



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

SECOND SECTION

CASE OF TURGAY AND OTHERS v. TURKEY (no. 4)

*(Applications nos. 29572/08, 55180/08, 55427/08, 56294/08, 60443/08 and
61438/08)*

JUDGMENT

STRASBOURG

21 September 2010

FINAL

21/12/2010

*This judgment has become final under Article 44 § 2 of the Convention. It
may be subject to editorial revision.*

In the case of Turgay and Others v. Turkey (no. 4),

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos, *judges*,

and Françoise Elens-Passos *Deputy Section Registrar*,

Having deliberated in private on 31 August 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in six applications (nos. 29572/08, 55180/08, 55427/08, 56294/08, 60443/08 and 61438/08) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by eleven Turkish nationals (“the applicants”), whose names appear in the appendix.

2. The applicants were represented by Mr Ö. Kılıç, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 18 June, 15 and 22 October, 10 November, 1 and 3 December 2008 the applicants' representative requested that the respondent Government be notified of the introduction of the applications in accordance with Rule 40 of the Rules of Court and that the cases be given priority under Rule 41.

4. On 17 March 2009 the President of the Second Section decided to give priority to the applications under Rule 41 of the Rules of Court and to give notice of the applications to the Government. It was also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The prosecution of the newspapers

5. At the material time the applicants were the owners, executive directors, editors-in-chief, news directors and journalists of one weekly and four daily newspapers published in Turkey: *Yedinci Gün*, *Gerçek*, *Özgür Ülke*, *Gelecek* and *Alternatif*. The publication of all five newspapers was suspended pursuant to section 6(5) of Law no. 3713 (the Prevention of Terrorism Act) by various Chambers of the Istanbul Assize Court on different dates between 13 May and 20 October 2008 for a period of one month on account of various news reports and articles. The impugned publications were mainly deemed to be propaganda in favour of a terrorist organisation, the PKK/KONGRA-GEL¹, and to constitute the approval of crimes committed by that organisation and its members.

6. Neither the applicants nor their representative participated in these *ex parte* procedures, and their written objections to the suspension orders were dismissed. Consequently, the orders were executed.

B. The prosecution of the applicants

7. The applicant Ali Turgay, the owner of *Yedinci Gün*, was prosecuted under sections 6(2) and 7(2) of Law no. 3713, as well as Articles 215, 218, 220 §§ 6 and 7 and 318 §§ 1 and 2 of the Criminal Code, mainly for disseminating propaganda in favour of the aforementioned organisation and praising crimes committed by that organisation and its members, on account of various articles published in the said newspaper. According to the information in the case file, this case is currently pending before the Istanbul Assize Court (case no. 2008/188).

8. The applicant Cevat Düşün, the owner of *Gerçek*, *Özgür Ülke*, *Gelecek* and *Alternatif*, was prosecuted on five occasions on similar charges, two of which resulted in his conviction (cases nos. 2008/257 and 2008/236). It appears that the remaining cases (which were joined under case no. 2008/283) are still pending before the Istanbul Assize Court. Case no. 2008/283 also involves another applicant, Ragıp Zarakolu, the executive director of *Alternatif*, who was similarly prosecuted under sections 6(2) and 7(2) of Law no. 3713.

1. Kurdistan Workers' Party, an illegal organisation.

II. RELEVANT DOMESTIC LAW

9. A description of the relevant domestic law and practice may be found in *Ürper and Others v. Turkey* (nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, §§ 12-14, 20 October 2009).

10. Moreover, Article 220 of the Turkish Criminal Code (Law no. 5237) provides as follows:

“(1) Those persons founding or leading an organisation for the purpose of committing acts defined as crimes by the law shall be sentenced to two to six years of imprisonment where the structure of the organisation, number of its members as well as its supplies and equipment are suitable for the crimes intended to be committed. An organisation shall be deemed to exist where there are at least three members.

...

(6) A person who is not a member of an organisation but who [nevertheless] commits crimes on behalf of an organisation shall be punished for the crime of membership of an [illegal] organisation, as well as for the crimes he or she has committed.

(7) A person who is not a part of the hierarchy within an organisation but who [nevertheless] knowingly and willingly provides assistance to the organisation shall be punished for the crime of membership of an [illegal] organisation.”

11. Lastly, Article 318 of the Turkish Criminal Code reads as follows:

“(1) Those persons who make suggestions that seek to dissuade the people from serving in the military service, or make propaganda or encourage people to that end, shall be imprisoned for a period of six months to two years.

(2) Where this offence is committed through the press or the media, the sentence shall be increased by half.”

THE LAW

12. Having regard to the similar subject matter of the applications, the Court finds it appropriate to join them.

I. ADMISSIBILITY

13. The Government argued that the applicants had failed to exhaust domestic remedies as the domestic proceedings were still pending.

14. The Court notes that the applicants' complaints under the Convention solely relate to the assize court's decisions suspending the publication of the five newspapers, and that the applicants had exhausted domestic remedies

within the meaning of Article 35 § 1 of the Convention by filing objections to the various decisions (see *Ürper and Others*, cited above, § 21). The Court accordingly rejects the Government's objection.

15. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

II. MERITS

A. Alleged violations of Article 10 of the Convention

16. The applicants alleged under Article 10 of the Convention that the suspension of the publication and distribution of *Yedinci Gün*, *Gerçek*, *Özgür Ülke*, *Gelecek* and *Alternatif*, which had been based on section 6(5) of Law no. 3713, constituted an unjustified interference with their freedom of expression. They claimed in particular that the banning, for such lengthy periods, of the publication of the newspapers as a whole, whose future content was unknown at the time of the national court's decisions, had amounted to censorship.

17. The Government submitted that the national court's decisions had pursued several legitimate aims, including the protection of national security, territorial integrity and public safety. Moreover, taking into account the content of the articles in question, the measures taken had been proportionate to the legitimate aims pursued and necessary in a democratic society.

18. The Court notes that it has recently examined a similar complaint and found a violation of Article 10 of the Convention in the case of *Ürper and Others* (cited above, §§ 24-45), where it noted in particular that the practice of banning the future publication of entire periodicals on the basis of section 6(5) of Law no. 3713 went beyond any notion of "necessary" restraint in a democratic society and, instead, amounted to censorship. The Court finds no particular circumstances in the instant case which would require it to depart from this jurisprudence.

19. There has accordingly been a violation of Article 10 of the Convention.

B. Alleged violations of Articles 6, 7 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention

20. The applicants complained under Article 6 §§ 1 and 3 of the Convention that they had been unable to participate in the proceedings before the Istanbul Assize Court and that the latter had decided to suspend

publication and distribution of the aforementioned newspapers without obtaining their submissions in defence. They further contended under Article 13 of the Convention that they had not had a domestic remedy by which to challenge the lawfulness of the national court decisions, as their objections to the suspension orders had been dismissed without trial. The applicants also complained under Article 6 § 2 that these orders had violated their right to be presumed innocent, since the national courts had held that criminal offences had been committed through the publication of news reports and articles in the aforementioned newspapers, for which they had been responsible. The applicants further submitted under Article 7 of the Convention that the decisions to suspend the publication and distribution of the newspapers amounted to a “penalty” without a legal basis. Lastly, they complained under Article 1 of Protocol No. 1 that the decisions to suspend the publication of *Yedinci Gün*, *Gerçek*, *Özgür Ülke*, *Gelecek* and *Alternatif* had constituted an unjustified interference with their right to property.

21. The Government contested these allegations.

22. Having regard to the circumstances of the cases and to its finding of a violation of Article 10 of the Convention (see paragraph 19 above), the Court considers that it has examined the main legal question raised in the present applications. It concludes therefore that there is no need to make separate rulings in respect of these other complaints (see, *mutatis mutandis*, *Demirel and Others v. Turkey*, no. 75512/01, § 27, 24 July 2007; *Demirel and Ateş v. Turkey* (no. 3), no. 11976/03, § 38, 9 December 2008; *Ürper and Others*, cited above, § 49).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

1. Pecuniary damage

23. The applicants claimed 1,149,000 Turkish liras (TRY) (approximately 527,000 euros (EUR)) in pecuniary damage for the commercial loss which the newspapers had suffered as a result of the suspension decisions. Under the same head, the applicants further claimed EUR 48,000 for the damage which they had suffered individually. However, they did not produce any documentary evidence in support of their claims for pecuniary loss.

24. The Government contested these claims, arguing that the purported pecuniary damage had not been duly documented.

25. The Court notes the applicants' failure to submit any documents to substantiate this claim. Accordingly, it must be rejected.

2. Non-pecuniary damage

26. The applicants next claimed EUR 48,000 in total in respect of non-pecuniary damage.

27. The Government considered this sum to be excessive.

28. The Court considers that all the applicants may be deemed to have suffered a certain amount of distress and frustration which cannot be sufficiently compensated by the finding of a violation alone. Taking into account the particular circumstances of the case and the type of violation found, the Court awards the applicants EUR 1,800 each for non-pecuniary damage.

B. Costs and expenses

29. The applicants also claimed EUR 16,040 for the costs and expenses incurred before the domestic courts and before the Court. In this connection they submitted documentation indicating the time spent by their legal representative on the applications, as well as tables of costs and expenditure.

30. The Government contested this claim.

31. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of EUR 2,000 for their costs before the Court.

C. Default interest

32. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 10 of the Convention;
4. *Holds* that there is no need to examine separately the complaints under Articles 6, 7 and 13 of the Convention and Article 1 of Protocol No. 1;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into Turkish liras at the rate applicable at the date of settlement:

(i) EUR 1,800 (one thousand eight hundred euros), in respect of non-pecuniary damage, plus any tax that may be chargeable, to each of the following applicants:

- Ali Turgay
- Cevat Düşün
- Ragıp Zarakolu
- Nurettin Fırat
- Ramazan Pekgöz
- Şinasi Tur
- Güler Özdemir
- Bilir Kaya
- Cengiz Kapmaz
- Bayram Balcı
- Memet Ali Çelebi

(ii) EUR 2,000 (two thousand euros) to the applicants jointly in respect of costs and expenses, plus any tax that may be chargeable to them;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President

APPENDIX

File No	Case Name	Date of lodging	Introduced by
29572/08	Turgay v. Turkey	18 June 2008	Ali Turgay
55180/08	Düşün v. Turkey	15 October 2008	Cevat Düşün
55427/08	Düşün v. Turkey	22 October 2008	Cevat Düşün
56294/08	Düşün v. Turkey	10 November 2008	Cevat Düşün
60443/08	Düşün and Others v. Turkey	1 December 2008	Cevat Düşün, Ragıp Zarakolu, Nurettin Fırat, Ramazan Pekgöz, Şinasi Tur, Güler Özdemir, Bilir Kaya, Cengiz Kapmaz, Bayram Balcı and Memet Ali Çelebi.
61438/08	Düşün and Others v. Turkey	3 December 2008	Cevat Düşün, Ragıp Zarakolu, Nurettin Fırat, Ramazan Pekgöz, Şinasi Tur, Güler Özdemir, Bilir Kaya, Cengiz Kapmaz, Bayram Balcı and Memet Ali Çelebi.