoning

The Court's analysis focused on the proportionality of the interference. The Court clarified that the applicants' acquittal in criminal proceedings did not imply that the interference complained of had been disproportionate. In reaching a different conclusion, the domestic civil courts did not base their conclusion solely on the circumstance that the conversations had been captured by clearly illegal means. They considered that the content published and the way it was presented unnecessarily exposed details of the private life of the persons concerned. The Court noted also that the dissemination on the internet, even though behind a paywall, made the information accessible to a large number of people for a considerable period.

As to the measure adopted, the Court recalled that in principle it is not admissible under Article 10 to prevent the disclosure of information that had already been made public or had ceased to be confidential (*Fressoz et Roire v. France* [GC], judgment of 21 January 1999, application no. 29183/95, § 53). However, in the present case, the removal order was necessary to redress the initial intrusion into Ms Bettencourt's private life and to put an end to the disturbance it was causing to a vulnerable woman. The publication of the recordings had been unlawful from the outset and, although they had been largely disseminated in the meantime, their reproduction remained prohibited for the press as a whole. The injunction was not shown to have had a deterrent effect on how the applicants, acquitted from the criminal charges, exercised and continued to exercise their rights to freedom of expression.

The Court concluded that the assessment carried out by domestic courts had been in keeping with the requirements of Article 10 and that there was consequently no violation of freedom of expression.

Note: The decision is important in that it provides an example of how the press must carry out their duties and responsibilities, even when it comes to reporting on serious matters of public interest, by carefully taking into account the right to privacy of vulnerable persons, especially when sensitive information and materials are disseminated through the internet (*Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, judgment of 5 May 2011, application no. 33014/05). However, it should be noted that the finding of non-violation, in this case, is inextricably linked to the circumstance that the interference did not take the form of a criminal sanction or civil liability, but was limited to the removal of the illegal content.

In-depth analysis of selected cases

Sabuncu and Others v. Turkey, *judgment of 10 November 2020, application no. 23199/17*

Facts of the case

The ten applicants were journalists with *Cumhuriyet* ("The Republic"), a leading national daily newspaper, or managers of the foundation which is the principal shareholder of the company that publishes it.

In the wake of the declaration of the state of emergency in July 2016, and after having spent few days in police custody, on 6 November 2016, the applicants were placed in pre-trial detention. The Istanbul 9th Magistrate's Court considered, *inter alia*, that there were strong suspicions that – through articles published in the newspaper *Cumhuriyet*, whose editorial policy they were deemed to control, and via social media – they were promoting and disseminating propaganda on behalf of organisations considered as terrorist organisations, notably the PKK/KCK (the Workers' Party of Kurdistan (an illegal armed organisation)/Kurdistan Communities Union) and an organisation referred to by the Turkish authorities as FETÖ/PDY (Fethullahist Terror Organisation/ Parallel State Structure). It also found that there was a risk of absconding and deterioration of the evidence and that alternative measures would be insufficient.

Several applications for release filed by the applicants and objections against the orders for their continued pre-trial detention were filed and rejected. Their detention was periodically extended.

In April 2017 the Istanbul public prosecutor's office filed a bill of indictment against the ten applicants with the Istanbul 27th Assize Court. The public prosecutor alleged primarily that, in the three years preceding the attempted *coup* of 15 July 2016, the editorial stance of *Cumhuriyet* had changed as a result of the applicants' influence, running counter to the editorial principles to which the newspaper had adhered for 90 years.

In July 2017, at the end of the first hearing, the Istanbul Assize Court found that the evidence was already gathered and the risk of absconding was no longer relevant for seven of the applicants and ordered their release. The release of the remaining three applicants was ordered between September 2017 and April 2018.

In April 2018, the Istanbul Assize Court acquitted one applicant (Mr Günay) of all charges and found the other nine guilty of assisting a terrorist organisation without being members of it, under Article 220 § 7 of the Criminal code. They were sentenced to terms of imprisonment ranging between three years and six months and seven years and six months. In February 2019 the Istanbul Court of Appeal dismissed the applicants' appeals. In September 2019, the Court of Cassation annulled the appeal judgment and sent the case back to the Court of Appeal. In November 2019, the Istanbul Court of Appeal acquitted one (Mr Gürsel) but departed from the Court of Cassation judgment and confirmed the conviction of the remaining eight. Proceedings on their further appeal are still pending before the plenary criminal divisions of the Court of Cassation.

In the meantime, in December 2016, the applicants had lodged individual applications with the Constitutional Court, alleging a breach of their right to liberty and security and their right to freedom of expression and freedom of the press. The Constitutional Court found a breach of those rights with respect of two applicants (Mr Günay and Mr Gürsel) and found no violation of the rights of the remaining eight applicants.

Before the Court, the applicants complain that their detention had been arbitrary and not based on any concrete evidence grounding a reasonable suspicion that they had committed a criminal offence (Article 5 § 1) and about the length of the proceedings before the Constitutional Court (Article 5 § 4). They further alleged a breach of their freedom of expression (Article 10), complaining that the charges for terrorism-related offences had been based on the editorial stance of a newspaper criticising certain government policies. Finally, they alleged that their detention had been designed to punish them for their criticism of the government and constituted an abuse of the restrictions on their right to liberty (Article 18 in conjunction with Article 5 § 1 and Article 10).

ECtHR's reasoning

The Court rejected several preliminary objections as to the admissibility of the complaints. However, it found that Mr Günay and Mr Gürsel, whose claims of violation of their rights to liberty and freedom of expression had been upheld by the Constitutional Court, had lost victim status in respect of those claims.

Article 5 § 1 (right to liberty – existence of reasonable grounds of the commission of a crime) – The Court recalled that, with a view of the seriousness of the alleged offences and the severity of the potential sentence, the facts needed to be examined by domestic authorities with great care. The facts grounding the suspicion of their commission should have been justified by verifiable and objective evidence and that they could have been reasonably considered as falling under one of the alleged crimes, as defined by the Criminal Code.

The Court observed that the published materials referred to by the judicial authorities in ordering and extending the applicants' pre-trial detention could be divided into four groups. They comprised: (1) articles criticising the political authorities' policies and the public conduct of their sympathisers; (2) articles, tweets and news items reporting statements made by persons allegedly representing illegal organisations; (3) critical views expressed by *Cumhuriyet* journalists about the administrative and judicial authorities' actions to combat the illegal organisations; and (4) sensitive information arousing public interest.

The Court considered that even assuming that all the newspaper articles cited by the national authorities to justify the applicants' initial and continued detention had been attributable to them, they did not disclose to an objective observer any fact capable of raising a reasonable suspicion of committing the offences of disseminating propaganda on behalf of terrorist organisations or assisting those organisations.

Upon a detailed examination of the applicants' alleged acts, the Court noted the following. They came within the scope of public debate on facts and events that were already known. They examined and reported the facts and opinions in accordance with journalistic duties. They did not constitute support or advocacy of the use of violence in the political sphere, nor indicated any wish on the applicants' part to contribute to the illegal objectives of terrorist organisations, namely to use violence and terror for political ends. The Court underlined how these facts were at first glance indistinguishable from the legitimate activities of political opposition, showing that they fell within the exercise of their freedom of expression and freedom of the press, as guaranteed by domestic law and by the Convention. Legitimate criticism of the authorities in the context of public debate, under freedom of expression and the press, was thus equated to assisting terrorist organisations and/or disseminating propaganda in favour of those organisations. In the Court's view, such an interpretation of the criminal law posed a considerable risk to the Convention system, resulting in any person expressing a view at odds

with the views advocated by the government and the official authorities being characterised as a terrorist or a person assisting terrorists. In a pluralist democracy, such a situation is incapable of satisfying an objective observer of the existence of a reasonable suspicion against journalists who are aligned with the political opposition but do not promote the use of violence.

Concerning the claim by the Turkish government that the measure was exceptionally justifiable with a view of the State of emergency, the Court noted that in this context many measures had been adopted that which placed significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention. However, none of them applied to the situation of the applicants. Therefore, the measures complained of could not be said to have complied with the conditions laid down by Article 15 of the Convention.

The Court, therefore, found a violation of Article 5 § 1 owing to the lack of reasonable suspicion that the eight applicants concerned had committed a criminal offence. It considered then unnecessary to examine separately the remainder of the applicants' claims under Article 5 §§ 1 (c) and 3.

Article 5 § 4 (right to liberty – speedy review of the legality of detention) – The Court reiterated that the requirement of a speedy review of detention applied to proceedings before the Constitutional Court. It noted that the periods to be taken into consideration ranged between seven months and sixteen months and that these periods had all fallen within the period of the state of emergency. Although the relevant periods could not be described as "speedy" in an ordinary context and referring to previous cases regarding detention during the state of emergency (*Akgün v. Turkey*, decision of 2 April 2019, application no. 19699/18, *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, application no. 13237/17, and *Şahin Alpay v. Turkey*, judgment of 20 March 2018, application no. 16538/17), the complexity of the applications and the Constitutional Court's caseload following the declaration of a state of emergency had to be taken into account. The Court concluded that this was an exceptional situation and that, in the specific circumstances of the cases, there had been no violation of Article 5 § 4.

Article 10 (freedom of expression) – The Court reiterated that criminal prosecution and pre-trial detention of journalists which is directly linked to their work interfere with Article 10 even when the person concerned is eventually acquitted. Indeed, they placed on them an actual and effective constraint on carrying out their journalistic work. It held in this respect that an unlawful detention measure that constitutes also interference with one of the freedoms guaranteed by the Convention cannot be regarded in principle as a restriction of that freedom prescribed by national law. With a view of the findings under Article 5 § 1, the Court held that there was a violation of Article 10 as well.

Article 18, in conjunction with Articles 5 § 1 and 10 (abuse of the restrictions on personal liberty and freedom of expression) – The applicants essentially complained that the real motive behind their pre-trial detention was to silence the newspaper's criticism of the government and its sympathisers. The Court took note that third-party interveners, including the Commissioner for Human Rights, indicated that after the 2016 *coup* there had been many instances in which opposition journalists were charged with unsubstantiated charges of terrorism and detained pending trial. However, the Court observed that "the political process and adjudicative process are fundamentally different" and that it must base its decision on "evidence in the legal sense". It reiterated that the existence of an "ulterior purpose" entailing the breach of Article 18 is not automatically shown by the finding that the applicants had been unlawfully detained in breach of their freedom of expression. The Court examined the circumstances of the case and noted that the Constitutional Court had thoroughly scrutinised the applicants' case and rendered an articulated decision accompanied by dissenting opinions. It concluded that the existence of an ulterior purpose had not been established beyond reasonable doubt. Accordingly, there had been no violation of Article 18.

General comments

The judgment decides a key case in the field of freedom and safety of journalists. It advances the Court's jurisprudence with regards to the protection against arbitrary detention of journalists in two respects.

Firstly, it articulates the principles relating to the existence of a "reasonable suspicion that a criminal offence has been committed" by a person held in pre-trial detention, an essential part of the safeguard laid down in Article 5 § 1 (c). This is, according to the judgment, something more than good faith. Compared to the standard approach to the issue (compare to *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 3 August 1990, application nos. 12244/86 12245/86 12383/86), the judgment contributes to developing and consolidating a two-fold test: (1) an objective observer must be satisfied with the existence of facts or information given as the basis for detention (factual aspect), and (2) those facts can be reasonably considered as falling under the legal description of the offence (legal characterisation). The main contribution of the judgment is to clearly establish the principle according to which "a suspicion cannot be regarded as reasonable if it is based on an approach consisting in 'classifying as criminal conduct' the exercise of the rights and freedoms recognised by the Convention" (see also *Ragıp Zarakolu v. Turkey*, judgment of 15 September 2020, application no. 15064/12, *Şık v. Turkey (no. 2)*, judgment of 24 November 2020, application no. 36493/17). Moreover, when the alleged offence is a serious one and the criminal proceedings impinge on the freedom of expression, the judgment calls for a very strict judicial scrutiny, both before national courts and by the Court itself.

A further contribution of the judgment to the development of principles in this area is the clear-cut assertion that an unlawful detention measure that interferes with freedom of expression "cannot be regarded in principle as a restriction of that freedom prescribed by national law". Coupled with the strict scrutiny required to justify the restriction of liberty of journalist for charges directly linked to their work, this set a very high standard of protection.

The finding of the Court that there was no abuse of the restrictions on personal liberty is also important in the ongoing jurisprudential debate on the scope of Article 18. In his dissenting opinion, Judge Kūris argued that the Court has applied a very exacting standard of "incontrovertible and direct proof" of the existence of an ulterior purpose for the restriction, borrowed from older case-law (*Khodorkovskiy v. Russia*, no. 5829/04, § 259, 31 May 2011). He claimed that a different approach developed in case-law and already validated by the Grand Chamber (*Merabishvili v. Georgia* [GC], judgment of 8 November 2017, application no. 72508/13) should have been followed. In his view, the Court should have conducted an autonomous evaluation, based also on contextual elements and using a wider range of available sources of information. The Grand Chamber has tackled the issue in the judgment on the *Selahattin Demirtaş v. Turkey (no. 2)* case, reported below.

Selahattin Demirtaş v. Turkey (no. 2) *[GC], judgment of 22 December 2020, application no. 14305/17*

Facts of the case

The applicant was an elected member of the Turkish National Assembly a former candidate for the Republic's presidency, and one of the co-chairs of the Peoples' Democratic Party (HDP) the first pro-Kurdish political party to gain parliamentary representation.

On 20 May 2016, an amendment to the Turkish Constitution was adopted. It lifted parliamentarians' inviolability (i.e. exemption from being arrested, questioned, detained or tried) under Article 83, para. 2, of the Constitution, in all cases where requests to this effect had been transmit-

ted to the National Assembly prior to the date of adoption of the amendment. The amendment left untouched parliamentary non-liability (i.e. liability for opinions expressed in the course of, or in connection with, parliamentary activities). This reform originated in October 2014 after clashes in Kobani, Syria, between Daesh and the forces of an organisation with links to the PKK, which are considered to be a terrorist organisation by Turkey. Following the measures taken by the Government to prevent Kurdish supporters to join the anti-Daesh forces in Syria, demonstrations soon became violent. In 2015 there was a resurgence of terrorist attacks, political violence, and armed clashes between the government forces and the Kurdish factions. This ended the process to resolve the "Kurdish question" that had been in place since 2011.

The applicant, whose party had initially made calls to demonstrate against the Government via its Twitter account, was active in his speeches and statements on these events. He called for the end of political violence but also supported and praised Kurdish "resistance" and the claims for autonomy of the Kurds. In a statement to the press of 16 January 2016, the President of Turkey explicitly referred to the applicant's statements as "crimes against the Constitution" and called for accountability, in a "process that will start with the lifting of [parliamentary] immunity".

In November 2016, the applicant was placed in pre-trial detention by the Diyarbakır 2nd Magistrate's Court, in the context of a criminal investigation conducted by the Diyarbakır public prosecutor, on suspicion of his membership of an armed terrorist organisation and inciting others to commit a criminal offence. The prosecution's case merged thirty-one criminal investigations concerning the applicant into a single one. Mr Demirtaş was thus one of 154 parliamentarians (including 55 HDP members) affected by the constitutional amendment. Eventually, 14 members from the HDP, including the applicant, and 1 member from another opposition party, were subjected to criminal investigations and were placed in pre-trial detention.

Subsequently, the Istanbul public prosecutor's office opened an investigation against the applicant for disseminating propaganda in favour of a terrorist organisation. Sent to trial before the Istanbul Assize Court, in September 2018 he was convicted as charged. On 7 December 2018, he started serving the prison sentence imposed on him. In September 2019, he was released following the termination of the pre-trial detention in the first set of proceedings and the suspension of the sentence given in 2018. Shortly after, he was placed again in pre-trial detention by the Ankara Magistrate's Court, upon application by the Ankara public prosecutor's office in a separate investigation alleging different charges for the same events.

Mr Demirtaş repeatedly challenged before the competent courts the legality of his initial and continued detention in the Diyarbakır proceedings. Throughout these proceedings, the applicant consistently maintained that his detention on remand was unlawful since all the charges against him related to political speeches and opinions covered by parliamentarian non-liability. He asserted that there were not sufficient grounds for his pre-trial detention and that the aim of depriving him of his liberty was to silence members of the political opposition. He also denied having committed any criminal offence and argued that he had been detained for expressing critical views about the policies pursued by the President of Turkey.

The applicant filed several applications before the Turkish Constitutional Court, challenging the lawfulness of his pre-trial detention and claiming the violation of his rights of freedom of expression and to be elected. The Constitutional Court dismissed his first application in 2017, upholding *inter alia* the constitutional amendment. In 2020, the Constitutional Court upheld the legality of the applicant's initial detention but declared that the applicant's right to liberty had been violated on account of the ineffective judicial oversight over the legality of his continued detention. All other complaints were rejected.

In a further application before the Constitutional Court, the applicant challenged the legality of

his further pre-trial detention. The proceedings are still pending. Consequently, the applicant remains in prison.

Before the Court, the applicant complained of the violation of his rights to liberty (Article 5, §§ 1, 3 and 4), to freedom of expression (Article 10), to be elected and sit in Parliament (Article 3 of Protocol no. 1), as well as of the abuse of the power to resort to restrictions on human rights allowed by the Convention (Article 18, in conjunction with Article 5 § 1)

In 2018, a Chamber of the Court held that there had been a violation of Articles 5 § 3, 18 (in conjunction with Article 5 § 3) and Article 3 of Protocol No. 1. It found that there had been no violation of Article 5 §§ 1 and 4 and did not consider it necessary to examine the case under Article 10. The case was referred to the Grand Chamber at the request of both parties.

ECtHR's reasoning

The Grand Chamber rejected several preliminary objections to the admissibility of the complaints. On the merits, contrary to the Chamber's approach, it gave freedom of expression a central role in its reasoning, by starting the analysis from the angle of Article 10. It found that the lifting of the applicant's immunity and his detention and prosecution were based on an unforeseeable legal basis, in breach of Article 10. The reasoning and findings on this point were relevant, if not decisive, in the Court's additional findings of the violation of other rights, in particular of Article 5 § 1 of the Convention and Article 3 of Protocol no. 1. The Court ordered, under Article 46, the immediate release of the applicant.

Article 10 (freedom of expression) – The Court carefully analysed the parliamentary proceedings on the constitutional amendment and the reasons given by domestic courts for the applicant's initial pre-trial detention and the indictment of 2017. It noted that the first was clearly aimed at depriving of immunity an identifiable group of opposition members of parliament for their speeches and the second relied exclusively on statements and opinion expressed by the applicant. The lifting of the applicant's parliamentary immunity and his pre-trial detention and prosecution thus constituted interferences in his rights to freedom of expression.

The legal provisions forming the basis for the interference were: (1) the constitutional amendment, and (2) the provisions of the Criminal code relating to terrorism-related charges. As per their quality, the question was whether their interpretation and application had been foreseeable by the applicant when he gave the speeches. The Court examined them in turn.

(1) The Court noted that the amendment affected only inviolability, not non-liability which is specifically aimed at protecting freedom of expression of members of parliament. Therefore, even after the amendment, the members of parliament continued to enjoy legal protection for political speeches in the National Assembly and their repetition or dissemination outside the Assembly. Only the Assembly could have decided otherwise, following the applicable constitutional procedure, providing for procedural guarantees. It had therefore been the task of the domestic courts to determine first and foremost whether the applicant's political speeches had been covered by parliamentary non-liability. The applicant had relied on this argument since the initial pre-trial detention. However, the Court was struck by the lack of analysis of the applicant's argument on this point by the domestic courts at all levels, including by the Constitutional Court. Even assuming that the impugned speeches had not been covered by non-liability, the constitutional amendment raised an issue of foreseeability in itself, as it stripped the members of parliament of the procedural safeguards provided for by the Constitution against the lifting of immunity. These included an individual assessment and decision by the Assembly of the situation of each of the members of parliament concerned and the right to appeal to the Constitutional Court. Moreover, the Court fully subscribed to the Venice Commission's clear finding that this one-off unprecedented *ad homines* amendment had been aimed expressly at specific statements by

members of parliament, particularly those of the opposition, and thus had been a "misuse of the constitutional amendment procedure"(Venice Commission, *Turkey – Opinion on the suspension of the second paragraph of Article 83 of the Constitution*, opinion no. 858/2016 of 14 October 2016). In this context, members of parliament could not reasonably have expected that the amendment would be introduced during their term of office. The interference had not been foreseeable.

(2) The Court reiterated that the applicant's speeches were the only factual basis for the applicant's pre-trial detention for terrorism-related charges. It observed that domestic courts' decisions lacked clarity and precision as to which offence(s) formed the basis for the applicant's detention. However, it considered that the offence of forming or leading an armed terrorist organisation and membership of such an organisation (Article 314 of the Turkish Criminal Code) played a prominent role. In the present case, the national courts adopted a broad interpretation of the offences and failed to carry out the analysis of the elements of the crime developed by the Court of Cassation. The political statements made by the applicant had been held sufficient to constitute acts capable of establishing an active link between the applicant and an armed organisation, without proper contextual analysis. This took place in a general context in which, as pointed out by the Commissioner for Human Rights, it was increasingly common for the evidence used to justify detention to be solely limited to statements and acts that were manifestly non-violent and should in principle be protected by Article 10. Furthermore, the Venice Commission stated that in applying Article 314 of the Criminal Code, the domestic courts often tended to decide on a person's membership of an armed organisation based on very weak evidence (Venice Commission, *Opinion on Articles 216, 299, 301 and 314 of the Turkish Criminal Code*, opinion no. 831/2015 of 16 March 2016). The range of acts that might have justified the applicant's pre-trial detention in connection with the serious offences in question was too broad to afford adequate protection against arbitrary interference by the national authorities. In particular, such an interpretation could not be justified where it entailed equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence links to a terrorist organisation. Therefore, the impugned provisions lacked the required quality of foreseeability.

Article 5 § 1 (right to liberty – existence of reasonable grounds of the commission of a crime) – On the question of whether there was a reasonable suspicion of the commission of the crimes – a requirement of pre-trial detention under Article 5 § 1(c) – the Grand Chamber conducted a very careful evaluation of the charges brought against the applicant and the supporting evidence and eventually disagreed with the non-violation finding of the Chamber. The Court found that the impugned political speeches by the applicant, for their content and context, even when expressing harsh criticism and shocking opinions, could not be viewed by an objective observer as inflammatory acts inciting or condoning violence. It had to be taken into account in this respect that they were linked to the exercise of the applicant's rights to freedom of expression as a member of the parliament. The Court concluded that the decisions on the applicant's pre-trial detention did not contain evidence that could indicate a clear link between his actions and the offences for which he was detained. Article 5 § 1 had therefore been violated.

Article 3 of Protocol no. 1 (right to free and fair elections) – The right to free elections includes the right of elected members to sit in Parliament. The Court stressed the interdependence between Article 10 and Article 3 of Protocol No. 1 and its particular relevance when democratically elected representatives were kept in pre-trial detention for expressing their political opinions. The Court considered whenever a member of parliament is detained in breach of Article 10 that for lack of reasonable suspicion there is a consequent violation of Article 3 of Protocol No. 1. This includes cases, like the one before the Court, in which domestic courts have altogether failed to take into

account that the offences in question had been directly linked to the victim's political activities.

Article 18, in conjunction with Article 5 § 1 (abuse of the restrictions on personal liberty – Although the Court was procedurally barred from examining the claim of abuse of restriction in conjunction with Article 10, its reasoning and findings on the point are relevant for freedom of expression. The Court examined whether the applicant's pre-trial detention had indeed pursued an ulterior purpose than the repression of crime. The Court analysed multiple factors, including: (1) the context and effects of the constitutional amendment; (2) the existence of a pattern of detaining and prosecuting opposition members for their opinions; (3) the timing and effect of the applicant's initial, continuing and subsequent pre-trial detention, in particular during two crucial campaigns (a referendum on significant constitutional reform and a presidential election); (4) the findings of other Council of Europe bodies on the independence of the judicial system especially during the state of emergency. It concluded that the concordant inferences drawn from this background supported the conclusion that the purposes put forward by the authorities for the applicant's pre-trial detention had been, since the beginning, and continued to be, merely cover for an ulterior political purpose, which is a matter of indisputable gravity for democracy.

General comments

The judgment in the *Demirtaş* case is probably the most significant given by the Court in 2020 and sets standards that are bound to become a point of reference in protecting political speech, and freedom of expression at large, against malicious prosecution and targeted detention under the cover of the fight against terrorism and political violence. It does so by an innovative approach (compare with *Sabuncu and Others v. Turkey*, judgment of 10 November 2020, application no. 23199/17, commented above, and *Şahin Alpay v. Turkey*, judgment of 20 March 2018, application no. 16538/17), which gives freedom of speech and the principle of legality of restrictions a central and prominent role in preserving the rule of law, when democratic institutions are threatened by authoritarian and populist pulls from the inside, through the abuse of the majoritarian rule.

This result is achieved through a noticeable interpretative approach. The Court shades away from considerations of judicial economy in its reasoning and fully develops a coherent interpretation of different conventional rights, in light of the overarching concept of the rule of law. In doing so, the Court significantly relies on the work of other Council of Europe bodies, the Venice Commission and the Commissioner for Human Rights in particular.

The Court has developed over time a body of principles based on the idea that freedom of speech is particularly important for opposition members of parliament, calling for the closest scrutiny by the Court (*Castells v. Spain*, judgment of 23 April 1992, application no. 11798/85; *Karácsony and Others v. Hungary* [GC], judgment of 17 May 2016, application nos. 42461/13 and 44357/13). In this framework, the judgment develops in particular the concept of foreseeability of the law, in two respects. First, it sets limits to the lifting of parliamentary immunity by way of a constitutional amendment procedure that targets opposition groups by depriving them of the safeguards ordinarily surrounding the lifting of the privilege. Secondly, it requires careful drafting of criminal law provisions and strict interpretation by domestic courts in the context of the fight against terrorism and political violence, so to avoid that the exercise of freedom of expression can be equated to participating in a terrorist organisation, in the absence of any concrete evidence of such a link. By placing its analysis at the level of the legality, rather than the proportionality, of the interference, the judgment sends a strong warning that in a democratic society, the law must have the primary function of protecting from arbitrary use of power and cannot become one of its tools.

The finding that pre-trial detention was based on provisions lacking the quality of "law" in the

conventional sense reverberates directly on the analysis under the rights to personal liberty and free election in a way that clarifies and expands the protection afforded. Although in the reverse order, the judgment strengthens the interconnection between articles 5 and 10 already expounded in *Subuncu* and other recent cases (*Ragıp Zarakolu v. Turkey*, judgment of 15 September 2020, application no. 15064/12, *Şık v. Turkey (no. 2)*, judgment of 24 November 2020, application no. 36493/17, *Atilla Taş v. Turkey*, judgment of 19 January 2021, application no. 72/17). The judgment reinforces the principle according to which the exercise of freedom of expression cannot in itself generate a "reasonable suspicion" of having committed a crime, given that the Court engages in very strict scrutiny of the justification given domestically (*Fox, Campbell and Hartley v. the United Kingdom*, judgment of 3 August 1990, application nos. 12244/86 12245/86 12383/86). Similarly, the judgment, in expanding the scope of the right to free election to cover include a "right to sit" for elected members of parliament, states that, as a matter of principle, where the detention of a member of parliament cannot be deemed compatible with the requirements of Article 10 of the Convention, it will also breach Article 3 of Protocol No. 1.

Lastly, the finding of a violation of Article 18 is of particular importance. Firstly, it underlines the political dimension of the case and the existence in Turkey of a problem in respecting liberty and security and freedom of expression. Secondly, it responds to criticism after the finding of no violation in *Sabuncu* and it departs significantly from the approach in the latter case. It restates in full the principles articulated in *Merabishvili v. Georgia* ([GC], judgment of 8 November 2017, application no. 72508/13). In particular, the judgment recalls that there is no reason for the Court to restrict itself to "direct proof" in relation to complaints under Article 18 or to apply a special standard of proof to such allegations. In applying these principles, it carries out a detailed and large analysis of the situation in Turkey at the material time, relying also on information provided by third interveners. Finally, the finding of a violation of Article 18, means that the initial, continuing and successive detention of Mr Demirtaş were aimed at silencing him as the opposition leader and preventing him from exercising his political rights under the Convention. This, says the judgment, leaves the Court with no choice but to order the only possible remedy to the situation: the immediate release of Mr Demirtaş.

Freedom of Expression and Freedom of the Media in South-East Europe (JUFREX)

The action is embedded in the "Horizontal Facility for the Western Balkans and Turkey 2019–2022" and it builds upon the results achieved during a previous regional European Union and Council of Europe Joint programme "Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)". The regional action is strongly interconnected with the six Beneficiary-specific JUFREX actions in: Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia and Serbia.

JUFREX activities are implemented with the aim to:

- promote freedom of expression and freedom of the media in line with European standards;
- improve the application of those standards by engaging a range of actors responsible to apply such standards in their daily work, namely: judges, prosecutors, lawyers, police officers, representatives of media regulatory authorities, media actors and students;
- consolidate a platform for regional cooperation, discussion and exchange of good practices.

Where an enabling environment for freedom of expression and freedom of the media exists and the right to seek, impart and receive information is well protected, citizens can genuinely participate in the democratic processes. National training institutions for legal professionals (Judicial Academies and Bar Associations) play a vital role to make this become a reality.

All JUFREX activities are based on innovative and modern learning tools on freedom of expression and freedom of the media and adopt a dynamic methodology for adult learning and a peer-to-peer model.

The "Horizontal Facility for the Western Balkans and Turkey 2019-2022" is a joint initiative of the European Union and the Council of Europe that enables the Beneficiaries to meet their reform agendas in the fields of human rights, rule of law and democracy and to comply with the European standards, including where relevant within the framework of the EU enlargement process.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

www.coe.int

The Member states of the European Union have decided to link together their know-how, resources and destinies. Together, they have built a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms. The European Union is committed to sharing its achievements and its values with countries and peoples beyond its borders.

www.europa.eu

Funded
by the European Union
and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Implemented
by the Council of Europe