EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release issued by the Registrar of the Court

ECHR 169 (2020)
11.06.2020

Criminal conviction of activists involved in the BDS campaign boycotting products imported from Israel had no relevant and sufficient grounds and violated their freedom of expression

In today's **Chamber** judgment[1] in the case of **Baldassi and Others v. France** (application no. 15271/16) the European Court of Human Rights held:

by a majority, that there had been **no violation of Article 7 (no punishment without law)** of the European Convention on Human Rights**, and**

unanimously, that there had been **a violation of Article 10 (freedom of expression) of the Convention.**

The cases concerned a complaint by activists in the Palestinian cause about their criminal conviction for incitement to economic discrimination, on account of their participation in actions aimed at boycotting products imported from Israel as part of the campaign "BDS : Boycott, Divestment and Sanctions".

The Court observed that as case-law stood at the relevant time, the applicants should have known that they were likely to be convicted under section 24 (8) of the Law of 29 July 1881 for calling for a boycott of products imported from Israel.

The Court noted that the impugned actions and comments from the applicants were a form of political or "militant" expression and concerned a subject of public interest.

The Court has emphasised on many occasions that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. It was in the nature of political speech to be controversial and often virulent. That did not diminish its public interest, provided that it did not cross the line and turn into a call for violence, hatred or intolerance.

The Court considered that the applicants' conviction had lacked any relevant or sufficient grounds. It was not convinced that the domestic court had applied rules in keeping with the principles set out in Article 10 or had conducted an appropriate assessment of the facts.

Principal facts

The eleven applicants are: Jean-Michel Baldassi, Henri Eichholtzer, Aline Parmentier, Sylviane Mure, Nohammad Akbar, Maxime Roll, Laila Assakali, Yahya Assakali, Jacques Ballouey, Habiba El Jarroudi, and Farida Sarr-Trichine. The applicants are all French nationals, apart from Nohammad Akbar and Habiba El Jarroudi, who are Afghan and Moroccan nationals respectively. Mr Eichholtzer and Ms Parmentier live in Habsheim and Zillisheim respectively. Jacques Ballouey lived in Mulhouse, as did the other applicants.

The applicants are members of the "Collectif Palestine 68", which is a local relay for the international campaign "Boycott, Divestment and Sanctions" (BDS). This campaign was launched on 9 July 2005 with an appeal from Palestinian non-governmental organisations, one year after the opinion issued

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

by the International Court of Justice which states that "[t]he construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law".

On 26 September 2009 five of the applicants took part in an action inside the [C.] hypermarket in Illzach, calling for a boycott of Israeli products, as organised by the "Collectif Palestine 68". They displayed the articles which they considered to be of Israeli origin in three trolleys in full view of customers, and handed out leaflets.

A similar event was organised by the "Collectif Palestine 68" on 22 May 2010 in the same hypermarket. Eight of the applicants were involved. They also presented a petition to be signed by hypermarket customers, inviting the hypermarket to stop selling products imported from Israel.

The Colmar public prosecutor summoned the applicants to appear before Mulhouse Criminal Court, among other things for incitement to discrimination, which offence is provided for in section 24 (8) of the Law of 29 July 1881.

By two judgments of 15 December 2011, Mulhouse Criminal Court acquitted the applicants. By two judgments delivered on 27 November 2013, Colmar Court of Appeal set aside the former judgments inasmuch as they had acquitted the applicants. It found the applicants guilty of the offence of incitement to discrimination.

As regards the incidents on 26 September 2009, the Court of Appeal imposed on each of the five accused a suspended fine of 1,000 euros (EUR) and ordered them to jointly pay each of the four admissible civil parties (the International League against Racism and Antisemitism, the Lawyers without Borders association, the "Alliance France-Israel" association and the "Bureau national de vigilance contre l'antisémitisme") EUR 1,000 in respect of non-pecuniary damage, and EUR 3,000 on the basis of Article 475-1 of the Code of Criminal Procedure (civil party expenses not defrayed by the State).

Concerning the incidents of 22 May 2010, the Court of Appeal imposed on each of the nine accused a suspended fine of EUR 1,000 and ordered them to jointly pay three of the civil parties (the International League against Racism and Antisemitism, the Lawyers without Borders association, the "Alliance France-Israel" association) EUR 1,000 each in respect of non-pecuniary damage, and EUR 3,000 on the basis of Article 475-1 of the Code of Criminal Procedure (civil party expenses not defrayed by the State).

By two judgments of 20 October 2015, the Criminal Division of the Court of Cassation dismissed the appeals on points of law lodged by the applicants, who had alleged, in particular, a violation of Articles 7 and 10 of the Convention. It found among other things that the Court of Appeal had justified its decision since it had rightly noted that the constituent elements of the offence laid down in section 24 (8) of the Law of 29 July 1881 had been made out and that the exercise of freedom of expression, set out in Article 10 of the Convention could, pursuant to paragraph 2 of that provision, be subject to restrictions or sanctions which, as in the present case, were measures necessary in a democratic society for the prevention of disorder and the protection of the rights of others.

Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law) of the Convention, the applicants complained that they had been convicted of incitement to economic discrimination on the basis of section 24 (8) of the Law of 29 July 1881 on freedom of the press, whereas that text had not covered economic discrimination. Relying on Article 10 (freedom of expression), they complained of their criminal conviction on account of their participation, in the context of the BDS campaign, in actions calling for a boycott of articles produced in Israel.

The applications were lodged with the European Court of Human Rights on 16 March, 18 March and 21 March 2016.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Mārtiņš **Mits** (Latvia),
Lado **Chanturia** (Georgia),
Anja **Seibert-Fohr** (Germany),

and also Victor **Soloveytchik**, *Deputy Section Registrar.*

Decision of the Court

Article 7

In the present case the Court observed that the applicants had been convicted under section 24 (8) of the Law of 29 July 1881, which provided that "anyone who, by any of the means set out in section 23, has engaged in incitement to discrimination, hatred or violence against a person or group of persons on account of their origin or their (non-)membership of a specific ethnic group, nation, race or religion shall be liable to one year's imprisonment and/or a fine of 45,000 euros".

The applicants were acquitted at first instance on the grounds, in particular, that the acts for which they had been prosecuted had been intended merely to dissuade customers from purchasing Israeli products and that section 24 (8) of the 29 July 1881 Law did not cover "economic" discrimination, the latter being specifically governed by section 24 (9), which referred to the acts of economic discrimination set forth and defined in Article 225-2 of the Penal Code. The Colmar Court of Appeal had, however, set aside that judgment, considering that the applicants had "incited people to discriminate against products from Israel" by discouraging customers from buying such goods on account of the origin of the producers, who constituted a "group of persons" belonging to a specific "nation", namely Israel.

The Court observed that section 24 (8) of the Law of 29 July 1881 did not explicitly mention incitement to economic discrimination. Section 24 (9) explicitly referred to that form of incitement to discrimination, but exclusively on grounds of sex, sexual orientation or disability, and not on account of origin or belonging to a particular nation.

However, the Court agreed with the Government that prior to the facts of the case the Court of Cassation had come down in favour of applying section 24 (8) of the 29 July 1881 Law to cases of calls to boycott products imported from Israel.

Thus as case-law stood at the relevant time, the applicants should have known that they were likely to be convicted under section 24 (8) of the 29 July 1881 Law for calling for a boycott of products imported from Israel.

There had therefore been no violation of Article 7 of the Convention.

Article 10

The Court observed that the call for a boycott combined the expression of a protest with incitement to differential treatment such that, depending on the circumstances, such call is liable to amount to incitement to discrimination against others. Incitement to discrimination is a form of incitement to intolerance, which, together with calls to violence and hatred, is one of the limits which should never

be overstepped in exercising freedom of expression. Nevertheless, incitement to differential treatment is not necessarily the same as incitement to discrimination.

The Court agreed with the applicants and the third parties that a distinction had to be drawn between the present case and *Willem v. France*. In announcing his decision to ask the municipal catering services to boycott Israeli products, Mr Willem had been acting in his capacity as mayor and using his mayoral powers regardless of the concomitant duties of neutrality and discretion; he had made the announcement without a prior debate or vote in the municipal council, such that he could not claim to have encouraged free discussion of a subject of public interest. Unlike in the latter case, the applicants here were ordinary citizens who were not restricted by the duties and responsibilities arising from a mayoral mandate and whose influence on consumers was not comparable to that of a mayor on his municipal services. Moreover, it had been in order to trigger or stimulate debate among supermarket customers that the applicants had issued the calls for a boycott which had led to the criminal proceedings of which they complained before the Court.

The Court observed that the applicants had not been convicted of making racist or antisemitic remarks or of inciting hatred or violence. Nor had they been convicted of being violent themselves or causing damage during the incidents of 26 September 2009 and 22 May 2010. It transpired from the case file that there had been no violence and no damage had been caused. The hypermarket where the applicants had conducted their actions had not claimed damages as civil parties before the domestic courts.

The applicants had been convicted, on account of their call to boycott products from Israel, of having engaged in "incitement to discrimination" within the meaning of section 24 (8) of the Law of 29 July 1881 on freedom of the press.

Colmar Court of Appeal had held that by calling on the hypermarket customers not to purchase products from Israel the applicants had incited people to discriminate against the producers or suppliers of the said products on grounds of their origin. It then pointed out that incitement to discrimination was not covered by the right to freedom of opinion and expression since it amounted to a positive act of rejecting a category of persons, consisting in inciting people to have recourse to differential treatment. The court considered that the fact that the accused had incited others to discriminate among producers or suppliers, rejecting those from Israel, was sufficient to make out the *actus reus* element of the offence of incitement to discrimination, hatred or violence laid down in section 24 (8) of the Law of 29 July 1881 on freedom of the press. It added that freedom of expression did not allow the holder of that right, under cover of that freedom, to commit an offence punishable by law.

The Court did not wish to call into question the interpretation of section 24 of the Law of 29 July 1881 on which the applicants' conviction was based, to the effect that by calling for a boycott of products from Israel the applicants had, within the meaning of that provision, incited people to discriminate against the producers or suppliers of those products on grounds of their origin. However, the Court noted that French law, as interpreted and applied in the present case, prohibited any call for a boycott of products on account of their geographical origin whatever the tenor, grounds and circumstances of such call.

It further noted that, adjudicating on that legal basis, Colmar Court of Appeal had failed to analyse the actions and remarks prosecuted in the light of those factors. The court had concluded, broadly, that the call for a boycott had amounted to incitement to discrimination within the meaning of section 24 (8) of the 29 July 1881 Law, on the basis of which the applicants had been prosecuted, and that that call "was in no way covered by the right to freedom of expression".

Thus the domestic court had failed to establish that the applicants' conviction on account of their call to boycott products from Israel had been necessary in a democratic society to attain the legitimate aim pursued, that is to say the protection of the rights of others.

Yet the court had been under an obligation to give detailed reasons for its decision, especially since the instant case concerned a situation in which Article 10 of the Convention required a high level of protection of the right to freedom of expression. Indeed, on the one hand, the actions and remarks imputed to the applicants had concerned a subject of public interest, and on the other, those actions and words had fallen within the ambit of political or militant expression.

The Court had emphasised on many occasions that there was little scope under Article 10 § 2 for restrictions on freedom of expression in the sphere of political speech or matters of public interest.

As the Court had pointed out in its *Perinçek* judgment, it was in the nature of political speech to be controversial and often virulent. That did not diminish its public interest, provided that it did not cross the line and turn into a call for violence, hatred or intolerance.

The Court deduced that the applicants' conviction was not based on relevant and sufficient grounds. It was not convinced that the domestic court had applied rules in keeping with the principles set out in Article 10 or had conducted an appropriate assessment of the facts.

There had therefore been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court ruled that France was to pay each of the applicants 380 euros (EUR) in respect of pecuniary damage, EUR 7,000 in respect of non-pecuniary damage and EUR 20,000 jointly to the applicants in respect of costs and expenses.

Separate opinion

Judge O'Leary expressed a partly dissenting opinion, which is annexed to the judgment.

The judgment is available only in French.

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