



**CLOONEY
FOUNDATION
FOR JUSTICE**

Turkey v. Veysel Ok

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Rights and Counter-terrorism*

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHOR:

Martin Scheinin is a professor of international law and human rights at the European University Institute. He formerly served as a member of the United Nations Human Rights Committee, responsible for evaluating state compliance with the International Covenant on Civil and Political Rights, and as the United Nations Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms While Countering Terrorism. Professor Scheinin also headed the International Association of Constitutional Law from 2010-2014 and chaired the International Law Association's Committee on Human Rights Law and Practice from 1997-2008. Professor Scheinin thanks the TrialWatch initiative for helping to draft the report, which facilitated his legal conclusions and grading of the trial.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice** focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, religious minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



Professor Martin Scheinin, former United Nations Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms While Countering Terrorism and member of the TrialWatch Experts Panel, assigned this trial a grade of D:

This trial did not meet the basic international requirements for a fair trial, which may have affected the outcome of the case. The defense was not countered by the prosecutor but the judge effectively assumed the role of the prosecution and proceeded to dismiss the arguments of the defense, thereby breaching, or at least giving rise to a well-founded impression of breaching, the requirement of judicial impartiality and as a consequence also negatively impacting the presumption of innocence. With respect to freedom of expression, an essential right in a democratic society, the requirement of judicial impartiality is particularly strict. Convicting a professional lawyer in an unfair trial for his public criticism of problems in the judicial system constituted a violation of the right to freedom of expression. This report need not and does not take a position on whether a conviction through a trial that met all requirements of the right to a fair trial would have constituted a human rights violation in respect of freedom of expression.

The Clooney Foundation for Justice (CFJ) monitored the trial of Turkish free speech lawyer Veysel Ok, which concluded on September 12, 2019. Mr. Ok was charged with insulting the judiciary for giving a newspaper interview in which he commented on the erosion of judicial independence in Turkey. While Mr. Ok ultimately received a suspended sentence, the proceedings against him entailed several fair trial violations and constituted a violation of his right to freedom of expression.

In particular, the trial raised concerns about judicial impartiality. The prosecution did not make any arguments or evidentiary presentation during the proceedings to counter the defense's case, which consisted of both oral arguments and written materials. In the face of the prosecution's functional abstention from the case, the judge convicted Mr. Ok, conducting her own legal analysis of the harmful impact of Mr. Ok's speech and - in essence - replacing the prosecutor. Precedent from the UN Human Rights Committee and European Court of Human Rights indicates that this shift in roles breaches both the guarantee of an impartial tribunal and the presumption of innocence.

As noted above, Mr. Ok was tried and convicted for voicing concerns about the judiciary. The authorities' decision to prosecute him on this basis is troubling given that speech about the functioning of the judicial system generally merits heightened

protection. Furthermore, as a lawyer, Mr. Ok was well-placed to assess the state of the judiciary.

More broadly, Mr. Ok's prosecution is likely to have a chilling effect on freedom of expression. His trial and conviction fit within a larger pattern of state suppression of freedom of expression, as also documented in the TrialWatch Fairness [Report on the trial of journalist Cansu Piskin](#). Article 301, the provision under which Mr. Ok was prosecuted, has been roundly condemned by international and regional institutions yet continues to be deployed against independent voices. Such attacks send the message to Turkish society that any expression of dissent can - and often will - be criminalized.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

The trial of free speech attorney Veysel Ok is representative of a larger pattern of state criminalization of dissent. Since the 2016 attempted coup and the government's subsequent consolidation of power, the Turkish government has increasingly relied on the courts to silence critics. In its 2017 Country Human Rights Practices Report, for example, the U.S. State Department noted that the most significant human rights violations in Turkey included "severe restriction of freedoms of expression and media, including imprisonment of scores of journalists, closing media outlets, and criminalization of criticism of government policies or officials."¹

According to free-speech organization Article 19, at least 132 journalist and media workers were behind bars as of September 2019.² Notably, Turkey attained the dubious distinction of being the number one jailer of journalists in the world three years in a row (2016-2018).³ A parallel crackdown has occurred against lawyers such as Mr. Ok. A recent Human Rights Watch report found that hundreds of defense attorneys have been jailed in Turkey, in what Human Rights Watch has called a "major assault on the right to a fair trial and on the role of lawyers in the administration of justice."⁴ Further, the Arrested Lawyers Initiative has documented the prosecution of more than 1,500 lawyers in Turkey from 2016-2018.⁵

Article 301, the law under which Mr. Ok was tried, has undermined freedom of expression in Turkey since it came into effect in 2005.⁶ The provision, which makes it a crime to "publicly degrad[e] the Turkish nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State," has been the basis for prosecutions of writers, journalists,

¹ US State Department, "Country Human Rights Practices Report: Turkey", 2018, pg. 2. Available at <https://www.justice.gov/eoir/page/file/1056796/download>.

² Article 19, "HRC42: States Must Urge Turkey to Restore Rule of Law", September 18, 2019. Available at <https://www.article19.org/resources/hrc42-states-must-urge-turkey-to-restore-rule-of-law/>.

³ Freedom House, "Freedom in the World 2019: Turkey", 2019. Available at <https://freedomhouse.org/report/freedom-world/2019/turkey>; Committee to Protect Journalists, "Turkey". Available at <https://cpj.org/europe/turkey/>.

⁴ Human Rights Watch, "Turkey: Mass Prosecution of Lawyers", April 10, 2019. Available at <https://www.hrw.org/news/2019/04/10/turkey-mass-prosecution-lawyers>.

⁵ The Arrested Lawyers Initiative, "Incarceration of Turkish Lawyers: Unjust Arrests & Convictions (2016-2018)", November 2018. Available at https://arrestedlawyers.files.wordpress.com/2018/11/unjust_arrests_and_convictions.pdf.

⁶ See Human Rights Watch, "Turkey: Government Amendments Will Not Protect Free Speech", April 16, 2008. Available at <https://www.hrw.org/news/2008/04/16/turkey-government-amendments-will-not-protect-free-speech>.

lawyers, politicians, and others for their expression of views critical of the government.⁷ According to estimates provided by the Turkish Ministry of Justice, 1,533 individuals were tried under Article 301 in 2006 and 1,189 individuals were tried in the first quarter of 2007 alone.⁸ In 2008, Article 301 was amended to require the Ministry of Justice to approve its use on a case by case basis.⁹ While this reform reduced the number of prosecutions brought under the provision, Article 301 continues to have a chilling effect.¹⁰

The Venice Commission, for example, has noted that the terms “degrades” and “Turkish nation” are ambiguous, creating unpredictability regarding conduct that might be susceptible of prosecution and endangering freedom of expression: in the Commission’s words, Article 301 “may lead individuals, and especially the media, to appl[y] self-censorship, which may have a very serious impact on the free flow and exchange of information and opinions.”¹¹ The Commission has thus recommended that Article 301 be redrafted to ensure that only statements liable to incite violence are criminalized, urging Turkey to display restraint so as to preserve freedom of expression and public debate.¹² The European Court of Human Rights has likewise raised concerns about the detrimental effects of Article 301, deeming the vagueness of the provision incompatible with the European Convention and a “threat to the exercise of the right to freedom of expression.”¹³

With respect to the courtroom, international organizations and institutions have questioned the independence of the Turkish judiciary. Although Article 138 of Turkey’s Constitution provides for an independent judiciary,¹⁴ the Council of Europe Commissioner for Human Rights has stated that “the independence of the [] judiciary has been seriously eroded.”¹⁵ Notably, the 2017 State Department report on Turkey’s human rights practices named “executive interference with independence of the

⁷ *Id.*; Venice Commission, “Opinion on Articles 216, 299, 301, and 314 of the Penal Code of Turkey”, March 15, 2016, pg. 4. Available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)002-e).

⁸ Human Rights Watch, “Turkey: Government Amendments Will Not Protect Free Speech”, April 16, 2008.

⁹ Freedom House, “Turkey”, 2014. Available at <https://freedomhouse.org/report/freedom-press/2014/turkey>; Venice Commission, “Opinion on Articles 216, 299, 301, and 314 of the Penal Code of Turkey”, March 15, 2016, pgs. 20-21.

¹⁰ Freedom House, “Turkey”, 2014; Venice Commission, “Opinion on Articles 216, 299, 301, and 314 of the Penal Code of Turkey”, March 15, 2016, pgs. 20-24.

¹¹ Venice Commission, “Opinion on Articles 216, 299, 301, and 314 of the Penal Code of Turkey”, March 15, 2016, pg. 22.

¹² *Id.* at pg. 24.

¹³ See European Court of Human Rights, *Altug Taner Akcam v. Turkey*, App. No. 27520/07, October 25, 2011, paras. 92-95; European Court of Human Rights, *Dink v. Turkey*, App. Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, September 14, 2010, paras. 116, 133; European Court of Human Rights, *Dilipak v. Turkey*, App. No. 29680/05, September 15, 2015.

¹⁴ The Constitution of the Republic of Turkey, Chapter Three: Judicial Power, Article 138. Available at http://www.hri.org/docs/turkey/part_iii_3.html.

¹⁵ Council of Europe, “Country Visit: Turkey”, July 8, 2019. Available at <https://www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders>.

judiciary, affecting the right to a fair trial and due process” as a major concern.¹⁶ After the attempted coup in 2016, 4,000 judges and prosecutors were removed.¹⁷ Amendments passed in 2017 gave the President of Turkey the power to appoint half of the country’s senior judges.¹⁸ As noted by the International Commission of Jurists, the past few years have seen an influx of loyalist judges, with thousands being selected for the bench.¹⁹

During Turkey’s two-year long state of emergency, due process rights eroded.²⁰ Turkey’s expansive terrorism legislation has made the arrest and imprisonment of journalists and lawyers easier than ever before,²¹ with courts reportedly relying on “the weakest of circumstantial evidence, secret testimony, or an ever-expanding web of guilt by association.”²² Meanwhile, lengthy and arbitrary pretrial detention is commonplace.²³

As described above, the use of laws like Article 301 to suppress free speech has become a routine occurrence. As such, the trial of Mr. Ok falls in line with a broader pattern of state action.

B. CASE HISTORY

Veysel Ok is a free speech lawyer and co-founder of the Media and Law Studies Association (MLSA).²⁴ MLSA coordinates pro bono legal support in press freedom cases and monitors trials against journalists in Turkey. Mr. Ok has represented well-known novelists, journalists, and other members of the media who have faced charges in connection with the crackdown in Turkey.²⁵

The case against Mr. Ok stemmed from a newspaper interview he gave in late 2015, in which he expressed concern that increased political pressure on the courts had resulted

¹⁶ US State Department, “Country Human Rights Practices Report: Turkey”, 2018, pgs. 1-2.

¹⁷ *Id.* at pgs. 14-15.

¹⁸ *Id.* at pg. 14.

¹⁹ See International Commission of Jurists, “Justice Suspended: Access to Justice and the State of Emergency in Turkey”, December 2018, pg. 18. Available at <https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>.

²⁰ See CNN, “Turkey lifts state of emergency, two year after coup almost toppled Erdogan”, July 18, 2018 (quoting Amnesty International to the effect that “[o]ver the last two years, Turkey has been radically transformed with emergency measures used to consolidate draconian powers, silence critical voices and strip away basic rights”). Available at <https://www.cnn.com/2018/07/18/europe/turkey-state-of-emergency-intl/index.html>.

²¹ See Human Rights Watch, “Turkey: Journalists Convicted For Doing Their Jobs”, April 27, 2018. Available at hrw.org/news/2018/04/27/turkey-journalists-convicted-doing-their-jobs.

²² Freedom House, “Freedom in the World 2019: Turkey”, 2019.

²³ See Freedom House, “Freedom in the World 2019: Turkey”, 2019; Council of Europe, “Country Visit: Turkey”, July 8, 2019; Lawyers Right Watch Canada, “Arrest and Detention of Lawyers in Turkey – Right to Pre-Trial Release”, July 2012. Available at https://www.lrwc.org/ws/wp-content/uploads/2016/06/Arbitrary-Arrest-Detention-of-Lawyers-in-Turkey.LRWC_.FIDH_.July_.2012.pdf.

²⁴ Media and Law Studies Association (MLSA), “About”. Available at <https://www.mlsaturkey.com/en/about/>.

²⁵ Lawyers for Lawyers, “Veysel Ok”. Available at <https://lawyersforlawyers.org/en/lawyers/veysel-ok-2/>.

in defendants being denied fair trials.²⁶ Among other things, Mr. Ok stated: “in the past there were judges with different perspectives/views; there was a high likelihood of encountering Judges who prioritized freedoms; but now the judiciary is in one single color.”²⁷ He also implied that some Turkish judges were receiving and following instructions from the Executive.²⁸ On December 29, 2015, soon after the interview, the Office of the President of Turkey filed a complaint with the public prosecutor.²⁹ In August 2016, the prosecutor’s office submitted its indictment, charging Mr. Ok under Article 301 for allegedly “publicly insulting the judicial bodies of the state.”³⁰

The court did not accept the indictment until September 2017, by which time Mr. Ok had begun defending several journalists arrested after the 2016 coup attempt.³¹ Mr. Ok subsequently appeared in court for hearings numerous times, with the trial delayed because of - among other things - changes in the presiding judge and requests to intervene by the Office of the President of Turkey.³² The case shuffled between the 37th Criminal Court of First Instance and the Second Criminal Court of First Instance.³³ On November 22, 2018, Mr. Ok made his tenth appearance before a trial court: this time, the 37th Criminal Court of First Instance.³⁴ The court ruled that the case fell outside its jurisdiction and referred it to the Second Criminal Court of First Instance for trial.³⁵

On March 21, 2019, the Second Criminal Court of First Instance held a hearing on the merits of Mr. Ok’s case - 952 days after he was first indicted. Then, on September 12, 2019, the court delivered its judgment, convicting Mr. Ok and imposing a suspended sentence of six months, reduced to five months due to good behavior.³⁶

The journalist who interviewed Mr. Ok - Cihin Acar - was also tried and convicted under Article 301. Mr. Acar did not appear in court due to the court’s distance from his hometown and his lawyer did not make arguments on his behalf. This report covers the proceedings against Mr. Ok.

²⁶ Republic of Turkey, Veysel Ok Indictment in Annex (unofficial translation).

²⁷ Id.

²⁸ Id.

²⁹ MLSA, “Veysel Ok appears before judge on charges of ‘insulting judiciary’”, May 8, 2018. Available at <https://www.mlsaturkey.com/en/veysel-ok-appears-before-judge-on-charges-of-insulting-judiciary/>.

³⁰ See Republic of Turkey, Veysel Ok Indictment in Annex.

³¹ MLSA, “Veysel Ok appears before judge on charges of ‘insulting judiciary’”, May 8, 2018.

³² MLSA, “Trial of Veysel OK outside the jurisdiction of court, says new judge”, November 22, 2018. Available at <https://www.mlsaturkey.com/en/trial-of-veysel-ok-outside-the-jurisdiction-of-court-says-new-judge/>; Lawyers for Lawyers, “Journalist’s Lawyer Veysel Ok Prosecuted”, May 11, 2018.

³³ Interview with defense lawyer.

³⁴ MLSA, “Trial of Veysel OK outside the jurisdiction of court, says new judge”, November 22, 2018.

³⁵ Id.

³⁶ Monitor’s Notes, September 12, 2019. See also Bianet, “Lawyer Veysel Ok and Journalist Cihan Acar Sentenced to 5 Months in Prison”, September 12, 2019. Available at <http://bianet.org/english/print/212967-lawyer-veysel-ok-and-journalist-cihan-acar-sentenced-to-5-months-in-prison>.



A. THE MONITORING PHASE

The Clooney Foundation for Justice deployed a monitor to Turkey to observe the proceedings against Veysel Ok. The monitor was assisted by an interpreter. Prior to the trial, background research, including preparation of a memorandum for the monitor, was undertaken.

The monitor did not experience any impediments in entering the courtroom and was present for the hearings on March 21, 2019 and September 12, 2019 (at the latter of which the judgment was read out).

The monitor used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendant's fair trial rights were respected. The monitor's TrialWatch App responses and notes were shared with Martin Scheinin, former United Nations Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms While Countering Terrorism and the member of the TrialWatch Experts Panel responsible for evaluating the fairness of the trial.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, TrialWatch Expert Martin Scheinin reviewed responses to the standardized questionnaire (collected via the CFJ TrialWatch App), court documents, and information collected by the monitor during the proceedings.

Former Special Rapporteur Scheinin found that the trial was marred by a breach of judicial impartiality. The prosecutor was not present for the main hearing on September 12, 2019 at which the lawyers of the accused presented several arguments, including a defense based on the European Court of Human Rights judgment in the case of *Morice v. France*. The case of the defense was not countered by the prosecution. The judge proceeded to close the hearing and convict Mr. Ok.

Despite the fact that the defendant's arguments were not challenged by the prosecution, the judgment dismissed these arguments *ex officio*. Consequently, the judge's conduct meant - or at least gave rise to the impression - that she was assuming the responsibilities of the prosecution to address and counter the arguments presented by the defense. Such conduct would be incompatible with the guarantee of judicial impartiality, which in criminal cases requires the court to treat the defense and the prosecution as two equal parties appearing before a neutral arbiter.

Additionally, the conviction of Mr. Ok through an unfair trial violated his right to freedom of expression, which may have a broader chilling effect. While jurisprudence from the UN Human Rights Committee and European Court of Human Rights clearly establishes that not all criticism of the judiciary is protected, Mr. Ok's stated concerns about the independence of the judiciary were not a manifestly unfounded attack deemed outside the bounds of Article 19 of the ICCPR and Article 10 of the European Convention. Instead, his critical comments on the functioning of the judiciary were rooted in his professional experience as a lawyer and contributed to a larger public debate on the state of the judiciary. As freedom of expression - an essential right in a democratic society - was affected, the requirement of judicial impartiality during the trial was particularly strict. Therefore, the conviction of Mr. Ok through an unfair trial violated his right to freedom of expression.



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR);³⁷ jurisprudence from the UN Human Rights Committee, tasked with monitoring implementation of the ICCPR; the European Convention on Human Rights;³⁸ and jurisprudence from the European Court on Human Rights, which has jurisdiction over complaints regarding violations of the European Convention. Turkey ratified the European Convention in 1954 and the ICCPR in 2003.

B. VIOLATIONS AT TRIAL

Right to Judicial Impartiality

The court's conduct in convicting Mr. Ok breached his right to an impartial tribunal. Article 14(1) of the ICCPR mandates judicial impartiality. In the words of the UN Human Rights Committee: "[t]he requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."³⁹ In *Ashurov v. Tajikistan*, the Committee found a violation of Article 14(1) where the complainant had explained, among other things, that the judge had "effectively replaced the passive and unprepared prosecutor."⁴⁰

Article 6(1) of the European Convention, mirroring Article 14(1) of the ICCPR, establishes a defendant's right to an impartial tribunal. The European Court, like the UN Human Rights Committee, distinguishes between subjective and objective impartiality: courts that are in actuality biased and courts that appear to be biased. According to the Court, objective impartiality is violated when:

there are ascertainable facts which may raise doubts as to [] impartiality. In this respect even appearances may be of a certain

³⁷ International Covenant on Civil and Political Rights, Art. 14(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter "ICCPR"].

³⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 [hereinafter "ECHR"].

³⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21. See also Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

⁴⁰ Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, paras. 2.8, 6.6.

importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. It follows that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be regarded as objectively justified.⁴¹

The Court has “recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases rais[ed] impartiality issues focused on the objective test.”⁴²

In the present case, a reasonable observer would have “legitimate reason to fear” that the presiding judge lacked impartiality under the objective test. As noted above, the prosecution did not make arguments during the trial. As reflected in the judgment and confirmed by defense counsel, the prosecution likewise did not make any written argumentation. In contrast, the defense put forth extensive oral arguments and also submitted written materials for the judge’s consideration. The only materials produced by the prosecution referenced in the judgment were the original criminal complaint from 2016 - a one-and-a-half page document that lacked legal argumentation - and a statement taken from Mr. Acar.

Consequently, in convicting Mr. Ok after hearing the defense and undertaking a very truncated deliberation (approximately 15 minutes), the judge in effect “replaced the prosecutor”: akin to the complainant’s characterization in *Ashurov* that resulted in the UN Human Rights Committee finding a judicial impartiality violation. Absent any presentation or argumentation from the prosecution, the judgment assesses the meaning of Article 301 and the allegedly humiliating impact of Mr. Ok’s words on the judiciary.⁴³ In accordance with the European Court’s jurisprudence, Mr. Ok would have - at the least - an “objectively justified” basis to doubt the court’s impartiality, if not even a basis to find a breach of the subjective impartiality requirement.

Lastly, the UN Human Rights Committee has found violations of Article 14(1)’s guarantee of impartiality where judgments have disregarded key defense contentions, such as claims regarding statutes of limitations and coerced confessions.⁴⁴ In Mr. Ok’s case, the convicting judgment ignored all defense arguments: the expiration of relevant statutes of limitations, European Court precedent on freedom of expression, and the fact that institutions such as the Venice Commission had publicly commented on the

⁴¹ European Court of Human Rights, *Padovani v. Italy*, App. No. 13396/87, February 26, 1993, para. 27.

⁴² European Court of Human Rights, *Kypraniou v. Cyprus*, App. No. 73797/01, December 15, 2015, para. 119.

⁴³ See Judgment in Annex.

⁴⁴ See Human Rights Committee, *Iskandarov v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006, April 28, 2011, para. 6.6; Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. No. CCPR/C/97/D/1519/2006, December 3, 2009, paras. 7.2-7.3.

deterioration of judicial independence.⁴⁵ The judgment consists solely of the application of Article 301 to Mr. Ok's interview. As such, its inattention to the defense's case raises further concerns about the right to judicial impartiality.

Presumption of Innocence

Mr. Ok's conviction despite the prosecution's lack of participation in the case appears to have shifted the burden of proof to the defense, undermining the presumption of innocence.

Article 14(2) of the ICCPR and Article 6(2) of the European Convention protect the defendant's right to be "presumed innocent until proved guilty according to law." As noted by the UN Human Rights Committee, the presumption "imposes on the prosecution the burden of proving the charge":⁴⁶ namely, "[a] criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and it is for the *prosecution* to dispel any such doubt (*italics added*)."⁴⁷

Correspondingly, the European Court of Human Rights has stated: "Article 6 § 2 requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused ... Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence."⁴⁸

In the present case, the court convicted Mr. Ok in the face of no evidentiary presentation or argumentation by the prosecution, suggesting that it had a "preconceived idea" of the case and functionally shifting the burden of proof to the defense. As such, Mr. Ok arguably did not benefit from the presumption of innocence.

Right to a Trial Without Undue Delay

The case against Mr. Ok raises serious concerns about undue delay, which are worth noting, but does not appear to rise to the level of a *per se* violation. Article 14(3)(c) of the ICCPR establishes the defendant's right "to be tried without undue delay." In assessing whether there has been a violation, the UN Human Rights Committee looks to the totality of the circumstances, including factors such as "the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative

⁴⁵ Monitor's Notes, March 21, 2019; Monitor's Notes, September 12, 2019; Judgment.

⁴⁶ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30.

⁴⁷ Human Rights Committee, *Larranaga v. Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.4.

⁴⁸ European Court of Human Rights, *Telfner v. Austria*, App. No. 33501/96, March 20, 2001, para. 15.

and judicial authorities.”⁴⁹ The right encompasses “not only [] the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.”⁵⁰ A court’s obligation to conclude proceedings expeditiously is heightened when defendants are in detention.⁵¹

Article 6(1) of the European Convention on Human Rights parallels Article 14(3)(c) of the ICCPR. Article 6(1) provides that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” The Guide to Article 6 establishes a totality of the circumstances framework for evaluating whether proceedings conclude within a “reasonable time.”⁵² According to the Guide, reasonableness is determined by examining the complexity of the case, measured by the number of charges and parties involved and the nature of the evidence; the applicant’s conduct; the conduct of the authorities; and “what is at stake for the applicant” in the dispute.⁵³ Per European Court jurisprudence, “the period to be taken into account in the assessment of the length of the proceedings starts from an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or some from other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect.”⁵⁴ As is true under the ICCPR, the European Convention requires that courts exercise special diligence when individuals are held in detention pending trial.⁵⁵

In *Muñoz v. Spain*, the UN Human Rights Committee found a violation of Article 14(3)(c) in a case in which the defendant was facing misdemeanor charges for injuring a policeman.⁵⁶ Although the defendant was not detained, almost 5 years elapsed between the date of the incident and the commencement of trial.⁵⁷ The Committee’s determination was based on the fact that the charges required limited police investigation and that the case overall was of low complexity.⁵⁸

Similarly, in *Corigliano v. Italy*, the European Court of Human Rights found a violation of Article 6(1) of the European Convention where Italian courts took more than 6 years to finalize a criminal case in which the defendant had been charged with aggravated

⁴⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 35.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² European Court of Human Rights, “Guide on Article 6 of the European Convention on Human Rights”, para. 298. Available at https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

⁵³ *Id.* at paras. 300-309.

⁵⁴ European Court of Human Rights, *Kangasluoma v. Finland*, App. No. 48339/99, January 20, 2004, para. 26.

⁵⁵ See European Court of Human Rights, “Guide on Article 6 of the European Convention on Human Rights”, para. 309.

⁵⁶ Human Rights Committee, *Munoz v. Spain*, U.N. Doc. CCPR/C/79/D/1006/2001, October 30, 2003, paras. 2.1-2.2.

⁵⁷ *Id.* at para. 7.1.

⁵⁸ *Id.*

slander for lodging a complaint about judicial officers' conduct.⁵⁹ The Court concluded that the length of the proceedings was unreasonable because the case was relatively simple and the investigation limited.⁶⁰ In light of these factors, the Court deemed the delay attributable to the domestic authorities and in contravention of Article 6(1).⁶¹

In the present case, a criminal complaint was filed against Mr. Ok at the end of 2015 and a judgment was not issued until September 2019. The case - as in *Munoz and Corigliano* - was not complex, revolving around the interview in which Mr. Ok criticized the judiciary. Furthermore, the indictment amounted to less than 2 pages, reflecting the simplicity of the charges,⁶² and only Mr. Ok testified as a witness at trial. Nonetheless, the case was postponed at least 10 times and the entirety of the proceedings lasted more than three and a half years.

Additionally, just as the European Court found the delays to be the fault of the domestic authorities in *Corigliano*, such was the case here. The prosecutor's office filed the indictment with the court in August 2016, some 8 months after the interview took place; the court did not accept the indictment until September 2017, more than a year later; and the trial began approximately a year and a half later. Given the straightforward nature of the case and that there does not appear to have been significant investigative action during the above time periods, responsibility for the lapses seemingly lies with the domestic authorities.

Nonetheless, the length of the proceedings likely falls below the threshold required for a clear finding of a violation because Mr. Ok was not detained pending trial. The simplicity of the case and the apparent lack of justification for the postponements, however, do *undermine* the right to a trial without undue delay, particularly given extensive documentation that Turkish authorities have used the specter of criminal charges to intimidate dissenting voices.⁶³ Notably, the fact that the indictment was accepted by the court just when Mr. Ok commenced his representation of government critics - more than a year after the indictment's submission - heightens concerns about the authorities' conduct with respect to the delay.

⁵⁹ European Court of Human Rights, *Corigliano v. Italy*, App. No. 8304/78, December 10, 1982, paras. 11-13.

⁶⁰ *Id.* at paras. 38-39, 45-47.

⁶¹ *Id.* at para. 47.

⁶² Republic of Turkey, Veysel Ok Indictment.

⁶³ See Freedom House, "Freedom in the World 2019": Turkey", 2019; Council of Europe, "Country Visit: Turkey", July 8, 2019

C. OTHER FAIRNESS CONCERNS

Right to Freedom of Expression

The prosecution and conviction of Mr. Ok after an unfair trial violated his right to freedom of expression. Article 19 of the ICCPR states that “everyone [has] the right to freedom of expression” and to “hold opinions without interference.”⁶⁴ It is “incompatible” with Article 19 to criminalize “the holding of an opinion”⁶⁵ as expressed in any medium: “orally, in writing or in print, in the form of art, or through any other media.”⁶⁶ The UN Human Rights Committee’s General Comment 34 expounds on this provision, mandating that “all forms of opinion [be] protected,” including commentary on “public affairs ... discussion of human rights, [and] journalism.”⁶⁷ The Committee has raised particular concerns about laws that restrict criticism of public officials:

the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials ... States parties should not prohibit criticism of institutions, such as the army or the administration.⁶⁸

The UN Human Rights Committee has noted that any limitations on the Article 19 right to freedom of expression must be strictly and narrowly tailored in accordance with a three-part test. Namely, the restriction must (i) be provided by law, (ii) pursue a legitimate aim, and (iii) be necessary and proportional.⁶⁹ The Committee has limited “legitimate aims” to respect for the rights and reputation of others, the protection of

⁶⁴ ICCPR, Article 19(1)(2).

⁶⁵ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 9.

⁶⁶ ICCPR, Article 19(2).

⁶⁷ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 9, 11.

⁶⁸ *Id.* at para. 38.

⁶⁹ *Id.* at para. 22; Human Rights Committee, *Velichkin v. Belarus*, U.N. Doc. CCPR/C/85/D/1022/20001, 2005, para 7.3.

national security or public order, the protection of public health, and the protection of public morals.⁷⁰

In *Sviridov v. Kazakhstan*, the Committee found a violation of Article 19 where the defendant, a human rights defender, had been arrested and fined for displaying a sign in a public place that read: “I demand a fair trial for Mr. Zhovtis!”⁷¹ Mr. Zhovtis had served as the director of the office where the defendant worked and had been sentenced to four years imprisonment.⁷² The defendant attended Mr. Zhovtis’ trial and documented several fair trial violations, which he wrote about on his organization’s website.⁷³ In assessing the case, the Committee noted that Article 19 protected an individual’s right to hold “opinions on matters of human rights such as the right to a fair trial” and that the State had thus “interfered with the author’s right to freedom of expression and to impart information and ideas of all kinds.”⁷⁴ Applying the three-part test, the Committee concluded that the Kazakh authorities had failed to either demonstrate a legitimate aim or show that the restrictions on protest were necessary or the fine proportional.⁷⁵

Article 10 of the European Convention on Human Rights parallels Article 19 of the ICCPR. Article 10 states that “everyone has the right to freedom of expression” and “to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁷⁶ Article 10 provides for “free criticism of the government” without fear of retaliation by the state.⁷⁷ Similar to Article 19 of the ICCPR, the right to freedom of expression under Article 10 is expansive: “printed documents, radio broadcasts, paintings, films, poetry, novels or electronic information systems” are all protected.⁷⁸ States not only have a duty not to encroach upon the right to freedom of expression but also have a positive obligation to ensure that the right is protected.⁷⁹

The Article 10 framework for assessing the validity of restrictions on freedom of expression resembles that of Article 19. The test has three prongs: (1) whether the restriction is prescribed by law, (2) whether it pursues a legitimate aim, and (3) whether it is “necessary in a democratic society.”⁸⁰ Legitimate aims are the protection of “national security, territorial integrity or public safety, [] the prevention of disorder or crime, [] the

⁷⁰ Human Rights Committee, *Velichkin v. Belarus*, U.N. Doc. CCPR/C/85/D/1022/20001, 2005, para 7.3.

⁷¹ Human Rights Committee, *Sviridov v. Kazakhstan*, U.N. Doc. CCPR/C/120/D/2158/2012, July 13, 2017, paras. 2.1-2.4.

⁷² *Id.* at para. 2.1.

⁷³ *Id.*

⁷⁴ *Id.* at para. 10.2.

⁷⁵ *Id.* at para. 10.4.

⁷⁶ ECHR, Article 10(1).

⁷⁷ See Council of Europe, “Protecting the Right to Freedom of Expression Under the European Convention on Human Rights”, 2017, pgs. 13-14. Available at <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.

⁷⁸ *Id.* at pg. 18.

⁷⁹ *Id.* at pgs. 90-91.

⁸⁰ *Id.* at pgs. 32-33.

protection of health or morals, [] the protection of the reputation or rights of others, [prevention of] disclosure of information received in confidence, or [] maintaining the authority and impartiality of the judiciary.”⁸¹

The European Court has provided detailed guidance with respect to the latitude due criticism of the judiciary. As noted in *Mustafa Erdogan et al v. Turkey*, “issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10” and “[t]he press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them.”⁸² Nonetheless, the protections of Article 10 do not extend to speech delivered with the sole intent to insult, gratuitous personal attacks, or baseless value judgments.⁸³

The Court expanded upon this distinction in *Morice v. France*, finding a violation of Article 10 where the defendant, a lawyer, was convicted of criminal defamation for criticizing in a newspaper interview judges who had presided over a case he was litigating.⁸⁴ Specifically, the defendant stated that the investigating judges in the case had engaged in “conduct which [was] completely at odds with the principles of impartiality and fairness.”⁸⁵ With respect to the aim of “maintaining the authority of the judiciary,” the Court clarified that restrictions of freedom of expression on this basis were reserved for “gravely damaging attacks that [were] essentially unfounded,”⁸⁶ not comments like those made by the defendant.

In the Court’s words: the objective of supporting the judiciary could not have:

the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter. In the present case, Judges M. and L.L. were members of the judiciary and were thus both part of a fundamental institution of the State: they were therefore subject to wider limits of acceptable criticism than ordinary citizens and the impugned comments could therefore be directed against them in that capacity.⁸⁷

⁸¹ ECHR, Article 10(2).

⁸² European Court of Human Rights, *Mustafa Erdogan et al v. Turkey*, App. Nos. 346/04 & 39779/04, August 27, 2014, paras. 40-41.

⁸³ *Id.* at paras. 44-45.

⁸⁴ European Court of Human Rights, *Morice v. France*, App. No. 29369/10, April 23, 2015, paras. 34-35.

⁸⁵ *Id.* at para. 34.

⁸⁶ *Id.* at para. 168.

⁸⁷ *Id.*

As such, the Court concluded that the punishment of the defendant in *Morice* was not “necessary in a democratic society.”⁸⁸

In the instant case, Mr. Ok’s right to freedom of expression and opinion was similarly violated. As noted above, he commented on the waning independence of the judiciary, stating:

in the past there were judges with different perspectives/views; there was a high likelihood of encountering Judges who prioritized freedoms; but now the judiciary is in one single color; the possibility of encountering Prosecutors and Judges who prioritize freedom of expression was high. But the biggest difference in this period is that the members of the judiciary are in single color. Almost all the judiciary members we have met in the last 2 years are monochromatic, single-minded. We see the judges of criminal courts of peace. In the cases tried here, neither defense nor objection has any effect. Currently, all journalists are tried constantly in front of 12 Judges of courts of peace. The shares (on social media) and sympathies of these judges are well known. In this sense, no matter how strong your defense before these judges is, it fails to affect the decision Because apparently there are ordered decisions, in their investigations, the political will (~government) instructs the judicial authorities. Or they are targeted in the media. Subsequently, the judges follow the instruction.⁸⁹

These were obviously strong words of criticism but, due to the presentation of a coherent line of argument, not the sort of gratuitous insult, “essentially unfounded attack” or “value judgment[t] with[out] sufficient factual basis” deemed outside the protection of the ICCPR and the European Convention. In contrast, Mr. Ok’s comments mirrored reports on judicial independence produced by organizations such as the Venice Commission⁹⁰ and the Council of Europe⁹¹ and, as such, were situated within a robust public debate on the state of the justice system. Moreover, Mr. Ok’s comments were those of a lawyer who has dedicated his career to press freedom. They were not a careless, gratuitous salvo, but considered remarks based on his in-court experience and concern for the deterioration of

⁸⁸ *Id* at para. 177.

⁸⁹ Republic of Turkey, Veysel Ok Indictment, pg. 2.

⁹⁰ Venice Commission, “Declaration on Interference with Judicial Independence in Turkey”, 2015. Available at <https://venice.coe.int/files/turkish%20declaration%20June%202015.pdf>.

⁹¹ Council of Europe, “New Threats to the Rule of Law in Council of Europe Member States”, Resolution 2188, 2017, paras. 6, 12.

the judiciary - of the ilk that the UN Human Rights Committee and the European Court have established as worthy of heightened protection.

Consequently, while the aim of Mr. Ok's prosecution and conviction may have been to safeguard the rights and reputations of the judiciary and maintain confidence in such, the restriction - as in *Morice* and *Sviridov* - interfered with protected speech and was not necessary. Further, given the reasoned nature of Mr. Ok's comments, the imposition of a suspended prison sentence - which can be executed in the event that Mr. Ok commits another "crime" - would have required full compliance with the requirements of a fair trial in order to demonstrate that the court had conducted a proper assessment of the proportionality of the sentence. As Mr. Ok was convicted for his public criticism of problems in the judicial system in breach of the requirements of a fair trial, his right to freedom of expression was violated.

CONCLUSION AND GRADE



As the European Court of Human Rights has repeatedly noted, Article 301 endangers the right to freedom of expression that underpins a democratic society. Mr. Ok's prosecution and conviction form part of a troubling trend of suppression of dissenting voices in Turkey, enabled by Article 301. This threat to freedom of expression is compounded when courts do not fulfill their responsibility to act impartially, as was true in Mr. Ok's case. As recommended by the Venice Commission and European Court, further revision of Article 301 could help mitigate its negative impact on freedom of expression. These are important considerations in advance of Turkey's 2020 Universal Periodic Review.

GRADE:

D



A. GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”⁹² and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

B. INDICTMENT

C. JUDGMENT

⁹² ICCPR, Article 26.