



The authorities violated a former Basque separatist politician's freedom of expression by convicting him for comments he had made at a public ceremony

In today's **Chamber judgment**¹ in the case of **Erkizia Almandoz v. Spain** (application no. 5869/17) the European Court of Human Rights held, by a majority, that there had been:

A violation of Article 10 (right to freedom of expression) of the European Convention on Human Rights.

The case concerned the participation by the applicant, a Basque separatist politician, in a ceremony to pay tribute to a former member of the ETA terrorist organisation, and his conviction for publicly defending terrorism, receiving a one-year prison sentence and seven years' ineligibility.

Having analysed the application of the various factors characterising hate speech and statements condoning or defending terrorism, the Court found that although the applicant had made his statements during a ceremony in memory of a former ETA member in a tense political and social context, the content and formulation of the applicant's comments showed that he had not intended to incite people to violence or to condone or defend terrorism.

In the Court's view, no direct or indirect incitement to terrorist violence had been established, and the applicant's speech at the ceremony had, on the contrary, advocated pursuing a democratic means of achieving the specific political objectives of the *abertzale* left. The Court found that the interference by the public authorities with the applicant's right to freedom of expression could not be deemed "necessary in a democratic society".

Principal facts

The applicant, Tasio Erkizia Almandoz, is a Spanish national who was born in 1943 and lives in Bilbao, Bizkaia.

On 21 December 2008 Mr Erkizia Almandoz participated as a speaker in a tribute ceremony, titled "Independence and Socialism", held in the village of Arrigorriaga (Basque Country) by the family of José Miguel Beñaran Ordeñana (alias "Argala"). The aim of the event was to pay tribute to Argala, a former member of the ETA terrorist organisation, who had been murdered thirty years previously by the extreme-right terrorist organisation *Batallón Vasco Español* (BVE).

Mr Erkizia Almandoz did not hold any political post at the material time, but he was an iconic political figure in one of the wings of the separatist movement in the Basque Country known as the "*abertzale* left" (*Izquierda Abertzale*).

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.

On 3 May 2011 the Criminal Chamber of the *Audiencia Nacional* convicted Mr Erkizia Almandoz of the criminal offence of condoning terrorism, set out in Articles 578 and 579 § 2 of the Penal Code, imposing a twelve-month prison sentence and seven years' ineligibility. It ruled that Mr Erkizia Almandoz had defended Argala by justifying and excusing his acts. The *Audiencia Nacional* took the view that he had not confined himself to making a political speech in favour of the independence of the Basque Country and socialism, but had delivered his speech in an ambivalent manner, calling for "reflection on the choice of the most appropriate way forward", that is the way "that would hurt the State most" and would lead "the people towards a new democratic scenario". He had shouted "Long live Argala" at the end of his speech, praising him as a terrorist. The *Audiencia Nacional* considered that the speech had followed a clear line of support for specific terrorist acts. Finally, the *Audiencia Nacional* noted that the event had attracted extensive media coverage, and that there had therefore been a high level of public interest, a prerequisite for classification as a criminal offence.

Mr Erkizia Almandoz appealed on points of law. On 14 March 2012 the Supreme Court dismissed that appeal.

Mr Erkizia Almandoz lodged an *amparo* appeal with the Constitutional Court. That court dismissed the *amparo* appeal by judgment of 20 June 2016, noting that the applicant's speech could be designated as "hate speech" and had had considerable public impact. The Constitutional Court balanced the competing interests in the case and concluded that Mr Erkizia Almandoz had overstepped the bounds of freedom of expression by flouting the right of others not to be threatened by a speech condoning terrorism. The Constitutional Court considered that Mr Erkizia Almandoz had overstepped the bounds of the right to freedom of expression as secured under Article 10 of the Convention and Article 20 of the Spanish Constitution, since his behaviour had amounted to "hate speech". The court also noted that the Court had given several inadmissibility decisions in cases where criminal convictions had been based on manifestations of hate speech, condoning the use of violence to achieve a political end.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) of the European Convention, the applicant complained of an infringement of his right to freedom of expression on account of his conviction for publicly defending terrorism, whereas, in his view, his speech had been aimed solely at initiating an exclusively democratic and peaceful procedure for securing the independence of the Basque Country.

The application was lodged with the European Court of Human Rights on 11 January 2017.

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

Paul Lemmens (Belgium), *President*,
Dmitry Dedov (Russia),
Georges Ravarani (Luxembourg),
Georgios A. Serghides (Cyprus),
María Elósegui (Spain),
Darian Pavli (Albania),
Anja Seibert-Fohr (Germany),

and also Milan Blaško, *Section Registrar*.

Decision of the Court

Article 10

The Court first of all noted that at the material time the applicant had not been acting in his capacity as a politician. It emphasised that the comments in question had concerned a subject of general interest in the context of Spanish society, particularly in the Basque Country. However, the fact that a given subject was of general interest did not mean that the right to freedom of expression in that sphere was unlimited.

The Court was therefore called upon to adjudicate whether the penalty imposed on the applicant could be described as being proportionate to the legitimate aim pursued, having regard to the various factors characterising hate speech and the fact of condoning or defending terrorism.

As regards the first of the criteria characterising hate speech, the Court noted that the applicant's statements had been made in a tense political and social context.

As regards the second criterion, it had to be seen whether the impugned comments could be regarded as a direct or indirect call for violence or as a defence of violence, hatred or intolerance. The Court noted that although the applicant had participated as the main speaker at an event held to pay tribute to a recognised member of the ETA terrorist organisation and to eulogise him, the speech as a whole had advocated neither the use of violence nor armed resistance, whether directly or indirectly. The applicant had explicitly recommended that the people take the most appropriate road towards a democratic scenario. Even if some of the expressions used by the applicant might have been considered ambiguous, there was no reason, in the Court's opinion, to conclude that the applicant had intended to incite people to resort to violence, condoning and lauding terrorist violence.

The Court also noted that the applicant had neither organised the event nor been responsible for projecting the photographs of masked ETA members. Thus the Court held that the mere fact that the applicant had taken part in this event could not in itself be considered as a call for the use of violence or as a manifestation of hate speech.

Lastly, as regards the third criterion characterising hate speech, namely the formulation of the comments and their direct or indirect capacity to lead to harmful consequences, the Court observed that the applicant's statements had been delivered orally in the framework of an event attended by supporters of the Basque separatist movement, and in the particular circumstances of the case, that the manner in which the applicant had formulated his words had not been obviously aimed at producing negative consequences.

Having regard to all the relevant criteria regarding the context of the case, the Court was therefore unable to follow the domestic court's assessment leading to the applicant's conviction. In the light of the circumstances surrounding the impugned event, the applicant's speech had had nothing to do with "hate speech". The Court could not conclude that the applicant had been trying to condone terrorist acts or to eulogise terrorism. Quite the contrary: the speeches given by the applicant had embodied a call for reflection aimed at pursuing a new pathway to democracy. Even though, at the material time, the terrorist violence perpetrated by the ETA had still been a harsh reality, the conviction of the applicant, who had been held responsible for all the acts conducted during the tribute to Argala, was wholly unjustified.

Given that no direct or indirect incitement to terrorist violence had been established and that the applicant's speech had rather encouraged his audience to continue along a democratic road towards the political objectives of the *abertzale* left, the interference by the public authorities with the applicant's right to freedom of expression could not be deemed to have been "necessary in a democratic society". There had therefore been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court held that Spain was to pay the applicant 6,000 euros (EUR) in respect of pecuniary damage and EUR 5,000 in respect of costs and expenses.

Separate opinions

Judge **Lemmens** expressed a concurring opinion. Judge **Dedov** expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.