



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

SECOND SECTION

CASE OF ÇETIN AND OTHERS v. TURKEY

(Applications nos. 40153/98 and 40160/98)

JUDGMENT
[Extracts]

STRASBOURG

13 February 2003

FINAL

13/05/2003

In the case of Çetin and Others v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr GAUKUR JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr R. TÜRMEŒ,
Mr C. BİRSAN,
Mr M. UGREKHELIDZE, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 6 November 2001 and 28 January 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 40153/98 and 40160/98) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by eight Turkish nationals (“the applicants”): Mr Vedat Çetin, who lodged application no. 40153/98 on 5 January 1998, and Mr Mehmet Kaya, Mr İsmet Bakaç, Mr Ahmet Sünbül, Mr Zeynel Bağır, Mr Metin Dağ, Mr Kemal Sahin and Mr Naif Kiliç, who jointly lodged application no. 40160/98 on 5 February 1998.

2. The applicants were represented before the Court by Mr S. Tanrikulu, of the Diyarbakir Bar. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The object of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber which would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. After deciding to join the applications the Chamber declared them partly admissible in a decision of 6 November 2001.

8. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

9. The applicants are Turkish nationals and live in Diyarbakir. At the material time, they worked as journalists on *Ülkede Gündem*, a Turkish-language daily newspaper based in Istanbul. Publication of the newspaper ceased on 24 October 1998 and it was replaced initially by *Özgür Bakis* and subsequently, on 27 April 2000, by another daily newspaper, *2 Binde Yeni Gündem*. That newspaper was replaced on 31 May 2001 by a weekly periodical called *Yedinci Gündem*.

10. At the material time one of the applicants, Mr Çetin, an independent journalist, wrote a column entitled “Notes from Diyarbakir” (*Diyarbakir'dan Notlar*), which was published on Tuesdays in *Ülkede Gündem*. Mr Bakaç was *Ülkede Gündem*'s representative in Diyarbakir. He currently works as a press officer for the Diyarbakir Urban District Council.

11. As for the other applicants, Mr Bagir is now the mayor of Lice, Mr Kaya is a lawyer and Mr Sahin and Mr Kiliç both teach in schools in eastern Turkey. Mr Sünbül continues to work as a journalist with the weekly publication *7. Gündem*, while Mr Dag currently works as a press officer for Kayapinar Town Council.

12. The main point at issue in the present case is a ban that was imposed on 1 December 1997 by the governor of the state of emergency region on the distribution of *Ülkede Gündem* in that region.

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the governor of the state of emergency region's decision

13. According to the applicants, the distribution of *Ülkede Gündem* was impeded by the security forces in the period from September to November 1997, and the governor of the state of emergency region subsequently imposed a ban on its publication and distribution in the region where the state of emergency had been declared (see paragraph 24 below). On 13 November 1997 the proprietor of *Ülkede Gündem* sent a letter to the Ministry of the Interior informing it of the disruption caused to the

distribution of the newspaper and demanding an end to these unlawful acts. He also sought compensation for the loss sustained.

14. On 19 November 1997 the governor of the state of emergency region wrote to the proprietor of *Ülkede Gündem* to say that his office was not responsible for the acts mentioned in the letter. He enclosed the seizure orders that had been made by the relevant authorities.

15. The Government have produced to the Court seventy-two warrants issued by judges of the Istanbul National Security Court for the seizure of various issues of the newspaper in the months of September, November and December 1997.

16. On 4 November 1997 Mr Bakaç and Mr Bagir lodged a criminal complaint with the Diyarbakir public prosecutor's office because of the alleged disruption to the distribution of the newspaper.

17. On 25 November 1997 the public prosecutor's office ruled that it had no power to deal with the complaint and referred it to the Diyarbakir Administrative Council under the Prosecution of Civil Servants Act.

18. On 5 February 1998 the Diyarbakir Administrative Council held that there was no case to answer in view of the seizure warrants that had been issued by the Istanbul National Security Court. Its decision was upheld by the Supreme Administrative Court on 3 March 2000.

B. The ban on the publication and distribution of *Ülkede Gündem* in the state of emergency region

19. On 1 December 1997 the governor of the state of emergency region imposed a ban on the publication and distribution of *Ülkede Gündem* in that region.

20. On 4 December 1997 the Diyarbakir Security Directorate wrote to Mr Bakaç, in his capacity as *Ülkede Gündem*'s representative in Diyarbakir, informing him of the ban. Its letter read as follows:

“Regard being had to Directive no. 1344 issued by the governor's office of the state of emergency region on 1 December 1997,

With effect from 1 December 1997 the publication and distribution of the daily newspaper *Ülkede Gündem* in the provinces in which a state of emergency has been declared under the aforementioned directive (Diyarbakir, Hakkari, Siirt, Sirnak, Tunceli and Van) shall be prohibited.”

21. Likewise, on 5 December 1997 the Tunceli Security Directorate wrote a letter to the company responsible for distributing the newspaper, Birlesik Basim Dagitim A.S., based in Adana, in the following terms:

“Regard being had to Directive no. 1344 issued by the governor's office of the state of emergency region on 1 December 1997,

With effect from 1 December 1997 the publication and distribution of the Istanbul daily newspaper *Ülkede Gündem* in the provinces in which a state of emergency has been declared under the aforementioned directive (Diyarbakir, Hakkari, Siirt, Sirnak, Tunceli and Van) shall be prohibited, pursuant to Article 1 of Legislative Decree no. 430 and section 11(e) of the State of Emergency Act.”

C. The bans imposed on the successor publications to *Ülkede Gündem*

22. On 7 May 1999 the governor of the state of emergency region imposed a ban pursuant to Article 11 (e) of Legislative Decree no. 285 on the publication and distribution of *Özgür Bakis*, the daily newspaper that had replaced *Ülkede Gündem*.

Similarly, on 1 June 2000 he issued an order prohibiting the publication and distribution of the daily newspaper *2 Binde Yeni Gündem* in the state of emergency region.

Lastly, on 27 June 2001 the weekly publication *Yedinci Gündem*, which had replaced *2 Binde Yeni Gündem*, met the same fate, with a ban being imposed on its publication and distribution in the region.

23. The applicants have produced a notice dated June 2000 which shows that at different times the governor of the state of emergency region imposed bans on the publication and distribution of seventeen periodicals, including *Ülkede Gündem*, *Özgür Bakis* and *2 Binde Yeni Gündem*.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The state of emergency region

24. The governor's office of the state of emergency region was set up with special powers after the state of siege was officially declared to be over on 19 July 1987 by Legislative Decree no. 285 of 10 July 1987. A state of emergency was thus decreed in the provinces of Bingöl, Diyarbakir, Elazig, Hakkari, Mardin, Siirt, Tunceli and Van. On 19 March 1994 the state of emergency was extended to the province of Bitlis, but lifted in the province of Elazig. It was declared to be over in the provinces of Batman, Bingöl and Bitlis on 2 October 1997, in the province of Van on 30 July 2000 and in the provinces of Tunceli and Hakkari on 1 August 2002. In July 2002 it was extended by four months in the provinces of Diyarbakir and Sirnak.

B. The powers of the governor of the state of emergency region

25. The powers of the governor of the state of emergency region (*Olaganüstü Hal Bölge Valisi*) are set out in the State of Emergency Act

(Law no. 2935 of 25 October 1983) and various legislative decrees that were issued after the state of emergency was declared (Legislative Decrees nos. 313, 387, 413, 421, 425, 426, 427, 428, 430, 432 and 481).

26. Section 11(e) of the State Emergency Act reads as follows:

“... If a state of emergency is decreed, the following measures may be imposed with a view to maintaining general security, safety and public order and to preventing any escalation in the violence ...:

...

(e) An order prohibiting, either absolutely or without prior permission, the editing, dissemination, publication or distribution of newspapers, reviews, brochures, pamphlets, posters or any similar publications, or the publication or distribution of any such [publications] which have been printed or disseminated outside the state of emergency region ...”

27. Article 1 (a) of Legislative Decree no. 430 provides:

“The printing, dissemination, publication or distribution of books, reviews, newspapers, brochures, posters or other similar publications liable seriously to undermine public order in the region, to cause agitation among the local population or to obstruct the security forces in the course of their duties by giving a false account of operations being conducted in the region shall be prohibited, either absolutely or without the prior permission of the governor of the region to which the state of emergency applies or the governors of the provinces concerned. [Likewise,] the publication or distribution of [any publication of the same type] that has been printed and published outside the state of emergency region shall be prohibited, either absolutely or without the prior permission of the governor of the region to which the state of emergency applies or the governors of the provinces concerned ...”

C. Judicial scrutiny of legislative decrees on the state of emergency and of measures taken by the governor of the state of emergency region

1. Constitutional review of legislative decrees on the state of emergency

28. The relevant part of Article 148 § 1 of the Constitution provides:

“... There shall be no right of appeal to the Constitutional Court to contest the form or substance of legislative decrees issued during a state of emergency, a state of siege or in wartime.”

2. Judicial scrutiny of measures taken by the governor of the state of emergency region

29. Article 7 of Legislative Decree no. 285, as amended by Legislative Decree no. 425 of 9 May 1990, precludes any application in the

administrative courts to have an administrative act performed pursuant to Legislative Decree no. 285 set aside.

30. Article 8 of Legislative Decree no. 430 reads as follows:

“No criminal, financial or civil liability may be asserted against ... the governor of the state of emergency region or provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This shall be without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification [*sebepsiz*].”

3. *The case-law of the Constitutional Court*

31. The Constitutional Court has reviewed the constitutionality of Article 7 of Legislative Decree no. 285, as amended by Legislative Decree no. 425 of 9 May 1990, in a judgment of 10 January 1991, which was published in the Official Gazette on 5 March 1992. It stated:

“It is not possible to reconcile that provision [which precludes any judicial scrutiny of acts performed by the governor of the state of emergency region] with the concept of the rule of law ... The system of government when a state of emergency has been declared is not an arbitrary one that escapes all judicial scrutiny. There can be no doubt that individual and regulatory acts performed by the competent authorities while the state of emergency continues must be subject to judicial review. Contravention of this principle is inconceivable in countries run by democratic regimes and founded on freedom. However, the impugned provision is contained in a legislative decree that cannot be the subject of constitutional review ... Consequently, the application for an order quashing that provision must be dismissed as being incompatible *ratione materiae* [*yetkisizlik*] ...”

32. As regards Article 8 of Legislative Decree no. 430, in two judgments delivered on 3 July 1991 and 26 May 1992 (published in the Official Gazette on 8 March 1992 and 18 December 1993 respectively), the Constitutional Court followed that decision in dismissing as incompatible *ratione materiae* applications for orders quashing the relevant provisions.

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicants complained that the ban imposed by the governor on 1 December 1997 on the distribution of the daily newspaper *Ülkede Gündem* in the state of emergency region constituted an unjustified interference in the exercise of their right to impart information or ideas.

They relied in that connection on Article 10 of the Convention, the relevant part of which provides:

“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, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

...

3. “*Necessary in a democratic society*”

48. It remains to be examined whether the measure concerned was “necessary in a democratic society” to achieve those aims.

...

(b) The Court's assessment

57. The Court would first point out that Article 10 guarantees freedom of expression to “everyone”. No distinction is made in it according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom (see, *mutatis mutandis*, *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, pp. 16-17, § 35). It applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information (see, *mutatis mutandis*, *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A no. 178, p. 23, § 47). In the present case, the Court considers that the applicants' ability to exercise their right to freedom to impart ideas and information to the inhabitants of the state of emergency region was directly at stake, as the ban affected *Ülkede Gündem*, which reported and commented on, among other things, items of regional news gathered by journalists – the applicants in this instance.

58. The Court considers that the only way it can examine whether the interference was necessary is by looking at the wording of section 11(e) of the State of Emergency Act (Law no. 2935) and Article 1 (a) of Legislative Decree no. 430, and the arguments put to it by the Government, as the impugned measure escaped judicial scrutiny by the domestic courts and the governor of the state of emergency region did not give any reasons for his decision.

59. The Court observes that section 11(e) of the State of Emergency Act and Article 1 (a) of Legislative Decree no. 430 are drafted in very broad

terms and grant the governor of the state of emergency region vast powers to impose administrative bans on the publication and distribution of publications. Such prior restrictions are not, in principle, incompatible with the Convention. However, they may only be imposed if a particularly strict framework of legal rules regulating the scope of bans and ensuring the effectiveness of judicial review to prevent possible abuse is in place.

60. As regards, firstly, the scope of the governor's powers, the Court notes that the relevant provisions enable him to prohibit the circulation and distribution of any written material considered liable seriously to undermine public order in the region, cause agitation among the local population or obstruct the security forces in the course of their duties by giving a false account of operations being conducted in the region (see paragraphs 26-27 above).

61. Having carefully examined the extent of what it accepts are exceptional powers, which by their nature may only be justified by very special circumstances, the Court must seek to determine what safeguards existed against their possible abuse in practice. In that connection, it observes that, although it is possible to counterbalance and limit powers of this type by strict and effective judicial scrutiny, both the provisions conferring the powers on the governor of the state of emergency region and the manner in which the rules are applied escape such scrutiny. In that regard, the Court can but share the concern expressed by the Constitutional Court in these terms (see paragraph 31 above):

“It is not possible to reconcile that provision [which precludes any judicial scrutiny of acts performed by the governor of the state of emergency region] with the concept of the rule of law ... The system of government when a state of emergency has been declared is not an arbitrary one that escapes all judicial scrutiny. There can be no doubt that individual and regulatory acts performed by the competent authorities while the state of emergency continues must be subject to judicial review. Contravention of this principle is inconceivable in countries run by democratic regimes and founded on freedom. However, the impugned provision is contained in a legislative decree that cannot be the subject of constitutional review ...”

62. The Court is obviously prepared to take into account the background to cases before it and, in particular, the difficulties inherent in the fight against terrorism. In that regard, it notes that the Commission declared inadmissible two applications concerning a ministerial order imposing restrictions on broadcasting media in circumstances similar to those in the present case (see *Purcell and Others v. Ireland*, no. 15404/89, Commission decision of 16 April 1991, Decisions and Reports (DR) 70, p. 262, and *Brind and Others v. the United Kingdom*, no. 18714/91, Commission decision of 9 May 1994, DR 77-A, p. 42). However, the present case is distinguishable from the aforementioned applications, which concerned restrictions on broadcasting media, whose impact is often far more immediate and powerful than that of the press. In addition, the regulations examined by the Commission described in considerable detail the type of

programme to which the ban applied (interviews with the spokespersons of certain organisations). Lastly, the decisions imposing the bans had been subjected to judicial scrutiny.

63. The Court observes in passing that it is unable to accept the Government's assertion that the reason the governor of the state of emergency region decided to ban the newspaper was that certain articles published in it, which had resulted in various issues being seized because they were liable to incite the population to riot or sought to vindicate criminal acts by terrorists, might have serious repercussions for public order in the region. The Court considers that the political tension caused by terrorist acts in the region concerned at the material time is a factor to be taken into account (see, *mutatis mutandis*, *Piermont v. France*, judgment of 27 April 1995, Series A no. 314, p. 26, § 77). While it is certainly possible that the articles that led to the seizure of the newspapers would have exacerbated an already tense situation, the decision to impose the ban contained no reasons and made no reference to the seizure warrants issued by the judges in Istanbul. In addition, the ban was not a preventive measure taken as a result of the seizures to which the Government refer, since the seizure of a publication as a preventive measure may only be ordered by a judge in criminal proceedings of a different kind to those which were brought in the present case. Accordingly, in the absence of detailed reasoning accompanied by proper judicial scrutiny, the decision to implement such a measure lays itself open to various interpretations. Thus, the ban could be perceived by the applicants as a response to heavy criticism in *Ülkede Gündem* of the security forces' operations in the region.

64. As to the Government's arguments that the local population had numerous sources of ideas and information available and that, as journalists, the applicants were involved in the publication of various newspapers and thus had been able to impart their ideas and information along with the rest of the country, the Court reiterates that the press plays an essential role in a democratic society. In view of their passive role as recipients of information, citizens must be permitted to receive a variety of messages, to choose between them and reach their own opinions on the various views expressed, for what sets democratic society apart is this plurality of ideas and information.

65. Furthermore, contrary to what the Government have asserted, the ban did not end after fifty-three days. The case file shows that although *Ülkede Gündem* ceased publication on 24 October 1998, the measure was still very much in force in June 2000. In addition, the successor publications to *Ülkede Gündem*, and various other publications, were unable to escape the same fate (see paragraphs 22-23 above). Lastly, since there is no right to seek judicial review in the administrative courts, such measures can only be lifted by a unilateral discretionary act on the part of the governor of the state of emergency region.

66. In conclusion, the Court notes that, because the courts have no power to review administrative bans on publications, the applicants were deprived of sufficient safeguards to protect against abuse. Accordingly, in the light of these considerations, it finds that the interference caused by section 11(e) of the State of Emergency Act and Article 1 (a) of Legislative Decree no. 430, and the way in which those provisions were applied in the instant case, cannot be regarded as having been “necessary in a democratic society” and went beyond the requirements of the legitimate aim pursued. There has therefore been a violation of Article 10 of the Convention.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

...

Done in French, and notified in writing on 13 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence EARLY
Deputy Registrar

Jean-Paul COSTA
President