



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

FOURTH SECTION

CASE OF GERGER v. TURKEY (No. 2)

(Application no. 42436/98)

JUDGMENT
(Friendly settlement)

STRASBOURG

9 March 2004

This judgment is final but it may be subject to editorial revision.

In the case of Gerger v. Turkey (No. 2),

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

Sir Nicolas BRATZA, President,

Mr M. PELLONPÄÄ,

Mr R. TÜRMEK,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. BORRERO BORRERO, judges,

and Mrs F. ELEN-PASSOS, Deputy Section Registrar,

Having deliberated in private on 2 July 2002 and 10 February 2004,

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

PROCEDURE

1. The case originated in an application (no. 42436/98) 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 a Turkish national, Mr Haluk Bahri Gerger ("the applicant"), on 11 June 1998.

2. The applicant was represented by Mr K.T. Sörek, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant complained about the interference with his right to freedom of expression and the fairness of the criminal proceedings brought against him. He invoked Articles 6 and 10 of the Convention.

4. The case was transferred to the Court on 1 November 1998 by virtue of Article 5 § 2 of Protocol No. 11 to the Convention.

5. On 15 June 2000 the complaints concerning the lack of independence and impartiality of the Istanbul State Security Court, the lack of an oral hearing before the Court of Cassation and the interference with the applicant's right to freedom of expression were communicated to the Government and the remainder of the complaints were declared inadmissible.

6. On 2 July 2002, having obtained the parties' observations, the Court declared the application admissible in so far as it had been communicated to the Government.

7. On 25 February 2003, the Registrar suggested to the parties that they should attempt to reach a friendly settlement within the meaning of Article

38 § 1 (b) of the Convention. The applicant and the Government submitted formal declarations accepting a friendly settlement of the case.

THE FACTS

8. The applicant was born in 1948 and lives in Ankara.

9. The applicant, a journalist, published an article entitled “State of Emergency and Provide Comfort Forces” (“*OHAL ve Çekiç Güç*”) in the 30 June 1995 issue of “*Evrensel*” (“Universal”), a daily newspaper published in Turkey.

10. On 30 June 1995, at the request of the public prosecutor, a single judge of the Istanbul State Security Court made an interim order for the seizure of copies of the issue of *Evrensel* newspaper published on 30 June 1995.

11. On 3 July 1995 the public prosecutor attached to the Istanbul State Security Court charged the applicant and the editor-in-chief of the newspaper with incitement to hatred and hostility by making distinctions on the basis of race and region under Article 312 §§ 2 and 3 of the Criminal Code.

12. On 23 September 1995 the applicant was released from prison after having served his sentence of one year and eight months’ imprisonment, stemming from another conviction by the Ankara State Security Court in connection with an earlier charge of incitement to hatred.

13. On 17 November 1995 the Ankara State Security Court commuted the applicant’s prison sentence to a fine in accordance with Law no. 4126, which came into force on 27 October 1995. The sentence was subsequently suspended.

14. On 15 May 1996 the Istanbul State Security Court, composed of three judges including a military judge, found the applicant guilty as charged. The court sentenced the applicant to one year and eight months’ imprisonment and a fine of 500,000 Turkish liras. The applicant was sentenced *in absentia*.

15. On 18 November 1996 the Court of Cassation quashed the judgment of the Istanbul State Security Court stating that the lower court should not have convicted the applicant without hearing his defence.

16. The case was remitted to the Istanbul State Security Court.

17. On 29 December 1997 the Istanbul State Security Court convicted the applicant once again under Article 312 §§ 2 and 3 of the Criminal Code. It ruled that the impugned article, taken as a whole, amounted to incitement to hatred and hostility on the basis of distinctions between races and regions. The court sentenced the applicant under Article 312 §§ 2 and 3 of

Criminal Code to one year and eight months' imprisonment and a fine of 500,000 Turkish liras.

18. On 12 January 1998 the applicant appealed to the Court of Cassation.

19. On 16 March 1998 the Court of Cassation upheld the Istanbul State Security Court's judgment of 29 December 1997.

20. On 17 August 1998 the applicant lodged a petition with the Istanbul State Security Court. He requested that the period that he had been imprisoned due to his conviction by the Ankara State Security Court be deducted from the prison sentence ordered by the Istanbul State Security Court.

21. On 11 September 1998 the Istanbul State Security Court accepted the applicant's request and, therefore, the applicant was not imprisoned.

THE LAW

22. On 22 July 2003 the Court received the following declaration signed by the applicant's representative:

"1. I note that the Government of Turkey are prepared to pay me *ex gratia* the sum of 7,000 (seven thousand) Euros with a view to securing a friendly settlement of my application registered under no. 42436/98. This sum, which is to cover any pecuniary or non-pecuniary damage as well as legal costs and expenses connected with the case, shall be paid in Euros, to be converted into Turkish liras at the rate applicable at the date of payment, to a bank account named by me. The sum shall be payable, free of any taxes which may be applicable, within three months from the date of the judgment delivered by the Court pursuant to Article 39 of the European Convention on Human Rights.

2. I accept the proposal and waive any further claims against Turkey in respect of the facts of this application. I declare that this constitutes a final settlement of the case.

3. This declaration is made in the context of a friendly settlement which the Government and I have reached.

4. I further undertake not to request that the case be referred to the Grand Chamber under Article 43 § 1 of the Convention after delivery of the Court's judgment.

Istanbul, 9 July 2003"

23. On 31 October 2003 the Court received the following declaration from the Government:

"1. I declare that the Government of the Republic of Turkey offer to pay *ex gratia* to the applicant, the amount of 7,000 (seven thousand) Euros with a view to securing a friendly settlement of his application registered under no. 42436/98. This sum, which also covers legal expenses connected with the cases, shall be paid in euros, free of any taxes that may be applicable, to a bank account named by the applicant, within three

months from the date of the judgment delivered by the Court pursuant to the Article 39 of the European Convention on Human Rights. This payment will constitute the final settlement of the case. In the event of failure to pay this sum within the said three month period, the Government undertake to pay, until settlement, simple interest on the amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

2. The Court's rulings against Turkey in cases involving prosecution under former Article 312 of the Penal Code clearly showed that Turkish law and practice needed to be brought into line with the Convention's requirements under Article 10 of the Convention. This is also reflected in the interference underlying the facts of the present case. To that end, amendments were made by the Government to Article 312 by Law no. 4744. The Government undertake to ensure that the amended Article 312 will be applied in accordance with the requirements of Article 10 of the Convention as interpreted in the Court's case-law.

The Government will continue to implement all necessary reform of domestic law and practice in this area, including by means of the organisation of training programmes for prosecutors and judges on the relevant Convention standards.

3. The Government refer also to the individual measures set out in the Interim Resolution adopted by the Committee of Ministers of the Council of Europe on 23 July 2001 (ResDH(2001)106, which they will apply to the circumstances of cases such as the instant one.

4. Finally, the Government undertake not to request the reference of the case to the Grand Chamber pursuant to Article 43 § 1 of the Convention after the delivery of the Court's judgment.

Ankara, 27 October 2003"

24. The Court takes note of the agreement reached between the parties (Article 39 of the Convention). It is satisfied that the settlement is based on respect for human rights as defined in the Convention or its Protocols (Article 37 § 1 *in fine* of the Convention and Rule 62 § 3 of the Rules of Court).

25. Accordingly, the case should be struck out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to strike the case out of the list;
2. *Takes note* of the parties' undertaking not to request a rehearing of the case before the Grand Chamber.

Done in English, and notified in writing on 9 March 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise ELEN-PASSOS
Deputy Registrar

Nicolas BRATZA
President