

TRIAL OBSERVATION REPORT - TURKEY

CASE: TRIAL OF VEYSEL OK (LAWYER) AND CIHAN ACAR (JOURNALIST)

HEARING 12TH SEPTEMBER 2019, ISTANBUL 2ND CRIMINAL COURT OF
FIRST INSTANCE

I. Introduction

This was the first occasion on which an observer from the Law Society had attended the trial of Veysel Ok and Cihan Acar. Veysel Ok is a leading advocate representing journalists in Turkey charged with terrorist offences. He was charged as a result of an interview he gave prior to the attempted coup in Turkey in 2015 in which he was critical concerning the independence of the judiciary in Turkey. In 2018, he co-founded the Media and Law Studies Association (MLSA), which provides pro-bono legal support to writers and journalists who have been subjected to intimidation, surveillance, smear campaigns and legal harassment. His most prominent clients are Ahmet Altan, the novelist and Deniz Yücel, the Die Welt correspondent. He has also applied to the Constitutional Court in Turkey and then to the European Court of Human Rights on behalf of journalist Şahin Alpay and the writer/academic Mehmet Altan and was instrumental in their release.

In 2015 an article was published featuring the interview with Veysel Ok in the Özgür Düşünce newspaper. In the article Ok called into question the independence of the judiciary in Turkey OK and was reported as stating:-

“Previously, judges could hold varying opinions. There was a possibility of being tried by judges who valued freedoms. But now all members of the judiciary come in a single colour. We see the judges serving at the Criminal Judgeships of Peace. They are deaf to defence statements or objections. Where the loyalties of these judges lie is clear. Nothing changes the result, because the decisions are pre-ordered. Either those in power give orders to the judicial authorities before the investigation, or attack the defendant via the government press.”

He was subsequently charged, jointly with the author of the article, Cihan Acar, under the notorious Article 301 of the Turkish Penal Code, with “insulting the judiciary.”

Prior to the final hearing on 12th September 2019 there had been a number of hearings and no less than five changes of judge. One judge recused himself from the case. At the previous hearing the judge had denied a request from lawyers acting for President Erdoğan to intervene in the case. President Erdoğan was not mentioned in the interview but I was told by Veysel Ok that the prosecution was taken with the encouragement of President Erdoğan’s office.

II. Trial observation

The trial was attended by a substantial number of journalists. I was the only overseas lawyer observing apart from a representative from the Clooney Foundation. There were also two representatives from the United States consulate present. There were approximately 25 observers in total.

A. Location and Courtroom

The case was heard in the 2. Asliye Ceza Mahkemesi courtroom at the Çağlayan courthouse in Istanbul. This is the central criminal court. A modern building which holds approximately 500 separate courtrooms. The 2. Asliye Ceza Mahkemesi courtroom is known as the “Press Court” where all of the trials of journalists or other trials where the defendant is charged with an offence arising out of a publication are held. It is a criminal court of first instance.

The case proceeded in front of a single judge. No prosecutor was present. I was told by Veysel Ok that under new rules introduced recently prosecutors no longer attend trials in the first instance courts. It was a comparatively small courtroom, the smallest I have seen in a number of observations in Turkey. The judge sat in an elevated position at the front. There was a seat for the prosecutor (who was not there) to the left of the judge, also elevated. The advocates sat on benches to the right of and on a lower level to the judge and they had sight of a screen on which the notes of the hearing, as dictated by the judge, were being written. They also had opportunity during the hearing to intervene and correct these notes.

The box from which witnesses gave evidence or from which the defendant addressed the judge was facing the judge. It was on a lower level. On the same level in front of the judge the clerk who was transcribing the hearing sat. There were four benches at the back of the court for observers which were all full.

B. Applicable Law and Procedure

Both defendants were charged under Article 301 of the Turkish Penal Code which reads as follows:-

“Article 301 (Amended on 30/4/2008 – By Article 1 of the Law no. 5759)

(1) A person who publicly degrades Turkish Nation, State of the Turkish Republic, Turkish Grand National Assembly, the Government of the Republic of Turkey and the judicial bodies of the State shall be sentenced a penalty of imprisonment for a term of six months to two years.

(2) A person who publicly degrades the military or security organisations shall be sentenced according to the provision set out in paragraph one.

(3) The expression of an opinion for the purpose of criticism does not constitute an offence.

(4) The conduct of an investigation into such an offence shall be subject to the permission of the Minister of Justice.”

The court operates under the Criminal Procedure Code of the Republic of Turkey.¹

¹ https://www.legislationline.org/download/action/download/id/4257/file/Turkey_CPC_2009_en.pdf

C. Description of Hearing

Veysel Ok was present. Cihan Acar was not present but was represented by lawyer Evin Baris Altintas. Veysel Ok was represented by three lawyers. Zelal Pelin Dogan, Dogusccan Avgun and Hurrem Sonmez.

Veysel Ok had arranged for a translation to be made of the letter of intervention made by the President of the Law Society of England and Wales in June 2019 into Turkish and this was handed in as an addendum to the defendant's petition in his defence.

The case opened with a discussion as to whether or not there should be a further adjournment to allow the journalist defendant to attend. This was contested by Veysel Ok on the basis that the case had been going on for a long time and should only be adjourned if there was a technical reason for doing so. The judge then checked the co-defendant's power of attorney given to his lawyer to determine whether or not the lawyer had the authority to apply for an adjournment. A further intervention from the lawyer acting for Cihan Acar suggested that he was content for the matter to proceed providing his client was either acquitted or given a suspended sentence.

Both Veysel Ok and all of the representing lawyers were then given opportunity to address the judge. Veysel Ok stated that (not verbatim):-

"I said the judiciary is not independent, criticizing the Criminal Courts of Peace. I still think the same way. This is not an idea I hold alone, many law professors, international organizations think the same way. Today at the root of most of Turkey's current problems is the issue of judicial independence, and as a part of the judiciary myself as a lawyer, I presented this criticism, under the TCK, and ECtHR and Constitutional Court case law, it is stated that criticism cannot be treated as insult."

The defence team had also submitted the Venice report on the Criminal Courts of Peace.²

Interventions were then made by each of the lawyers representing Veysel Ok. The first intervention, by lawyer Zelal Pelin Dogan, referred the judge to the ECtHR case of *Maurice v France*. He referred to the decision having involved an interview of a lawyer concerning two judges in a case where he had been involved. He claimed the case was authority for the proposition that "restrictions on the free speech rights of lawyers should only be exceptions." I have not been able to verify this argument since the case of *Maurice v France*³ involves an entirely unrelated set of facts.

Arguments were also put that the case had been prosecuted out of time since there is a four month limitation in relation to such prosecutions and the charges were laid outside of this period. Zelal argued that even if the case was now dropped it has

² Turkey – Criminal Judgeships of Peace – Memorandum of the Ministry of Justice
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)004-e)

³ Application no. 11810/03

lingered on for three years and has had a chilling effect on Veysel Ok's freedom of expression over that period.

The lawyer for Cihan Acar, Mustafa Sogutlu, then acknowledged Ok's role as legal counsel for many journalists who were accused in freedom of expression cases. He pointed out that the Justice Minister Abdülhamit Gül made a televised statement on a five year plan to strengthen confidence in the judiciary. This showed that there were huge question marks about the independence of the judiciary, something accepted by all. On 30 May, president Erdoğan announced the reform strategy document, which states the same thing as Ok had stated in a more detailed way. In such circumstances he claimed that it was "inexplicable" that this hearing was proceeding. He demanded acquittals for both defendants.

Another lawyer (Doğuş) then made a statement pointing out that Ok was being tried for a statement he made in 2015. He is a lawyer and he is the co-director of an organization that works in the field of freedom of expression. He pointed out that after the 2016 coup we saw that many judges were removed, and that only this week a judge who worked in the Ergenekon trials was convicted on FETÖ charges.⁴ He claimed that all political parties and numerous NGOs were sharing their comments and criticism as part of the recently announced reform package. Finally he claimed that Ok's words fall under Article 10 of the ECHR, and under Article 148 of the Turkish Constitution local courts have to take into account ECtHR. He demanded Ok's acquittal.

Veysel Ok then make a final statement to the court claiming that if we say the judiciary is independent, nothing will change. The fact that the judiciary in Turkey is not independent is a huge fact "as huge as the Çağlayan Courthouse." He claimed that he had exercised his right to criticize and demanded his acquittal.

There followed a short adjournment after which the judge returned to find both men guilty and sentenced them both to six months' imprisonment under Article 301. Each sentence was reduced to five months and both sentences were suspended.

III. Rights That Appear to Have Been Violated

This was an observation of the final hearing only so I cannot comment on the procedural fairness of the other hearings which led to the final hearing. However, procedurally it was clear that Veysel Ok was able to participate fully in the hearing, in a language he understood, and with the benefit of three separate counsel. The judge was attentive and courteous and made careful notes of the statements made. She did not comment on the arguments put to her when passing sentence so no reasons for the decision were given. The giving of reasons is one of the cornerstones of the judicial

⁴ The Ergenekon trials were a series of high-profile trials which took place in Turkey in which 275 people, including military officers, journalists and opposition lawmakers, all alleged members of Ergenekon, a suspected secularist clandestine organization, were accused of plotting against the Turkish government. The trials resulted in lengthy prison sentences for the majority of the accused. In the event, those sentences were overturned shortly after.

function and a central aspect of the rule of law. The ECHR has on numerous occasions reinforced this principle⁵. The main violations of Article 6 of the ECHR and Article 14 of ICCPR however relate to the length of the proceedings (more than three years) and the lack of an “independent and impartial tribunal.”

The European Court of Human Rights has found in a previous case against Turkey⁶ that interference with the right to express opinions concerning the independence of the judiciary is a violation of Article 10 of the convention. In that case it was found that civil proceedings for defamation taken by three judges who objected to the applicant’s comments on their independence amounted to a violation of the applicant’s rights to articulate his concerns under Article 10. The European Court of Human Rights found that courts, along with other public institutions, are not immune from criticism and scrutiny.

The position of Veysel Ok in this case seems to be indistinguishable to that of the law professor in the Erdogan case in that both publications “concerned an important and topical issue in a democratic society which the public had a legitimate interest in being informed of and therefore that the article in question contributed to a debate of general interest.”⁷ On this basis the criminalisation of Veysel Ok’s expression of concern in relation to the independence of the judiciary would appear to be a clear violation of his rights under Article 10.

The offence with which both men were charged has also been the subject of much international criticism over a long period of time. During the 2010 Universal Periodic Review of Turkey five states⁸ explicitly recommended that Turkey remove or revise Article 301. Other criticism has been made by the OSCE and a number of NGO’s including Amnesty International⁹ Adverse comments have also been made in a number of ECtHR cases including *Dink v. Turkey*¹⁰ and *Taner Akcam v Turkey*¹¹

More recently the Venice Commission has conducted a full review of the shortcomings and difficulties which this statutory provision entails and have concluded in strong terms that it should be redrafted and further amended in order to make it sufficiently clear and specific to satisfy the principles of foreseeability and legality:-

⁵ See for instance *Boicenco v. Moldova*, 41088/05, 11 July 2006

⁶ *Mustafa Erdogan and others v Turkey* (Application Number 364/04)

⁷ *Ibid.* Para 41

⁸ Armenia, Cyprus, France, Spain and the USA) UN Doc. A/HRC/15/13 pp. 20-22

⁹ Amnesty International, Article 301: End it, don’t amend it, 3rd April 2013

¹⁰ Application number 2668/07, 6102/08, 7072/09 and 7124/09

¹¹ Application number 27520/07

“...the Article should be interpreted by the domestic courts in line with the above-mentioned case-law of the ECtHR (*Dink v. Turkey*). As the ECtHR, the Commission has doubts as to whether the protection of State organs against discredit could be considered as pursuing the legitimate aim of protecting the public order, in the absence of incitement to violence by the perpetrator¹²¹. In this respect, according to the General Comment no. 34 of the UN Human Rights Committee, “*States should not prohibit criticism of institutions such as the army or the administration*”. The Article should not be applied to penalise harsh criticism of government policies, which would chill public debate, but only in case the statements can be considered as an “incitement to violence or hatred”. The Commission also recalls that the tools of criminal law should be used with restraint by the State in the area of political speech and questions of general interest, and that in the absence of incitement to violence, the imposition of an imprisonment sentence fails to meet the requirement of necessity in a democratic society.”¹²

IV. Rights Partly Respected

As stated much of the procedural requirements in Article 11 of ICCPR and Art 6 of ECHR were respected in this particular hearing. Failure of Turkish judges to give reasons for their decisions is a very common issue and has been commented on before.

V. Other / Miscellaneous

Discussions with Veysel Ok confirmed that he felt that the judge had no option other than to convict. She had given the lightest sentence possible. The minimum sentence under Art 301 is six months imprisonment. This had been reduced to five months and had been suspended in the case of both defendants.

VI. Conclusions and Recommendations

The convictions will be appealed and taken to the Constitutional Court thereafter. If a negative response is received from the Constitutional Court then it is likely that an application will be made to the ECtHR. We should monitor and support these appeal processes. The judicial reform proposals referred to in the hearings should also be monitored and there will be opportunities for further interventions around these. The extent to which perspectives need to change on the part of the government are clearly illustrated in the introductory text to these proposals. In discussing freedom of expression the authors state:-

“Freedom of expression, which is an indispensable part of human rights, is the most important condition and element in democracy. In the last sixteen years, important steps have been taken towards promoting freedom of expression and media in Turkey, and fundamental amendments have been introduced in the legislation, especially in the Constitution.”

¹² Venice Commission Opinion on Articles 216, 299,301 and 314 of the Penal Code of Turkey adopted 11-12 March 2016 para: 94

This is not a state of affairs that many international observers would recognise. However the introduction of these proposals is a positive sign that things might be changing for the better.

VII. Annexes

Some of the online and media coverage of the trial can be accessed through the links below.

<https://lawyersforlawyers.org/en/veysel-ok-given-a-5-months-suspended-sentence/>

<https://www.mlsaturkey.com/en/lawyer-veysel-ok-journalist-cihan-acar-given-5-month-suspended-sentence-for-insulting-judiciary/>

<https://cfj.org/wp-content/uploads/2019/09/20190912-Veyssel-Ok-Statement-Turkey.pdf>

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Law Society of England and Wales

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