



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

SECOND SECTION

CASE OF KILIÇ AND EREN v. TURKEY

(Application no. 43807/07)

JUDGMENT

STRASBOURG

29 November 2011

FINAL

29/02/2012

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

In the case of Kılıç and Eren v. Turkey,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Işıl Karakaş,

Guido Raimondi,

Paulo Pinto de Albuquerque, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 8 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 43807/07) 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 two Turkish nationals, Mr Mehmet Fatih Kılıç and Mr Kemal Eren (“the applicants”), on 1 October 2007.

2. The applicants were represented by Mr C. Demir, a lawyer practising in Van. The Turkish Government (“the Government”) were represented by their Agent.

3. On 11 December 2009 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

4. Following the communication of the application, the Government, but not the applicants, filed further written observations (Rule 54 § 2). However, the applicants indicated their wish to pursue their application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1986 and 1980 respectively and live in Ağrı.

6. On 21 March 2006 the applicants attended the *Newroz* celebrations in Patnos, a district of Ağrı. During the gathering, the crowd shouted slogans.

Subsequently, the Patnos Security Directorate initiated an investigation on account of the fact that some of the participants had shouted slogans praising the imprisoned leader of the PKK (the Kurdistan Workers' Party, an illegal organisation). Following an examination of a recording of the gathering, it was reported that the first applicant had shouted "*Biji Serok Apo*" ("Long live President Öcalan"), while the second applicant was seen as shouting slogans such as "*Biji Serok Apo*" and "*Gençlik Aponun Fedaisidir*" ("Youth are the guardsmen of Öcalan").

7. On 28 March 2006 the applicants were taken into police custody. In police statements taken from them on the same date, they both denied shouting slogans in support of the PKK. They maintained that they had shouted slogans in support of peace. Again on the same date, the applicants were subsequently taken before the public prosecutor and the investigating judge in turn. In their statements to the prosecutor and the judge, they maintained that they had only shouted "Kurds and Turks are brothers" and denied the accusations. The investigating judge released the applicants when the interrogation was over.

8. On 29 March 2006 the Patnos Public Prosecutor initiated criminal proceedings against the applicants in the Patnos Criminal Court, charging them with disseminating the propaganda of an illegal organisation, based on the slogans shouted during the *Newroz* celebrations. The prosecution accordingly called for the applicants to be sentenced pursuant to Article 220 § 8 of the Criminal Code.

9. On 15 August 2006 the court received an expert report regarding the video footage of the event. According to this report, the second applicant was seen shouting slogans in Kurdish and Turkish such as "*Disa disa serhildan serokeme Öcalan*" ("Rise up again and again, our president is Öcalan"), "*Biji Serok Apo*" ("Long Live President Apo") and "*Gençlik Aponun Fedaisidir*" ("Youth are the guardsmen of Öcalan"). The report stated that in the video footage there was no sign of the first applicant.

10. On an unspecified date, the Patnos Criminal Court declared that it lacked jurisdiction and transferred the case file to the Erzurum Assize Court, holding that offence with which the applicants were charged ought to be classified as praising a crime or a criminal and thus fell to be examined under Article 215 of the Criminal Code.

11. On 12 July 2007 the Erzurum Assize Court delivered its decision. While noting that the applicants had denied shouting the alleged slogans, based on the recording of the event, the court found the applicants guilty of praising both a crime and a criminal pursuant to Article 215 of the Criminal Code. It accordingly sentenced the applicants to twenty-five days' imprisonment each. The court then commuted the prison sentence to a fine of 500 Turkish liras (TRY) (the equivalent to 270 euros). As domestic legislation did not provide for an appeal, this decision was final.

12. On 19 October 2007 the first applicant paid the fine.

13. Subsequently, on 26 February 2008 the Erzurum Public Prosecutor reopened the proceedings against the second applicant for reconsideration of his case in view of Section 562 of Law no. 5728, which was published in the Official Gazette on 7 February 2008.

14. On 27 February 2008 the Erzurum Assize Court found that in view of the new provision, the second applicant had become entitled to benefit from Section 231 of the Criminal Procedure Code (Law no. 5271), which provided the possibility of suspending his sentence. Consequently, it decided to suspend the enforcement of the judgment for a period of five years in respect of the second applicant.

II. RELEVANT DOMESTIC LAW

15. Article 215 of the Criminal Code (Law no. 5237) reads as follows:

“Any person who approves of an offence committed, or praises a person on account of an offence he or she has committed, shall be liable to a term of imprisonment of up to two years.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

16. The applicants complained that their conviction and sentencing had constituted a breach of Articles 6, 7, 10 and 13 of the Convention. In this respect, they maintained that the domestic court had erred in its decision.

17. The Government contested that argument.

18. The Court notes at the outset that the application should be examined solely under Article 10 of the Convention, which reads:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime...”

A. Admissibility

19. The Court further considers that application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

20. The Government argued that the interference with the applicants' right to freedom of expression had been in accordance with the law, had pursued a legitimate aim and had been necessary in a democratic society. The applicants' convictions had been based on Article 215 of the Criminal Code and had been justified by the need to protect national security, public safety and to prevent disorder and crime. The Government further considered that the interference had been proportionate to its aims, as the applicants had received minor fines and the second applicant's sentence had subsequently been suspended for five years.

21. The applicants did not reply to the Government's observations.

22. In the Court's view, the criminal proceedings instituted against the applicants and their subsequent convictions for shouting slogans amounted to an interference with their right to freedom of expression, notwithstanding the fact that the second applicant's sentence was subsequently suspended by the domestic court (see, *mutatis mutandis*, *Balçık v. Turkey*, no. 63878/00, §§ 40-42, 26 April 2005). It further notes that the interference was prescribed by law, namely Article 215 of the Criminal Code (see paragraph 15 above). As to the legitimacy of the aims pursued, the Court observes that in the present case the national authorities sought to protect national security and to prevent disorder or crime. It therefore remains to be determined whether the interference complained of was "necessary in a democratic society".

23. The Court has frequently held that "necessary" implies the existence of a "pressing social need" and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that this goes hand in hand with European supervision (see *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII).

24. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I).

25. The Court considers that the above-mentioned principles also apply to measures taken by domestic authorities to maintain national security and public safety as part of the fight against terrorism. In this connection, it must, with due regard to the circumstances of each case and the State's margin of appreciation, ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations (see *Zana*, cited above, § 55, and *Gül and Others v. Turkey*, no. 4870/02, § 38, 8 June 2010).

26. At this point, the Court recalls that it has examined complaints relating to similar issues to those in the present case and found a violation of Article 10 of the Convention (see *Gül and Others*, cited above, §§ 32-45; and *Bahçeci and Turan v. Turkey*, no. 33340/03, §§ 24-34, 16 June 2009).

27. Turning to the particular circumstances of the present case, the Court observes from the documents in the case file that, based on the video recordings of the gathering, the Assize Court found it established that the first applicant had shouted "*Biji Serok Apo*" ("Long live President Öcalan"), and the second applicant had shouted "*Biji Serok Apo*", "*Gençlik Aponun Fedaisidir*" ("Youth are the guardsmen of Öcalan") and "*Dısa dısa serhildan serokeme Öcalan*" ("Rise up again and again, our president is Öcalan") during Newroz celebrations held in Ağrı. There is no indication in the case file that this celebration was not peaceful or that the people who had attended the celebration engaged in acts of violence. Consequently, the applicants were prosecuted solely for shouting slogans.

28. The Court observes that, taken literally, one of the slogans shouted by the second applicant "Rise up again and again, our president is Öcalan" might be construed as having a violent tone. Nevertheless, as stated above, this slogan was shouted during a lawful and peaceful gathering – which limited its potential impact on "national security" and "public order" – and thus it is not a call for violence. The Court further notes that the present application is distinguishable on its context from the case of *Taşdemir v. Turkey* ((dec.), no. 38841/07, 23 February 2010). In the latter case, the slogan shouted by the applicant, "*Biji Serok Apo, HPG cepheye misillemeye*" (Long live Apo, HPG (the armed wing of the PKK) to the front line in retaliation) had clearly amounted to an apology for terrorism. In this connection, the Court stresses that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Karataş v. Turkey* [GC], no. 23168/94, § 49, ECHR 1999-IV; and *Gül and Others*, cited above, § 41). The Court also reiterates that, according to its well-established case-law, paragraph 2 of Article 10 is applicable not only to "information" or "ideas" which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic

society” (see *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 57, 8 July 1999).

29. The Court observes that, in the circumstances of the present case, by shouting these slogans, the applicants did not advocate violence, injury or harm to any person. Furthermore, neither in the domestic court decisions nor in the observations of the Government is there any indication that there was a clear and imminent danger which required the interference faced by the applicants (*Gül and Others*, cited above, § 42).

30. In view of the above findings, the Court is of the view that the applicants’ conduct cannot be considered to have had an impact on “national security” or “public order” by way of encouraging the use of violence or inciting others to armed resistance or rebellion, which are essential elements to be taken into account (see, *a contrario*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV).

31. Having regard to the above considerations, the Court concludes that, in the circumstances of the present case, the interference in question was not “necessary in a democratic society”. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. The applicants did not submit any just satisfaction claim. Accordingly, the Court considers that there is no call to award them any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention.

Done in English, and notified in writing on 29 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President