REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ALİ KIDIK

(Application no. 2014/5552)

26 October 2017

On 26 October 2017, the Second Section of the Constitutional Court found violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution in the individual application lodged by *Ali Kıdık* (no. 2014/5552).

THE FACTS

[8-29] The applicant, owner and chief editor of a web-site publishing in the aviation sector, published five news articles on his web-site in March and April 2014 about O.Y., then chairman of the Turkish Aeronautical Association ("the TAA"). Titles of these news articles are as follows: "If you cause TAA to go bankrupt, I would not leave you in peace", "This document would make you shocked", "Full of ambition for undeserved money! When would you be satisfied" and "Turkish Aeronautical Association is on the edge of cliff". It was asserted therein that a meeting was held with O.Y. without touching upon the content thereof, and in brief, the following claims were made: the TAA was managed improperly, policies to the detriment of the association had been pursued, friends of O.Y. granted undeserved profit, total debt of the TAA exceeded 410 million Turkish liras according to the data provided by the Turkish Central Bank, and O.Y. provided employment for 110 of his relatives. Certain documents were published in support of these claims. The applicant was of the opinion that the TAA should focus on its fundamental duties and should be managed by professionals.

Upon O.Y.'s request, the 5th Chamber of the Ankara Magistrate's Court ordered blocking of access to the impugned news and articles. In his column that he wrote immediately upon the court's order, the applicant directly targeted O.Y. and maintained that a jet-aircraft and a helicopter of the TAA were rented out, with very low rates, to a political party chairman in the course of the local election campaigns, also recalling that his previous claims had not been refuted yet. The same court accepted O.Y.'s request and once again ordered blocking of access to this article. The objections raised by the applicant against these orders were dismissed by the 14th Chamber of the Ankara Criminal Court.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court, at its session of 26 October 2017, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

31. The applicant made the following allegations and requests:

i. He contended that the blocked articles did not involve any aspect that would constitute an offence; his articles did not contain insults; the legal conditions for blocking access did not arise; pieces of news in the articles were true; there was public

interest in publishing actual and current news and they were imparted by striking a balance between the essence and the form.

ii. He maintained that disclosing corruptions taking place in such a prominent public association served the best interest of the public; the press had a duty to inform the public of current events; and not only giving the news but also criticising and assessing the situation from different angles should also be considered as part of freedom of the press.

iii. He added that all his claims in the articles were concrete and supported by documents and that the inferior courts delivered their decisions on the very same day as the petition of complaint was filed, without collecting any documents or information.

iv. The applicant complained that his freedom of expression and freedom of the press were violated.

32. In its observations, the Ministry indicated that, despite the indispensable significance of the freedom of expression for a democratic society, the press was required to comply with the limitations set out for "the protection of the reputation or rights and private and family life of others". According to the Ministry, Article 9 of Law no. 5651 was adopted as a requirement of the State's positive obligation to protect the individuals' honour and reputation. Therefore, in the present case, the inferior courts found that there had been an attack against the complainant's personal reputation. The Ministry considered that the fact that the blocking of access was only imposed on certain articles instead of the whole website showed that the interference was proportionate.

B. The Court's Assessment

33. In the examination of the allegation, the Court will rely on Articles 26 and 28 of the Constitution which concern the protection of the freedom of expression and freedom of the press. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*" reads, in so far as relevant, as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities...

The exercise of these freedoms may be restricted for the purposes of ... protecting the reputation or rights ... of others...

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

34. Article 28 of the Constitution, titled "*Freedom of the press*" reads, in so far as relevant, as follows:

"The press is free, and shall not be censored...

The State shall take the necessary measures to ensure freedom of the press and information.

In the limitation of freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply..."

1. Admissibility

35. The Court declared the alleged violations of the freedoms of expression and the press admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

Mr. Serdar ÖZGÜLDÜR expressed a dissenting opinion in this respect.

2. Merits

a. Existence of Interference

36. Access was blocked with a court order to the applicant's articles published on a website. The said court order interfered with the applicant's freedom of expression and freedom of the press.

b. Whether the Interference Constituted a Violation

37. Article 13 of the Constitution reads, in so far as relevant, as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution... . These restrictions shall not be contrary to ... the requirements of the democratic order of the society ... and the principle of proportionality."

38. The above-mentioned interference shall constitute a violation of Article 26 of the Constitution unless it satisfies the requirements laid down in Article 13 of the Constitution. Therefore, it must be examined whether the interference in the present case was prescribed by law as required by Article 13 of the Constitution, relied on one or more than one of the legitimate aims set out in Article 26 § 2, and was in compliance with the requirements of the democratic order of the society and the principle of proportionality.

i. Whether the Interference was Prescribed by Law

39. No complaint was lodged as to the criterion of prescription by law. Under the circumstances of the instant application, the Court has concluded that Article 9 of Law no. 5651 constituted the legal basis of the restriction.

ii. Whether the Interference Pursued a Legitimate Aim

40. The Court has concluded that the impugned orders to block access to the news pieces and columns at issue pursued a legitimate aim as they were part of a series of measures aimed at "protecting the rights or reputation of others".

iii. Whether the Interference Complied with Requirements of the Democratic Order of the Society and the Principle of Proportionality

(1) General Principles

(a) Requirements of the Democratic Order of the Society

41. The Court has explained on many occasions what should be understood from the expression "requirements of the democratic order of the society". Accordingly, a measure that restricts the fundamental rights and freedoms must correspond to a social need and be used as a last resort. If the restrictive measure does not satisfy these criteria, it cannot be considered as a measure which is compatible with requirements of the democratic order of the society (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan,* no. 2014/6128, 7 July 2015, § 51). Inferior courts enjoy a certain margin of appreciation in the determination of whether or not such a social need is present. Nevertheless, this margin of appreciation is subject to the Court's review.

(b) Proportionality

42. In addition, it should also be examined whether any restriction imposed on fundamental rights and freedoms is a proportional limitation that allows for the least interference possible with fundamental rights, provided that the relevant interference is required for the democratic order of the society (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 63; *Bekir Coşkun*, §§ 53 and 54; for explanations as to the principle of proportionality, see also *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, §§ 96-98; *Tansel Çölaşan*, §§ 54 and 55; and *Mehmet Ali Aydın*, §§ 70-72). Therefore, the measure of blocking access imposed in the present case must be in a reasonable balance of proportionality with the damage that is believed to have been sustained by the complainant.

(c) Online Journalism and Freedom of the Press

43. Online journalism via the Internet, as long as it performs the fundamental function of the press, must be considered within the ambit of freedom of the press (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.,* no. 2013/2623, 11 November 2015, §§ 36-42; *Önder Balıkçı,* no. 2014/6009, 15 February 2017, § 39; and *Orhan Pala,* no. 2014/2983, 15 February 2017, § 45). While freedom of the Internet falls within the ambit of the liberty of imparting thoughts and opinions from the perspective of the press, it is considered as part of the liberty of receiving

information or ideas -enshrined in the essence of the constitutional protection on the freedom of expression- from the perspective of individuals accessing the Internet (i.e. the Internet users).

44. The freedom of expression and freedom of the press apply to everyone and are vital for proper functioning of democracy (see *Bekir Coşkun*, §§ 34-36). These freedoms not only cover the content of information but also the means through which such information is disseminated. Therefore, all kinds of restrictions imposed on websites or measures such as blocking of access to news available on websites have a real bearing on the freedom of receiving and imparting information. It must be borne in mind that the press offers one of the best means of conveying different ideas and positions in terms of forming public opinion (see *İlhan Cihaner (2),* no. 2013/5574, 30 June 2014, § 63).

(d) Scope of the Freedom of Expression

45. On the other hand, Article 26 § 1 of the Constitution does not envisage a limitation on the freedom of expression in regard to contents. The freedom of expression covers any kind of expression such as imparting political, artistic, academic or commercial thoughts and opinions (see *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, § 37; and *Önder Balıkçı*, § 40). Therefore, the information contained in columns and news pieces on a website, even if they are regarded as "valueless" or "useless" by others, fall under the protection of the freedom of expression regardless of individuals' subjective evaluations.

46. In cases such as the present one, the freedoms of expression and the press also protect, in addition to the right to convey information, the public's right to receive information regarding well-known figures. Moreover, the Court has repeatedly emphasised that politicians, figures well-known to the public, and persons exercising public authority should be more tolerant to criticism as a consequence of their functions and that the acceptable limits of criticism towards these persons are wider (see, for politicians, *Ergün Poyraz (2)*, § 58; for persons exercising public authority, *Nilgün Halloran,* no. 2012/1184, 16 July 2014, § 45; for a well-known Chief Public Prosecutor, *İlhan Cihaner (2)*, § 82; and for a well-known public official preparing to enter politics, *Önder Balıkçı*, § 42).

(e) Duties and Responsibilities of the Press

47. Although the press has the right to criticise and comment on politicians and public officials in a democratic society, Articles 26 and 28 of the Constitution do not guarantee an absolutely unlimited freedom of expression. Article 12 § 2 of the Constitution ("*The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals.*") also refers to the duties and responsibilities of persons in the exercise of their fundamental rights and freedoms. The obligation to abide by the limitations stipulated by Article 26 § 2 of the Constitution entails

certain “duties and responsibilities” with respect to the exercise of the freedom of expression, which are also applicable to the press (see, for the duties and responsibilities of the press, *Orhan Pala*, § 46; *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 22 February 2016, § 89; *R.V.Y. A.Ş.,* no. 2013/1429, 14 October 2015, § 35; *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 67; and *Önder Balıkçı*, § 43).

48. These duties and responsibilities are particularly important in situations where “the rights and reputation of others” might be damaged and especially when the reputation of an individual whose name is mentioned is concerned (see *Orhan Pala*, § 47). Freedom of the press requires the persons concerned to respect the professional ethics, give true and reliable information and act in good faith. Distortion of the truth in bad faith may exceed the limits of acceptable criticism. Therefore, the duty to provide information includes obligations and responsibilities and limits to which the press agencies need to conform *ipso facto* (see *Orhan Pala*, § 48; *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, §§ 42 and 43; *Kadir Sağdıç* [Plenary], no. 2013/6617, 8 April 2015, §§ 53 and 54; and *İlhan Cihaner (2)*, §§ 60 and 61).

49. The scope of the responsibilities at issue varies depending on the applicant’s circumstances and the means by which the freedom of expression is exercised. In the determination of whether a sentence is “necessary in a democratic society”, the Court will not disregard this aspect of the matter.

(f) Protection of the Honour and Reputation of Individuals

50. According to Article 26 § 2 of the Constitution, another reason for restricting the freedom of expression and, by extension, a responsibility that must be fulfilled by the press is the protection of the reputation or rights of others. The honour and reputation of an individual constitute a part of his/her personal identity and spiritual integrity and benefits from the protection of Article 17 § 1 of the Constitution (see *İlhan Cihaner (2)*, § 44). The State is obliged not to arbitrarily interfere with an individual’s honour and reputation and to prevent the attacks of third parties (see *Nilgün Halloran*, § 41; *Adnan Oktar (3),* no. 2013/1123, 2 October 2013, § 33; *Bekir Coşkun*, § 45; and *Önder Balıkçı*, § 44).

51. For these reasons, in similar applications, the Court examined whether a fair balance had been struck between the applicant’s freedom of expression and the press (which was interfered with due to the blocking of access to the content) and the right to respect for the honour and reputation (which was interfered with due to the news published on the website) (see *Nilgün Halloran*, § 27 and *İlhan Cihaner (2)*, § 39). This examination is not an abstract one.

(g) Balancing Exercise between Competing Rights

52. Some of the criteria for a balancing exercise between competing rights -applicable to the present case- may be listed as follows:

i. whether the publication in question is true;

ii. whether there is public interest in the publication and whether it contributes to a debate of general interest;

iii. whether the public is interested in the subject and whether the subject is current;

iv. whether a balance was struck between the essence and the form;

v. the circumstances under which the news or article was published;

vi. the subject of the news or article; the kind of expressions used therein; the content, form and consequences of the publication;

vii. the nature and scope of the restrictions on the news;

viii. the identity of the person stating the expressions found in the news;

ix. the identity of the person targeted, how well he/she is known and prior conduct of the person concerned;

x. the weight of the rights of the public and other persons against the expressions used.

53. In line with the circumstances of the application, the Court reviews whether the relevant criteria, some of which are mentioned above, were duly taken into consideration (see *Nilgün Halloran*, § 41; *Ergün Poyraz (2)*, § 56; *Kadir Sağdıç*, §§ 58-66; and *İlhan Cihaner*, §§ 66-73). Therefore, all the content published by the applicant should be evaluated within the entirety of the case, without separating them from the context in which they were published (see *Nilgün Halloran*, § 52 and *Önder Balıkçı*, § 45).

(h) Grounds for the Interference with Freedom of Expression

54. In this regard, the centreline of the assessments to be made in respect of the impugned incident is whether the administration and inferior courts could plausibly set forth that the grounds on which they relied in their decisions constituting the interference in question were "necessary in a democratic society" and compatible with the "principle of proportionality" in respect of the restriction imposed on the freedom of expression (see *Bekir Coşkun*, § 56; *Abdullah Öcalan*, § 98; *Tansel Çölaşan*, § 56; and *Ahmet Temiz (6)*, no. 2014/10213, 1 February 2017, § 34). Interferences with the freedom of expression without any grounds or on such grounds that do not satisfy the criteria laid down by the Court shall be in breach of Article 26

of the Constitution.

(2) Certain Findings as to the Blocking of Access Ordered on the Basis of Article 9 of Law no. 5651

55. Expression and dissemination of thoughts on the Internet are easier, cheaper, faster and more widespread than the printed publications. It is easy to access websites, as well. Websites offer a larger capacity in terms of storing and disseminating a vast amount of data. For these reasons, websites play an important role in improving the public's access to current issues and facilitating the transmission of information. For the same reasons, some offences are committed more easily by means of the publications on the Internet. In particular, personal rights and rights to private life may be violated by anyone in an easy, cost-free and speedy manner. The legislator has provided for special and speedy procedures, besides ordinary cases or filing complaints before the public prosecutor's offices, for the purpose of combating more effectively with the offences committed through the Internet and providing a speedier and more effective protection of private life and personal rights. One of those procedures involves the decisions on removal of the content and the blocking of access to publication, which was introduced by Law no. 5651 and is issued by a magistrate judge via a non-contentious procedure or by the head of the Information and Communication Technologies Authority (ICTA) and the approval of a magistrate judge.

56. It is clearly noted under Article 8 of Law no. 5651, titled "*Decision on blocking of access and its execution*", that the magistrate judges' decisions to block access or remove content are "protection measures". It is noted under Article 9/A of Law no. 5651, titled "*Blocking of access to the content on account of the right to respect for private life*", that such a decision is a "protection measure". In its judgment dated 2 October 2014, the Plenary of the Court held that decisions on blocking of access are necessary and exceptional judicial measures which are taken in democratic countries for the grave offences such as child pornography, sexual abuse of children and racism and are imposed as a part of criminal proceedings. The Court previously pointed out that the decisions on blocking of access under Law no. 5651 are not criminal or administrative sanctions but merely measures (see the Court's judgment no. E.2014/149, K.2014/151, 2 October 2014).

57. Protection measures restrict a fundamental right of the persons in respect of whom a judgment had not been rendered yet at the time of the imposition. Accordingly, at the time of imposition of the measure, it was not legally certain whether the act had been carried out; if it had been carried out, whether it had been done so by the suspect or accused or whether the relevant act constituted an offence; or whether the facts justifying the imposition of measures on third parties had been accurate. Such certainty could only be observed upon the finalisation

of the judgment. Therefore, the protection measure does not involve a degree of lawfulness to the extent of legal certainty at the time of its imposition. The question whether the relevant measure is lawful or not may only be answered when the facts and legal consideration on which the measure is based are proven to be appropriate. Otherwise, it would be concluded that the imposed measure is unlawful.

58. According to Article 9 of Law no. 5651 which is resorted to in cases of violation of personal rights, natural persons and legal entities alleging a violation of their personal rights may request the removal of publication of that content by means of sending a warning to the content provider or, if the content provider cannot be contacted, to the hosting provider, or such persons/entities may also apply directly to a judge to request blocking of access to the content. The judge who receives such a request is obliged to issue a decision on the request without holding a hearing. The necessary action for the decision on blocking of access to the content submitted by the Access Providers Union ("the Union") to the access provider must be carried out immediately, within 4 hours at the latest, by the access provider.

59. It is not clear in Article 9 of Law no. 5651 whether a judicial investigation will be launched against the perpetrators after the decision to block access. Where an investigation is launched for the interference with personal rights, judicial authorities may render a decision as to the consequence of the blocking of access measure according to the outcome of the investigation or prosecution. On the other hand, if an investigation is not launched, the measure in question will prevent Internet users from accessing the blocked content for an indefinite period of time.

60. As it is observed, upon the request for blocking of access to content, the magistrate judge carries out an examination on the basis of the documents submitted by the person who filed the request. Accordingly, the relevant media organ and those responsible are not informed of the application which was filed. Moreover, the relevant persons from the website, against which the request for blocking of access was filed, cannot be present at the hearing as in contentious proceedings since a hearing will not be held. As the judge is obliged to issue the decision within 24 hours, he/she cannot send a notification to the other party and ask them to submit written statements. The other party cannot defend themselves, they cannot have information or make comments on the evidence, opinions and observations submitted for the purpose of affecting the decision of the judge.

61. As the remedy of blocking of access envisaged under Law no. 5651 is a non-contentious legal remedy, namely as there is not an adverse party, the representatives of the media organ which would be effected by the decision and those responsible cannot benefit from the principle of the equality of arms and they cannot have reasonable and acceptable

opportunities to present their defence, including the possibility of submitting evidence against the allegations of the person filing the request. In summary, the judge issues his/her decision on the basis of the case file, namely on the basis of the information and documents submitted by the person filing the request; and the statements of the other party cannot be collected in the course of these proceedings.

62. For these reasons, taking protection measures in general and the measure of blocking of access to the online publication at issue specifically may be considered as justified in some respect, or "*prima facie*" justified. In other words, it must be acknowledged that the procedure provided for under Article 9 of Law no. 5651, which is the basis for the decision on blocking of access at issue, is exceptional. That procedure involves the magistrate judge rendering a decision on blocking of access within 24 hours without holding a hearing, hearing the other party or collecting evidence at the end of a review limited to pieces of evidence submitted by the person who filed the request. This procedure may only be applied if the relevant online publication is seen, at first sight, to be manifestly in breach of personal rights. In cases where it is *prima facie* understood that the personal rights were breached without any need to make further examination, such as the disclosure of naked photographs or videos of a person, the exceptional procedure stipulated under Article 9 of Law no. 5651 may be conducted.

63. The doctrine of *prima facie* violation is also applied to the objections to be filed against the decision on blocking of access to Internet rendered by the domestic courts. Indeed, Article 9 of Law no. 5651 contains special provisions with regard to the method of objections to be filed against a measure concerning the restriction of access to a webpage. The decision rendered upon review of the objection is not delivered as a result of contentious proceedings, which settles the dispute on the merits; it is limited to the *prima facie* necessity of the decision of the magistrate judge to block access. In such cases, the "doctrine of *prima facie* violation" would ensure a fair balance between the need for speedy protection of personal rights from online publications and the freedom of expression.

(3) Other Available Legal Remedies against Interferences with Honour and Reputation

64. Both criminal and civil protection mechanisms are available in our country against third parties' interferences with personal rights. A person whose personal rights have been attacked through an online publication may follow the procedure laid down in Article 9 of Law no. 5651 by applying to a magistrate judge and obtaining a speedy protection in case of a "*prima facie* violation". To secure more satisfaction, the same person may also pursue other remedies. In private law, for example, persons may rely on Articles 24 and 25 of the Turkish Civil Code (Law no. 4721, dated 22 November 2001) to request the prevention or stay

of interference or the termination of an on-going interference, determination of the unlawfulness of an interference, publication or notification to third parties of the decision or the text of response and correction. They may also bring actions for compensation of pecuniary or non-pecuniary damages. In cases where a delay would pose a risk and cause serious damage, the judge may be requested to decide on the requisite measures for the prevention of the risk or damage. Therefore, in cases where a delay would pose a risk or cause serious damage, an interim measure may be taken pursuant to the Code of Civil Procedure (Law no. 6100, dated 12 January 2011) upon request in order to prevent the risk or damage. Apart from those, a person who has suffered an interference with his/her personal rights may file an action of unjust enrichment (*sebepsiz zenginleşme*) against those who made an unjust gain due to their statements or the victim of interference may also, as per the provisions regulating performance of business without requirement of proxy (*vekaletsiz iş görme*), request the transfer of the gains made thanks to the publication.

65. If an attack made against personal rights via Internet constitutes an offence according to criminal laws, the complainant may solely or also request that the perpetrator be punished. In this case, the claimant may apply to a public prosecutor's office for criminal investigation and prosecution. In any event, the public prosecutor is legally obliged to launch an investigation *ex officio* in respect of offences that do not require a complaint to be filed. In the event that a criminal investigation is launched, since the judge will decide on security measures if he/she renders a conviction pursuant to Article 223 § 6 of the Code of Criminal Procedure (Law no. 5271, dated 4 December 2014), a decision will also have been delivered with regard to the measure of blocking of Internet access.

66. Moreover, persons may pursue general legal remedies in any case for the protection of their personal rights if they cannot secure the protection they wanted due to the *prima facie* lack of a violation found as per Article 9 of Law no. 5651. The fact that the magistrate judge has or has not found a violation *prima facie* does not mean that the dispute is entirely resolved. Because decisions rendered *prima facie* shall never materially constitute a final decision for a normal case.

67. In this context, in cases where no violation is found *prima facie* through the procedure set out in Article 9 of Law no. 5651, the request shall be dismissed without any further examination. In the cases handled before general courts, on the other hand, the alleged violation must be proven for the request to be accepted. In such cases, general courts may not dismiss the request by simply holding that no violation is found at first sight. It must be proven whether or not there has been a violation with all the evidence available, including expert reports.

(4) Application of Principles to the Present Case

68. As indicated above, the blocking of access envisaged by Article 9 of Law no. 5651 is a remedy that is only used in cases of unlawful interference with personal rights and it aims to eliminate without delay the interferences targeting an individual's honour and reputation. The purpose of implementing the measure of blocking of access to an online publication is to strike the necessary delicate balance between freedom of the press and personal rights. That is, it seeks to stop an on-going and *prima facie* visible interference with personal rights by blocking the access to the relevant publications of websites that unjustly harm individuals, disseminate false information about them, and violate their honour and reputation. In this sense, this measure should be used in such a way that does not impair the very essence of freedom of the press and the rights of the members of the press to impart information and criticise but protects, at the same time, the interests of the right holder.

69. The impugned news pieces and columns contained, in general, the allegations that the Turkish Aeronautical Association ("the TAA") was managed improperly, that the policies pursued were to the detriment of the association, and some people were offered undeserved profit. According to the applicant, the TAA's ranks were filled with those who were close to the complainant. Certain documents were also shared in the impugned columns and news pieces as basis for the allegations. In general, the complainant's policies were considered as a scandal (see §§ 13-16 and 18 above).

70. In both of its judgments, the first-instance court observed that the complainant had not been tried in relation to the allegations published on the website and held that the publication of those allegations without a finalised court judgment would cause a breach of personal rights. The said court acknowledged that the news and the articles reflected the author's personal opinion and exceeded the limits of simply conveying information. In its second judgment, the first-instance court indicated the nature of the articles as "news or a personal opinion" but also added that they could humiliate the complainant in the society.

71. Nevertheless, it was neither alleged nor did the inferior courts held in their judgments that the applicant had reported false news by distorting the facts or making additions to the news, that she had acted in bad faith, or that method of obtaining the information had been unacceptable. It is clear the complainant did not wish any negative news to be reported with regard to his chairmanship of the TAA. It should be noted that the impugned news pieces and columns are under the protection of the freedom of expression, regardless of individuals' subjective assessments (see § 46 above).

72. In the case of *Orhan Pala*, the Court held that expecting the journalists to act as

a prosecutor to verify the accuracy of a statement imposes a heavy burden of proof on them, and such a liability may give rise to unfair consequences at the end of the proceedings where they stand as an accused or a defendant (see *Orhan Pala*, § 51).

73. In the present application, the first-instance court considered the absence of any judicial decision against the complainant in the impugned articles as the justification of the blocking of access to the articles. In other words, it held that no news containing allegations against a person may be reported without an existing judicial decision against that person. Adopting such a limit of certainty in news reporting and expression of opinions in the press would obviously result in the total removal of the freedoms of expression and the press.

74. It is clear that the TAA is one of the longest-standing and most important institutions of Turkey in aviation. Given that the website of which the applicant is the owner and chief editor particularly publishes pieces regarding the field of aviation, there is no doubt that any development related to the TAA falls within the applicant's area of interest. It is understood that the applicant reflected the management of the TAA and the policies of its chairman as sensational and that he found the developments unacceptable. Through his website, he directed harsh criticism towards the complainant from his point of view.

75. The news pieces and columns in question were about an aviation association which was, at the material time, and still is one of the prominent and well-known institutions of Turkey. Similarly, it is clear that the articles in question serve the function of ensuring that the opinions and attitude of the complainant, who has an undeniable level of recognition, as well as his activities related to aviation are discovered and that a public opinion is created in those respects. The higher the value of a news piece or article to inform the public is, the more the person needs to succumb to the publication of the said news piece or article (see *İlhan Cihaner (2),* § 74 and *Kadir Sağdıç,* § 67).

76. Although the impugned online articles involve political aspects in part, it is beyond dispute that, fundamentally, they concern an institution which depends on donations from the society and serves the public; therefore, the articles are related to public interests and have a high value in terms of informing the public. According to the conclusion drawn from the above, there is no doubt that the publication of certain allegations concerning the TAA and its chairman (the complainant) in the news and articles contributes to a debate of high general interest.

77. It may be acknowledged that certain phrases used in the impugned news pieces and columns harshly criticised the complainant and even crossed the line at times. First of all, in this kind of applications, it is not for the judicial authorities to substitute themselves for the press and to determine what type of reporting shall be used in a certain situation. And secondly, it must be accepted that the scope of freedom of the press, as a natural consequence of its close

relationship with democracy, should be interpreted broadly to allow for exaggeration and even provocation to some extent.

78. It has not been shown that the publication of the news had a considerable impact on the complainant's life. Considering that the news was not related to his private life, it did not contain strong insults, nor did it amount to an arbitrary personal attack, what remains is the polemical and aggressive style used by the applicant as he was reporting the news. In this regard, it must be noted that the freedom of expression does not only protect the content of the news and opinions but also the style through which they are conveyed (see, *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.,* §§ 41 and 42; *Ergün Poyraz (2),* § 77; *İlhan Cihaner (2),* §§ 59 and 86; and *Kadir Sağdıç,* §§ 52 and 76).

79. The complainant is the chairman of one of the largest institutions active in the field of aviation. It is obvious that the complainant enjoyed certain advantages as regards conveying his views to those interested. In fact, prior to the publication of the impugned articles, the applicant had met with the complainant in his capacity as a journalist and asked the complainant about the allegations. Therefore, it should be acknowledged that the limits of criticism directed towards the complainant are much broader compared to ordinary persons. Taking account of the public's right to be informed about well-known figures, the complainant should foresee that his actions and words will be tracked by the press, that there will be news coverage about him, and that he might be strongly criticised; thus, he should be able to tolerate these to a higher extent for the sake of democratic pluralism.

80. It is out of question to think that the offences punishable under criminal legislation may be left unsanctioned if they have been committed over the Internet. For this reason, it is a necessity, in terms of the legal system, to block access in some cases. On the other hand, the Internet offers an indispensable platform for accessing information, expressing and sharing information and thoughts, and spreading the knowledge. In this day and age, Internet has become one of the most effective and widespread medium used by individuals in the exercise of their freedom of expression and information since it accommodates the principal means of participation in the debates and actions concerning matters of general interest.

81. In its examination as to the annulment of Article 9 § 9 of Law no. 5651, the Court held that if individuals were to fear that they may be subject to the State interference when exercising their rights and freedoms, it would inhibit their free exercise of those rights and freedoms, and will severely impede individuals in their efforts to construct the foundations of a democratic society. In the same judgment, the Court followed that individuals employ the internet in the exercise of many rights and freedoms defined in the Constitution. For example, individuals may use the internet to exercise their freedom of information, their freedom of

thought and expression, their freedom of education and learning, their freedom to receive information, and their freedom of enterprise (see the Court's judgment no. E.2014/87, K.2015/112, 8 December 2015, § 166).

82. Therefore, given the vital importance of the rights and freedoms linked to the freedom of Internet -in particular the freedoms of expression and the press- in a democratic society, it is clear that the authorities and courts using the public power with respect to the Internet should act very delicately (see the Court's judgment no. E.2014/149, K.2014/151, 2 October 2014; and for explanations on the indispensable nature of the Internet, see also the Court's judgment no. E.2014/87, K.2015/112, 8 December 2015, § 116). The measure of blocking access to the Internet must be used as a last resort. If it is possible to tackle harmful content on the Internet through other means or if the blocking of access caused a larger damage in comparison with the protected interest, the decision to block access shall constitute a violation of the freedoms of expression and the press under those circumstances.

83. One of the methods of protecting personal rights in the Turkish legal system in cases where there has been an interference with personal rights committed via the Internet is the non-contentious legal remedy before magistrate judges, which is regulated by Article 9 of Law no. 5651 and was used in the present application. As noted before, this is a remedy in which the persons responsible for the media outlet to be affected by the decision cannot be afforded the guarantees of the law of trial procedure and where, by extension, it becomes difficult to strike a balance between conflicting rights. The decision of blocking of access to content serves the function of informing the public of the fact that a piece of news coverage amounted to an attack on the honour and reputation of others. It should be recalled that it is possible to deliver such a decision as a result of non-contentious proceedings only in cases where the unlawfulness and the interference with personal rights are apparent enough to be seen at first sight (i.e. prima facie) and where the damage must be redressed speedily.

84. In addition, the restriction becomes permanent in cases, as in the present one, where there is no subsequent criminal investigation and prosecution and, consequently, no new decision rendered in respect of the measure. Such restrictions with indefinite durations clearly pose great risks with regard to the freedoms of expression and the press. For these reasons, this legal remedy must be considered as such a remedy that is effective in a very narrow area, compared to other remedies in the legal system aimed at protecting the honour and reputation of individuals.

85. Holding that the impugned news pieces and articles had amounted to an interference with the complainant's personal rights, the first-instance court decided to block

access to the content pursuant to Article 9 of Law no. 5651. Nonetheless, the first-instance court failed to prove that it was necessary to eliminate the unlawful interference with the complainant's honour and reputation through the impugned news, without carrying out adversarial proceedings, in a speedy manner and without delay.

86. Considering that the final cause of the victim of an unlawful interference with the individuals' right to respect for their honour and reputation due to expressions of thought and opinion on online platforms is the compensation of the damages he/she has suffered, the Court observes that there are other criminal or civil remedies (depending on the circumstances) that are available, effective and capable of offering a better prospect of success especially with regard to disputes such as the one giving rise to the present application. Moreover, the complainant still has the opportunity to request the blocking of access to the content within a set of contentious proceedings he can file.

87. In view of all the circumstances of the present application, the Court considers that the interference with the freedoms of expression and the press guaranteed under Articles 26 and 28 of the Constitution -caused by the blocking of access decision giving rise to the complaint- did not correspond to a more pressing social need. The reasons given for the blocking of access decision against the applicant may not be deemed sufficient. The impugned blocking of access decision is not necessary in a democratic society for the protection of the complainant's reputation.

88. In a democratic society, restrictions may not be used to the extent in which they disproportionately hinder the exercise of a right, regardless of the aims they pursue. In the instant case, the news pieces and articles at issue seem to have been blocked for an indefinite duration. Therefore, even if it is argued that the disputed restriction concerned certain specific articles and had limited effects, the significance of the interference is not any less. Even if the blocking of access to an online publication may be acceptable for the purpose of temporarily stopping an interference with personal rights until the end of an investigation or proceedings, it cannot be considered as proportionate under the circumstances of the instant case that a decision taken as a measure without establishing relevant and sufficient grounds stay in effect indefinitely.

89. For these reasons, it must be held that there has been a violation of the freedom of expression protected under Article 26 of the Constitution and the freedom of the press protected under Article 28 of the Constitution.

Mr. Serdar ÖZGÜLDÜR expressed a dissenting opinion in this respect.

C. Application of Article 50 of Code no. 6216

90. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

91. The applicant requested the Court to find a violation.

92. As there is legal interest in conducting a retrial in order to redress the consequences of the violations of the applicant's freedoms of expression and the press, a copy of the judgment must be sent to the Ankara 5th Magistrate Judge (Miscellaneous Files nos. 2014/355 and 2014/320) for retrial.

93. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 26 October 2017:

A. BY MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, that the alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

B. BY MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, that the freedom of expression and freedom of the press safeguarded by Articles 26 and 28 of the Constitution were VIOLATED;

C. That a copy of the judgment be SENT to the Ankara 5th Magistrate Judge (Miscellaneous Files nos. 2014/355 and 2014/320) for a retrial to remove the consequences of the violation;

D. That the total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. That the payment be made within four months as from the date when the applicant applies to the Ministry of Finance following the notification of the judgment; In case of any default in payment, legal INTEREST ACCRUE for the period elapsing from the expiry of four-month time limit to the payment date; and

F. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE SERDAR ÖZGÜLDÜR

In the case giving rise to the present application, the "blocking of access" decision was not imposed on the whole of the website in question but solely on the applicant's allegations and statements (news pieces and columns) with regard to the person concerned (the complainant). Article 9 titled "Removal of content from publication and blocking of access" of Law no. 5651 (dated 4 May 2007) provides for a special protection system, for the parties concerned by publications, with regard to violations of personal rights via any publication made on the Internet. Accordingly, a decision of "blocking of access" may be issued as a measure upon request of the person concerned and decision of the relevant magistrate judge, where the conditions are fulfilled. This decision, which may be challenged and which becomes final upon dismissal of the objection, is an important protection mechanism provided for the individual rights and freedoms. This legal ground for restriction -imposed on the freedom of expression within the scope of protection of the honour and reputation of individuals- shall be examined and ruled on by the relevant judicial body (the magistrate judge) in every individual case. This objectionable decision can only become final in respect of the said "measure". The person affected by the "blocking of access" decision can (and should) claim the lawfulness of his allegations contained in the online publication through filing actions (e.g. for cessation of intervention, compensation, declaration etc.) by relying on the possibilities provided by the Civil Code, the Code of Obligations, or other special laws. If the lawfulness is established as a result of such proceedings, he can have this decision reversed by means of applying to the competent body that issued the "blocking of access" decision. Making an assessment towards a violation by merely criticising and neglecting the legal protection system provided for the persons that are otherwise completely vulnerable to the Internet would lead to a conclusion where the freedom of expression is preferred to the honour and reputation of individuals and thus leaves third parties deprived of a legal safeguard against online publications. Therefore, making an issue subject to an individual application at the very beginning based on the presumption that there was a "structural problem", although the issue had not been raised as a matter of legal dispute or legally reached a result, would not be in compliance with the law. Noting that this application lodged without exhausting the available legal remedies may not be

examined on the merits, I do not agree with the majority who consider otherwise.