

Ankara 4. Assize Court  
Indictment no: 2023/5424; 2023/5309  
Case no: 2023/ 93 E.

Between:

**Republic of Türkiye**  
**Public Prosecutor's Office**

**vs.**

**Furkan Karabay**

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**EXPERT OPINION BY ARTICLE 19**

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London

01.03.2024

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## Introduction and summary

1. This expert opinion has been prepared by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation working globally to promote the right to freedom of expression and information. We have been asked to advise on the compatibility of the charges brought against Furkan Karabay (the Defendant) under Article 67(6) of the Turkish Code of Criminal Procedure (Law No. 5271) with international and European law and standards on the right to freedom of expression. We understand that this opinion will be relied upon by the Defendant in the case currently pending before the Ankara 4. Assize Court.
2. This expert opinion reviews the case in the light of Türkiye's obligations to protect the right to freedom of expression, as guaranteed by Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights (the European Convention). As Türkiye has signed and ratified these treaties, the Turkish courts are therefore required to apply international and European human rights law in the present case. This is without prejudice to the consideration of how the Defendant's conviction may also violate other human rights, including the right to liberty (Article 5 of the European Convention), the right to a fair trial (Article 6 of the European Convention), and the principle of legality (Article 7 of the European Convention).
3. In the expert opinion, we address:
  - a) The facts of the case relevant for the subsequent analysis;<sup>1</sup>
  - b) Overview of key international human rights law standards applicable to the case;
  - c) Analysis of compliance of Article 6(1) of the Turkish Anti-Terrorism Law No. 3713, under which the Defendant was charged, with international freedom of expression standards;
  - d) Our assessment of the present case in the light of international and European human rights standards.
4. ARTICLE 19 submits that Article 6(1) of the Turkish Anti-Terrorism Law No. 3713, under which the Defendant was charged, does not comply with international and European freedom of expression standards. These provisions should be abolished. Even if this Court were to consider these provisions as providing a sufficient legal basis for prosecution under international and European human rights law, ARTICLE 19 submits that the prosecution of the Defendant under these provisions violates his right to freedom of expression. The charges against him should be dismissed in their entirety.

## ARTICLE 19's expertise on the right to freedom of expression

5. ARTICLE 19 is an international human rights organisation that advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and the implementation of such standards in domestic legal systems. ARTICLE 19 has produced a number of standard-

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<sup>1</sup> These are based on an unofficial translation of the indictments against the Defendant, no. 2023/5309, dated 30 July 2023 and no. 2023/5424, dated 8 August 2023.

setting documents and policy briefs based on international and comparative law and best practice on issues ranging from freedom of expression and national security to hate speech. On the basis of these publications and overall legal expertise, ARTICLE 19 regularly intervenes in domestic and regional human rights court cases, including in courts in Türkiye,<sup>2</sup> and comments on legislative proposals as well as existing laws that affect the right to freedom of expression.

6. ARTICLE 19 has specific expertise in the area of counter-terrorism legislation that affects freedom of expression. This includes producing the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (Johannesburg Principles),<sup>3</sup> the analysis of the terrorism offences contained in the penal codes of countries such as the United Kingdom, Tunisia and Russia and interventions in several high-profile national security cases.<sup>4</sup> ARTICLE 19 also has extensive expertise in freedom of expression and privacy issues. This includes leading the development of the *Global Principles on Freedom of Expression and Privacy*,<sup>5</sup> producing various policies on freedom of expression and privacy issues,<sup>6</sup> and intervening in a landmark case dealing with a publication engaging the right to private life of public figures.<sup>7</sup>

## The facts and arguments of the parties of the case

7. The Defendant is a Turkish journalist and an editor of *Gerçek Gündem*, a Turkish news website. On 31 January 2023, he published an article on *Gerçek Gündem*. The article provided a profile on İrfan Fidan, a current Judge of the Constitutional Court of Türkiye who previously held the position of the Chief Public Prosecutor in Istanbul. The article made allegations of İrfan Fidan's partiality and abuse of power as prosecutor in particularly controversial cases, including those touching upon espionage, corruption, money laundering, high-profile assassinations, and terrorism. The article also cited ties that Mr Fidan allegedly has with the ruling party in Türkiye and instances of impunity in cases where persons affiliated with the political establishment were accused of criminal offenses.
8. The Defendant also published several tweets on 12 January 2023 and 31 January 2023, which contained allegations of wrongdoings committed by Fidan in his position as the Chief Public Prosecutor. The tweets generally reflect the content of the article made available on *Gerçek Gündem*.

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<sup>2</sup> These include interventions in the cases raised on the basis of Article 6(1) of the Turkish Anti-Terrorism law, for example, [the case of Buse Söğütlü](#).

<sup>3</sup> ARTICLE 19, [Johannesburg Principles: National Security, Freedom of Expression and Access to Information](#), 1996.

<sup>4</sup> See, ARTICLE 19, [UK: Counter Terrorism and Border Security Bill could criminalise expression and opinions](#), 9 October 2018; ARTICLE 19, [Tunisia: Counter-terror law endangers rights](#), 31 July 2015; ARTICLE 19, [Rights in extremis: Russia's anti-extremism practices from an international perspective](#), 23 September 2019; or for instance, ARTICLE 19, [UK: ARTICLE 19 intervenes in Miranda Case](#), 16 December 2015.

<sup>5</sup> ARTICLE 19, [Global Principles on Freedom of Expression and Privacy](#), 7 March 2017.

<sup>6</sup> See, e.g. ARTICLE 19, [The "Right to be Forgotten": Remembering Freedom of Expression](#), 2016; or ARTICLE 19, [Privacy and freedom of expression in the age of artificial intelligence](#), 25 April 2018.

<sup>7</sup> ARTICLE 19, amicus brief to the Inter-American Court in [Jorge Fontevecchia and Hector d'Amico v. Argentina](#), September 2011.

9. The prosecution accused Mr Furkan Karabay, as well as Mr Faruk Eren, who is the editor-in-chief of *Gerçek Gündem*, of “disclosing or publishing the identity of officials on anti-terrorist duties or identifying them as targets.” The article and tweets about Mr Fidan form the basis for the charges brought under Article 6/1 of Anti-Terrorism Law No. 3713.
10. The first indictment No. 2023/5309, dated 30 July 2023, noted that the Defendant “took advantage of the convenience provided by the profession of journalism” to ‘target’ İrfan Fidan with accusatory tweets. The second indictment No. 2023/5424, dated 8 August 2023, pointed to the article on *Gerçek Gündem*, as well as associated social media posts, which, according to the prosecution, amounted to the criminal offense of disclosing or publishing the identity of officials on anti-terrorist duties or identifying them as targets under Article 6/1 of Anti-Terrorism Law No. 3713. The two indictments have been joined in one criminal case. According to the information made available to ARTICLE 19, the trial is scheduled to take place at the Ankara 4 Assize Court on the 5<sup>th</sup> of March 2024.
11. The Defendant accepts having authored the impugned article and social media posts but denies the charges. He points out great public interest both in the personality of İrfan Fidan who, at the time of the article and tweets, was also a candidate for the President of the Constitutional Court and the criminal cases discussed in the article and the tweets. Mr Karabay also contends that his publications about Mr Fidan are sufficiently reliable and are based on quality journalistic research.

## Applicable international standards on the right to freedom of expression

12. As a party to the ICCPR and the European Convention, which form part of Turkish law, the domestic courts are required to consider international and European standards on freedom of expression when deciding this case.
13. Under Article 19 para 3 of the ICCPR and Article 10 para 2 of the European Convention, the right to freedom of expression is not an absolute right. It may be legitimately restricted by the State in certain circumstances. Under the so-called three-part test any restrictions:
  - **Must be provided for by law:** any restriction must have a basis in law, which is publicly available and accessible, and formulated with sufficient precision to enable citizens to regulate their conduct accordingly;<sup>8</sup>
  - **Must pursue a legitimate aim,** exhaustively enumerated in Article 10 para 2 of the European Convention and Article 19 para 3 of the ICCPR. When a threat to the legitimate aim is invoked, the State must show in a specific and individualised fashion the precise nature of the threat at issue.<sup>9</sup>

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<sup>8</sup> See, *inter alia*, the European Court of Human Rights (the European Court), *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, [App. No. 17224/11](#), 27 June 2017; *De Tommaso v Italy*, [App. No. 43395/09](#), 23 February 2017; *Cumhuriyet Vakfı and Others v Turkey*, [App. No. 28255/07](#), 8 October 2013; or *Ahmet Yıldırım v Turkey*, [App. No. 3111/10](#), 18 December 2012.

<sup>9</sup> HR Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 29 July 2011, para 35.

- **Must be necessary in a democratic society:** any restriction must be necessary and proportionate to the aim sought. Necessity entails an assessment of whether the proposed limitation satisfied a “pressing social need” and whether the measure is the least restrictive to achieve the aim. A measure cannot be regarded as necessary where a less restrictive means could be employed to achieve the same end. The proportionality lens should be used to assess the nature and severity of the penalties imposed.<sup>10</sup>

### ***International standards on the interplay between the right to freedom of expression and anti-terrorism measures***

14. Under Article 19 para 3 of the ICCPR and Article 10 para 2 of the European Convention, the right to freedom of expression may legitimately be restricted to protect national security, provided that the restriction at issue complies with the requirements of legality, necessity and proportionality. The key international standards on the interplay between the right to freedom of expression and anti-terrorism measures can be summarised as follows:

- In **General Comment No. 34**, the Human Rights Committee (HR Committee) cautioned against the use of counter-terrorism measures to create excessive restrictions on freedom of expression and information. The Committee stated, “The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities”.<sup>11</sup>
- In addition, **the Johannesburg Principles**, which authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression, provide that an act of expression should be criminalised on national security grounds only where it is intended to incite imminent violence, is likely to incite such violence, and there is a direct and immediate connection between the speech and the likelihood or occurrence of such violence.<sup>12</sup> The UN Secretary-General has supported this interpretation, stating that “laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action.”<sup>13</sup>
- In her recent report, **the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism** noted that “Failure to use precise and unambiguous language in relation to terrorist or security offences may fundamentally affect the protection of several fundamental rights and

<sup>10</sup> See, *inter alia*, the ECtHR, *Fressoz and Roire v France*, [App. No. 29183/95, 21 January 1999](#); or *Yarar v Turkey*, [App. No. 57258/00](#), 19 December 2006.

<sup>11</sup> General Comment No. 34, *op.cit.*, para 46.

<sup>12</sup> Johannesburg Principles, *op.cit.*, Principle 6.

<sup>13</sup> The protection of human rights and fundamental freedoms while countering terrorism, Report of the Secretary-General, A/63/337, 28 August 2008, para 62.

freedoms.”<sup>14</sup> In particular, the Special Rapporteur cited “States’ use of overly broad legislative provisions” that may “capture a range of legitimate activities and would restrict the work of civil society, lawyers, journalists and human rights defenders” and warned against legislation which creates “incentives for self-censorship and directly undermines the ability of journalists and human rights defenders.”<sup>15</sup>

- **The European Court of Human Rights** (European Court) has consistently found that there is little scope for restrictions on political speech or on debate of questions of public interest.<sup>16</sup> The difficulties raised by the fight against terrorism do not in themselves suffice to absolve the national authorities from their freedom of expression obligations under Article 10 of the European Convention.<sup>17</sup> In other words, the principles which emerge from the Court’s case-law relating to Article 10 also apply to measures taken by national authorities to maintain national security and public safety as part of the fight against terrorism.<sup>18</sup> The European Court applied these principles in several cases where Turkish authorities have prosecuted and convicted individuals, journalists, protesters, members of the opposition, and human rights defenders under the Criminal Code and the Counter-Terrorism Law in its various iterations.<sup>19</sup>

### ***Freedom of expression and privacy***

15. The right to privacy is protected under the ICCPR (Article 17) and the European Convention (Article 8). Under Article 19 para 3 of the ICCPR and Article 10 para 2 of the Convention, the right to freedom of expression may legitimately be restricted for the purposes of protecting the privacy rights of others. As underlined above, when a legitimate aim is invoked, including ‘the protection of the rights of others’, the state must demonstrate in an individualised manner the precise nature of the threat that a given expression poses for that legitimate aim. Relevant jurisprudence and authoritative interpretation on balancing the right to freedom of expression with the right to privacy can be summarised as follows:

- When freedom of speech is in conflict with the right to privacy, international human rights law requires that authorities conduct a detailed assessment to adequately weigh the conflicting rights and interests, namely, the right to freedom of expression versus the right to privacy. **The Human Rights Committee** stated that in a “public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.”<sup>20</sup>

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<sup>14</sup> “Impact of counter-terrorism measures on civil society and civic space, and counter-terrorism-based detention”, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/78/520, 10 October 2023, para 47.

<sup>15</sup> *Ibid.*

<sup>16</sup> See, e.g., European Court, *Sürek v. Turkey (no. 2)*, [App. No. 24122/94](#), 8 July 1999, para 34.

<sup>17</sup> European Court, *Döner and Others v. Turkey*, [App. No. 29994/02](#), 7 March 2017, para 102.

<sup>18</sup> European Court, *Faruk Temel v. Turkey*, [App. No. 16853/05](#), 1 February 2011, para 58.

<sup>19</sup> See e.g., European Court, *Özer v. Turkey (no.3)*, [App. No. 69270/12](#), 11 February 2020; *Hatice Coban v. Turkey*, [App. No. 36226/11](#), 20 October 2019; *Ali Gürbüz v. Turkey*, [App. Nos. 52497/08 and 6 others](#), 12 March 2019.

<sup>20</sup> General Comment No. 34, *op.cit.*, para 38. See also HR Committee, *Bodrozic v. Serbia and Montenegro*, [Comm. No. 1180/2003](#), 31 October 2005.

- **The European Court** has consistently reiterated that an uninhibited debate on issues of public interest is a core societal value which elevates the need for protection of a given expression.<sup>21</sup> In a number of cases under Article 8 of the Convention concerning press, the Court has stated that although the press must not overstep certain bounds regarding the protection of the reputation and rights of others, its task is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest;<sup>22</sup> and that the press must retain its vital function as a “public watchdog.”<sup>23</sup> Hence, whenever measures or sanctions imposed by the state authorities can discourage participation of the press in debates over matters of legitimate public concern, the most careful scrutiny must be applied.<sup>24</sup>

16. ARTICLE 19 further submits that it is well-established under international freedom of expression standards that all public figures, and in particular senior civil servants, acting in an official capacity are subject to wider limits of acceptable criticism than private individuals.<sup>25</sup> This is because they inevitably and knowingly expose themselves to public scrutiny and must therefore display a particularly high degree of tolerance.<sup>26</sup> The European Court reiterated these principles also in cases against Türkiye in cases concerning journalists.<sup>27</sup>

## Compliance of the applicable Turkish law provisions with international and regional standards

17. The Defendant is charged under Article 6(1) of the Counter-Terrorism Law, Law No. 3713 29, which states: “Those who announce that the crimes of a terrorist organization are aimed at certain persons, whether or not such persons are named, or who disclose or publish the identity of officials on anti-terrorist duties, or who identify such persons as targets shall be punished with imprisonment between one to three years.”

18. ARTICLE 19 submits that these provisions do not meet the requirements of the three-part test outlined above:

- The provisions do not meet the requirement of **legality** that mandate that the law in question be precisely formulated and foreseeable. The conduct punishable by the law is overly ambiguous. Firstly, the disjunctive character of the operative elements of the

<sup>21</sup> See European Court, *Khadija Ismayilova v. Azerbaijan*, [App. No. 65286/13 and 57270/14](#), 10 January 2019, para 161; or *Bodrozic v. Serbia and Montenegro*, *op.cit.*

<sup>22</sup> European Court, *Couderc and Hachette Filipacchi Associés v France*, [App. No. 40454/07](#), 10 November 2015, para 89.

<sup>23</sup> See, e.g., European Court, *The Observer and Guardian v. the UK*, [App. No. 13585/88](#), 26 November 1991, para 59; *Busuioc v. Moldova*, [App. No. 61513/00](#), 21 December 2004, para 56.

<sup>24</sup> See, e.g., European Court, *Lingens v Austria*, [App. No. 9815/82](#), 8 July 1986, para 44, *Bladet Tromsø and Stensaas v. Norway* [GC], [App. No. 21980/93](#), para 64; *Thorgeir Thorgeirson v. Iceland*, [App. No. 13778/88](#), 25 June 1992, para 68.

<sup>25</sup> See, e.g., European Court, *Morice v. France*, [App. No. 29369/10](#), 23 April 2015, para 131; *Aurelian Oprea v. Romania*, [App. No. 12138/08](#), 19 January 2016, para 74; *Do Carmo de Portugal e Castro Câmara v. Portugal*, [App. No. 53139/11](#), 4 October 2016, para 40. See also General Comment No. 34, *op. cit.*, para 38.

<sup>26</sup> See, e.g., European Court, *Kuliš v. Poland*, [App. No. 15601/02](#), 18 March 2018, para 47; *Hannover v. Germany (No. 2)*, [Apps. App. Nos. 40660/08 and 60641/08](#), 7 February 2012, para 110; or *Amihalachioaie v. Moldova*, [App. No. 60115/00](#), 20 April 2004, paras 35-36, 39.

<sup>27</sup> See European Court, *Dilipak v. Turkey*, [App. No. 29680/05](#), 15 September 2015, concerning the prosecution of a journalist for ‘denigrating’ the Turkish armed forces.

provision is a matter of great concern: it allows to prosecute those “who disclose or publish the identity of officials on anti-terrorist duties, or who identify such persons as targets”. Secondly, given the convoluted definition of terrorism under Turkish law,<sup>28</sup> it is not sufficiently foreseeable which public officials ought to be considered to be “on anti-terrorist duties”. Finally, the formula “identifying as a target” appears to be overly broad and ambiguous. As designed under Article 6(1), the punishable conduct is not linked to an act of incitement to commit a crime against the public official. In practice, any critical reporting on a state official that may trigger non-violent protest actions against them could be considered an offence under Article 6(1). As such, the provision at hand risks becoming a catch-all formula that can cover any content and any information pertaining to relevant public officials. Article 6(1) requires more precise drafting for the sake of the foreseeability of its application.

- The legal construction of Article 6(1) fails to satisfy the requirement of **necessity and proportionality**. As outlined earlier, international human rights standards provide that laws should only allow for the criminalisation of speech that directly encourages the commission of an act that is truly terrorist in nature, is intended and is likely to result in such a terrorist act being committed.

19. We also note that the Council of Europe’s Committee of Ministers strongly criticised Article 6 of Law No. 3713 as a whole, with a reference to relevant European Court’s case-law:

Where the views expressed, however scathing they may be do not encourage violence, armed resistance, an uprising, hostility or hatred between citizens, or seem unlikely to do so, the Court believes that it is unjustified to restrict freedom of expression. [...]. In the light of the Court's case-law, criminal liability should be clearly confined to statements inciting to violence.<sup>29</sup>

The wording of “identification as a target” of an individual, which is the operative part of the provision relied upon by the prosecution in this case, goes well beyond incitement to commit violence against said individual.

20. ARTICLE 19 also notes that the Turkish Criminal Code already criminalises a range of offenses that would overlap with inciting of violence or other crimes against public officials “on anti-terrorist duties.” These include “provocation to commit a public offense”; “provoking public hatred and hostility towards a section of the public”; and “provocation to disobey the law”.<sup>30</sup> As such, there is “no pressing social need” to penalise

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<sup>28</sup> See, e.g., the Letter of the mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the independence of judges and lawyers to Turkish Government, [OL TUR 13/2020](#), 26 August 2020.

<sup>29</sup> Information Documents - CM/Inf(99)28 15 May 2000, Violations of the freedom of expression in Turkey: General and individual measures, Implementation by Turkey of judgments of the European Court of Human Rights (Application of Article 46, paragraph 2, of the European Convention on Human Rights), Memorandum prepared by the Directorate General of Human Rights, Section C.1 a. Introduction of the general criterion of “incitement to violence.”

<sup>30</sup> The Turkish Criminal Code, Article 214 “Provocation to Commit a Public Offence, Article 216 “Provoking public Hatred and Hostility towards a section of the public”, and Article 217 “Provocation to Disobey the Law”. For these articles, a Common



peaceful conduct, without any elements of incitement, in such broad and convoluted terms as it is enshrined in Article 6(1).

21. In its commentary on the provision at hand, the Council of Europe's Committee of Ministers also pointed out the failure of the Turkish legislator to recognise the defence of truth and public interest.<sup>31</sup> This lacuna in the law impedes law enforcement's and the judiciary's ability to properly balance the interests in protecting the freedom of the press and those in protecting the identity of the public officials in question as required by Article 19 of the ICCPR and Article 10 of the European Convention. Specifically referencing Article 6(1), the Council of Europe's Committee of Ministers recommended that:

If restrictions on freedom of expression are to be proportionate to the legitimate aims pursued, the latter must be weighed up against other conflicting interests, such as the public interest in being informed. In some cases, this public interest may take precedence over the need, for example, to protect the rights of others. In addition, where the remarks complained of contain factual elements, their truthfulness is a key element to be taken into account.<sup>32</sup>

22. We also note that the European Court already found the prosecutions under Article 6(1), in absence of the defence of public interest and the defence of truth in Turkish legislation, to violate Article 10 of the European Convention.<sup>33</sup>

## **Application of the relevant international human rights standards to the present case**

23. Even if the court accepts that Article 6(1) of Law No. 3713 can form the basis for the prosecution (and that it meets the requirement of "provided by law"), which ARTICLE 19 vehemently disputes, we submit that its application to the case of Mr Karabay would not sustain scrutiny under the requirements of the three-part test, listed above.
24. First, ARTICLE 19 argues that the restrictions **did not pursue a legitimate aim**. The onus of establishing every requisite element of the crime and presenting sufficient and admissible evidence in its support lies on the prosecution. The failure to do so renders the interference with the Defendant's right to freedom of expression to be without a legal basis. It is unclear how Mr Fidan, a current judge of the Constitutional Court of Türkiye, can benefit from a provision that grants protection of privacy to officials "on anti-terrorist duties." Furthermore, his previous high-level position as the Chief Public Prosecutor of Istanbul entailed a wide jurisdiction that well transgressed the pool of cases with terrorism elements. The publications of the Defendant touched upon

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Provision Article 218 increases the penalties where the offences defined in the aforementioned articles are committed through the press or broadcasting.

<sup>31</sup>Information Documents - CM/Inf(99)28 15 May 2000, Violations of the freedom of expression in Turkey: General and individual measures, Implementation by Turkey of judgments of the European Court of Human Rights (Application of Article 46, paragraph 2, of the European Convention on Human Rights), Memorandum prepared by the Directorate General of Human Rights, Sections C.1b and C.2.

<sup>32</sup> *Ibid.*, Section C.1.b.

<sup>33</sup> See e.g. the European Court, *Süreker v. Turkey (no. 2)*, *op.cit.*; or *Özgür Gündem v. Turkey*, [App. No. 23144/93](#), 16 March 2000.

numerous aspects of Mr Fidan's work as a prosecutor. The cases cited in the impugned social media posts and the news article went well beyond the discussion of terrorism cases. Most importantly, the two indictments that form the basis for the charges against the Defendant simply state that the Defendant's publications "identified the complainant as a target" without providing any further elaboration on how Mr Karabay's journalistic work or opinions he expressed on social media placed Mr Fidan, a well-known political figure in Türkiye, at risk of being a victim of crimes. This violates the well-established principle of criminal justice that the burden of proof rests upon the prosecution.

25. ARTICLE 19 also submits that there was no pressing social need to prosecute the Defendant for his publications. The Defendant acted as a journalist with a view to inform the Turkish public of issues of great public interest. The margin of appreciation of States in determining that pressing social need is particularly narrow where freedom of the press is at stake.<sup>34</sup> Careful examination of the impugned publications reveals a large number of issues of public interest raised: allegations of corruption, money laundering, partiality, political connections of Mr Fidan, lack of accountability for high-profile violent crimes, as well as the circumstances of Mr Fidan's appointment as a judge of the Constitutional Court. As an important public figure who is now a sitting judge of the Constitutional Court, Mr Fidan is legitimately subject to elevated public scrutiny and needs to accept higher levels of criticism and intrusion in his privacy, including in relation to the previous positions that he held in the government. It is important that the Defendant's reporting concerns the exercise of Mr Fidan's official functions rather than the details of his private life, which diminishes the considerations of privacy in the case at hand. Not only does Mr Karabay have the right to exercise his right to freedom of expression and publish social media posts and an online article about a high-profile government official, but the public also holds the right to be informed about such officials.<sup>35</sup>
26. ARTICLE 19 recalls that in *Sürek v. Turkey (no. 2)*, the European Court noted that the seriousness of the alleged misconduct in question elevated the need for the public in knowing not only the nature of the conduct but also the identity of the public officials who were implicated in that case.<sup>36</sup> Similarly, in the present case, the Defendant raised allegations of serious crimes committed by Mr Fidan, including high-level political corruption and abuse of office. The public has a legitimate interest in being informed on these matters.
27. Further, as a top-tier prosecutor, Mr Fidan's identity and his role in terrorism-related cases was already in public domain when the impugned publications appeared online. As such, there is no legitimate interest in protecting his identity. We recall that in *Özgür Gündem v. Turkey*, which concerned lower-tier local officials involved in fighting terrorism (gendarmerie commanders, village guards, and a regional governor), the European Court underlined that their names had already been in public domain when the publications that formed the basis for criminal prosecution for uncovering the

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<sup>34</sup> The European Court, *Dammann v. Switzerland*, [App. No. 77551/01](#), 25 April 2006, para 51.

<sup>35</sup> *Lingens v Austria*, *op.cit.*, paras 41-42.

<sup>36</sup> *Sürek v. Turkey (no. 2)*, *op.cit.*, para 39.

officials' identity were published.<sup>37</sup> The Court pointed out that, as a result of their role and identity already being known to the general public, the potential damage which the restriction aimed at preventing was minimal and, thus, the criminal measures applied against the media outlet in that case could not be justified.<sup>38</sup> The invocation of a legitimate aim, such the protection of one's right to privacy, to restrict free expression cannot be based on a speculation. The State must demonstrate, in an individualised fashion, the precise nature of the threat to Mr Fidan's rights to be able to establish "a pressing social need" to intervene with the defendant's journalistic work. In defiance of international standards, the prosecution provided no evidence of the imminent connection between the Defendant's expression and the likelihood of violence occurring against Mr Fidan.

28. Further, as the Defendant highlighted, his publications were based on facts and actuality of the allegations.<sup>39</sup> This examination must also be conducted with reference to the public watchdog function of the press and the well-established principle of protection of journalist sources.<sup>40</sup>
29. Finally, the very fact of criminal prosecution of the Defendant and the possibility of imprisonment as a punishment does not pass the test of **proportionality**. Any interference with an expression is disproportionate unless there is no less restrictive measure to pursue the stipulated legitimate aim. ARTICLE 19 reiterates that criminal penalties, and in particular imprisonment, are only permissible in the exceptional cases.<sup>41</sup> We also recall that the European Court has put great emphasis in its jurisprudence on avoiding severe penalties that amount to a form of censorship intended to discourage the press from exercising its function.<sup>42</sup> In this case, the imposition of criminal sanctions on a well-known journalist for speech of political nature will also inevitably produce a chilling effect on the media environment in Türkiye and will discourage others from participating in a debate on issues of public interest. Imprisonment seems to be the only possible punishment under the relevant provisions, which renders the Defendant's prosecution grossly disproportionate.
30. Without prejudice to the main arguments, we note that if the Defendant's accusations had indeed harmed Mr Fidan's reputation, which was not claimed in this case, the matter should have been pursued through a civil dispute. The latter would present a legitimate alternative remedy to protect Mr Fidan from damage to his reputation, should he be able to establish the unjustified and defamatory character of Defendant's publications.

## Conclusion

31. In light of the foregoing, ARTICLE 19 submits that the prosecution of the Defendant constitutes a violation of his right to freedom of expression, as guaranteed by Article 10 of the European Convention and Article 19 of the ICCPR. The provisions of Article 6(1) of

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<sup>37</sup> *Özgür Gündem v. Turkey*, *op.cit.*, para 68.

<sup>38</sup> *Ibid.*

<sup>39</sup> See, on the defence of truth, *Sürek v. Turkey (no. 2)*, *op.cit.*, para 39; *Özgür Gündem v. Turkey*, *op.cit.*, para 68.

<sup>40</sup> See e.g., the European Court, *Sanoma Uitgevers B. V. v. The Netherlands*, [App. No. 38224/03](#), 14 September 2010.

<sup>41</sup> *Sürek v. Turkey (no. 2)*, *op.cit.*, para 34; or Global Principles on Freedom of Expression and Privacy, *op.cit.*, Principle 24.

<sup>42</sup> The European Court, *Bédat v. Switzerland*, [GC], App. No. 56925/08, 29 March 2016, para 79.

the Turkish Anti-Terrorism Law No. 3713, on the basis of which he was charged, fail to satisfy the test of legality, necessity and proportionality. The prosecution failed to provide any evidence as to the individualised link between the Defendant's publications and the alleged threat to the rights of Mr Fidan. There is no "pressing social need" to apply a criminal sanction to the work of a journalist who raises legitimate questions of public interest about a well-known political figure in Türkiye. In any event, the application of the sanction of imprisonment would be a grossly disproportionate measure for the achievement of the articulated objectives. The conviction of the Defendant, an investigative journalist, can also produce a chilling effect on engaging in public debate and conducting media work on issues of public interest.

32. ARTICLE 19 therefore respectfully asks the Court to dismiss the charges against the Defendant in their entirety.

JUDr. Barbora Bukovska  
Senior Director for Law and Policy  
On behalf of ARTICLE 19