



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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 28889/02
by Erdal Fırat ÇARALAN
against Turkey

The European Court of Human Rights (Third Section), sitting on 8 November 2007 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mr R. TÜRMEŒ,
Mrs E. FURA-SANDSTRÖM,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. ZIEMELE, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having regard to the above application lodged on 23 May 2002,

Having regard to the decision to apply Article 29 § 3 of the Convention
and examine the admissibility and merits of the case together,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Erdal Fırat Çaralan, is a Turkish national who was born in 1981 and lives in Istanbul. He was represented before the Court by Mr K.T. Sürek, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant was a member of a political party, the Labour Party (*Emeğin Partisi*), at the time of the events giving rise to the present application.

On 17 October 2000 the applicant was taken into police custody after having distributed leaflets of the Labour Party concerning collective labour agreements. On the same day, he was released without being brought before a judge.

On an unspecified date the Eyüp public prosecutor imposed a fine of 22.815.000¹ Turkish Liras (TRL) on the applicant for illegally distributing leaflets. The applicant did not pay the due amount.

Subsequently, on 26 February 2001 the Eyüp public prosecutor filed a bill of indictment with the Eyüp Magistrate's Court charging the applicant of having illegally distributing leaflets under Article 534 § 1 of the Criminal Code.

On 28 February 2001 the Eyüp Magistrate's Court found the applicant guilty as charged and, by issuing a penal order (*ceza kararnamesi*), sentenced him to a fine of TRL 34,220,000². When issuing the penal order, the court did not hold a public hearing; it decided solely on the content of the case file.

On 19 April 2001 the applicant filed an objection against the decision of 28 February 2001. In his petition, he maintained that the Labour Party was not required to obtain authorisation or to submit a copy of the leaflet in question to the authorities for information purposes prior to the distribution of leaflets as, according to Article 44 of Law no. 2908, the political parties were not required to do so. He further contended that he was deprived of the opportunity to submit his defence submissions to the Eyüp Magistrate's Court in violation of Article 6 of the Convention. The applicant finally submitted that his criminal conviction infringed his freedom of expression, in violation of Article 10 of the Convention.

On 13 June 2001 the Eyüp Criminal Court dismissed the applicant's objection holding that the decision of 28 February 2001 was lawful.

The decision of 13 June 2001 was not served on the applicant.

On 21 May 2002 the applicant found out about the content of the decision of 13 June 2001 and paid the fine.

Subsequently, on 29 November 2006 the Eyüp public prosecutor applied to the Ministry of Justice and requested that a written order be issued pursuant to Article 309 of the New Criminal Code to quash the judgment of

¹. Approximately equivalent to 40 euros (EUR) at the time.

². Approximately equivalent to EUR 37 at the time.

the Eyüp Criminal Court dated 13 June 2001. On 16 January 2007 the Ministry of Justice issued a written order and instructed the Chief Public Prosecutor at the Court of Cassation to ask the Court of Cassation to set aside the said judgment.

On 27 March 2007 the Court of Cassation quashed the judgment of the Eyüp Criminal Court. It held that, according to Article 44 of Law No. 2908 political parties were not required to obtain prior authorisation to distribute leaflets, and as a result the applicant's conviction was not in line with the domestic law. It concluded that the applicant should be acquitted. The case file was remitted to the Eyüp Magistrate's Court. After a re-examination of the case, on 15 May 2007 the Eyüp Magistrate's Court acquitted the applicant of the charges against him and decided that he should be reimbursed for the fine he had paid in 2002. Furthermore, his conviction was erased from the judicial records.

B. Relevant domestic law and practice

At the material time, Article 534 § 1 of the Criminal Code, Article 44 of Law no. 2908 and the relevant provisions of the Code of Criminal Procedure provided as follows:

Article 534 § 1 of the Criminal Code

"Persons who sell or distribute printed or handwritten documents and pictures in public places without having obtained a prior authorisation, in circumstances where a prior authorisation from the competent authority is required, shall be liable to a fine of a maximum of 30 Turkish liras."

Article 44 of Law no. 2908

"Associations shall not publish or distribute leaflets, written statements or similar publications without a prior resolution by their executive board. The leaflets, written statements and similar publications shall contain the forenames, surnames and signatures of the president and members of the executive board which passed the resolution.

A copy of the resolution by the association's executive board to publish and of the leaflet, written statement or similar publication shall be lodged for information purposes with the highest ranking local authority and the public prosecutor's office for the area. The latter shall deliver in exchange a receipt recording the time and date the documents were lodged. No leaflet, written statement or similar publication may be distributed or communicated to the press until 24 hours after it has been lodged.

...

The aforementioned provisions are not applicable in respect of political parties."

Article 386

“The judge at the magistrates’ court may issue a penal order and decide on the merits of the case concerning the offences within the jurisdiction of the magistrates’ court without holding a hearing.

With such a penal order only a fine or an imprisonment for a maximum of three months or the temporary suspension of exercising a profession or a seizure measure or some of them or all of them can be imposed (...)”

Article 387

“If the judge at the magistrates’ court finds it disadvantageous to deliver the sentence without a hearing, he will then decide a date for the hearing.”

Article 390

“If it is a prison sentence that has been delivered by a penal order, upon the filing of an objection a hearing shall be held.

(...)

If it is a fine or temporary suspension of the practice of a profession or a confiscation measure or some or all of them that is served by a penal order, upon the filing of an objection the president of the criminal court or the judge shall examine the objection under Articles 301, 302 and 303 [of the present code]. (...)”

Article 302

“Apart from the exceptions prescribed by law the decision upon an appeal shall be delivered without a hearing. The public prosecutor shall be heard if necessary.

If the appeal is granted, the authority that examines the appeal shall also decide on the merits of the case.”

Article 303

“Decisions rendered upon objection are final. However, if the authority orders the suspect’s detention on remand, the latter can file an urgent objection.”

In a judgment given on 30 June 2004 the Constitutional Court declared Article 390 § 3 of the Code of Criminal Procedure unconstitutional and a nullity. It held that lack of a public hearing before the Criminal Court of First Instance that examines the objections against the penal orders, would be in breach of the right guaranteed under Article 6 of the Convention, as well as Article 36 of the Constitution.

Finally, Article 309 of the New Code of Criminal Procedure (no. 5271), concerning references to the Court of Cassation by written order of the Ministry of Justice (*Kanun yararına bozma*) provides:

“Where the Ministry of Justice has been informed that a judge or court has delivered a judgment that has become final without coming under the scrutiny of the Court of Cassation, it may issue a formal order to the Chief Public Prosecutor requiring him to ask the Court of Cassation to set aside the judgment concerned ...”

COMPLAINTS

1. The applicant submitted several complaints under Article 6 of the Convention. He argued, in the first place, that he did not have a fair and public hearing in the determination of the criminal charges against him. He maintained that the domestic courts had determined his case without holding a hearing. The applicant also stated that the domestic courts had failed in the evaluation of facts and interpretation of domestic law. He also argued that he had not been tried by an independent and impartial tribunal in that the judges sitting on the benches of the Eyüp Magistrate's Court and the Eyüp Criminal Court were attached to the Supreme Council of Judges and Prosecutors.

2. The applicant invoked Article 10 of the Convention and alleged that his conviction constituted a breach of his right to freedom of expression.

THE LAW

The Government argued under Article 35 of the Convention that the application should be rejected for failure to comply with the six months rule since the Eyüp Criminal Court's decision had been delivered on 13 June 2001, whereas the application was lodged with the Court on 23 May 2002; more than six months later. They further argued that since the applicant was subsequently acquitted of the charges against him, he could no longer be considered as a victim within the meaning of the Convention. The Government finally stated that with the new Criminal Code and the Code of Criminal Procedure, which came into force on 1 June 2005, the practice of issuing penal orders ceased to exist.

The applicant did not reply to the Government's observations.

As regards the Government's objection, concerning the six months time-limit, the Court does not consider it necessary to decide on this matter since the application should be declared inadmissible for the following reasons.

The Court takes note of the information sent to it by the Government, according to which Turkish law has been amended to satisfy the requirements of the Convention. It points out, however, that its task is confined to assessing the circumstances obtaining in the instant case and therefore it cannot be expected to find that a case is no longer of any valid legal interest to the applicant because there have been developments since the material time (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 38, ECHR 2001-VIII).

The Court further reiterates that a decision or measure favourable to an applicant is not sufficient in principle to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly

or in substance, and then afforded redress for, the breach of the Convention (see, *Öztürk v. Turkey* [GC], no. 22479/93, § 73, ECHR 1999-VI).

In this connection, it is observed that in 2001 the Izmir Magistrate's Court issued a penal order against the applicant, without holding a public hearing, and sentenced him to a fine for distributing leaflets of a political party of which he was a member. However, subsequently, there was a retrial and the applicant was acquitted of the charges against him. In their decisions, the domestic courts acknowledged the fact that the applicant's conviction had not been in accordance with the domestic law as, according to Article 44 of Law no. 2908, political parties were not required to get prior authorisation to distribute leaflets. The courts also held that the applicant should be reimbursed for the fine he had paid in 2002. It is also noted that this conviction was erased from the applicant's judicial record.

The Court further notes that the applicant has not made any comments on the Government's additional submissions.

In these circumstances, the Court considers that the applicant cannot claim to be a victim of a violation of Articles 6 and 10 of the Convention, within the meaning of Article 34. It follows that the application is incompatible *ratione personae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 and 4 (see, *Şentuna v. Turkey* (dec.), no. 71988/01, 25 January 2007; *Sapan v. Turkey* (dec.), no. 36075/03, 3 May 2007).

In view of the above, it is appropriate to discontinue the application of Article 29 § 3 of the Convention and to reject the application.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President