



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

SECOND SECTION

CASE OF MARAŞLI v. TURKEY

(Application no. 40077/98)

JUDGMENT

STRASBOURG

9 November 2004

FINAL

09/02/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Maraşlı 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 L. LOUCAIDES,

Mr R. TÜRMEŒ,

Mr C. BİRSAN,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI, *judges*,

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

Having deliberated in private on 19 October 2000, and on 19 October 2004,

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

PROCEDURE

1. The case originated in an application (no. 40077/98) 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, Recep Maraşlı (“the applicant”), on 10 December 1997.

2. The applicant, who had been granted legal aid, was represented by Mr I. Güler and Ms F. Karakaş, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. By a decision of 19 October 2000 the Court declared the application partly inadmissible. It retained the applicant's complaints concerning the independence and impartiality of the Istanbul State Security Court and the alleged interference with his rights to freedom of thought and freedom of expression as well as the alleged discrimination the applicant faced in the exercise of those rights.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1956 and lives in Germany.

5. The applicant wrote an article entitled “*Kurdistan: will it become a common colony of Europe?*” in “*Newroz*”, a weekly newspaper published in Istanbul.

6. The article read:

“The Turkish bourgeoisie has been advancing their intention of associating with the European Community since the date of the Treaty of Rome. However, the economic and political problems of Turkey have not been solved since that date. The conditions for association have not been established either.

On the other hand, the founders of the European Union are not keen on taking on board a huge problem with its fifteen million unemployed people and serious economic and social problems.

Considering the still unresolved problems of German unification and the unexpected economic integration of East European countries, the acceptance of Turkey by the Community definitely seems impossible.

However, Europe does not want to keep out Turkey completely. It is keen on keeping Turkey within its hinterland as an investment area and a market. The dilemma of either being part of Europe or outside Europe is a common thread.

Briefly, the structural problem of Turkey and the unwillingness of Europe for association with it intersect. On the one hand, the pressures on Turkey from the various institutions of European association on matters such as “Democracy”, “Human Rights”, “the Kurdish Problem”, etc. reflect the reaction of domestic public opinion in Europe. On the other hand, these pressures are being used as an excuse to keep Turkey out.

The above issue has to be emphasised in order to point out the defects in the sincerity both of the approaches to the solution of the Kurdish problem and the idea that the European institutions are the purest supporters of democracy and human rights.

The customs union seems an acquired right or an opportunity for Turkey. However, it also seems very difficult for Turkey, having regard to her political and economical problems.

The way to the customs union and the European Union will result in important changes for the Kurdish National Movement. In the first instance, Kurdistan, already shared by the colonialist Middle East States, will become a common colony of Europe along with her Turkish part. Accordingly, Kurdistan's political and social problems which originate from her colonial status will be directly addressed to Europe.

It will become easier for Turkey to control Kurdistan by economic means than has been the case with its control through military force and political violence. This means that Kurdistan will become an economic and political environment for Turkey such that she will have neither the need for, nor the possibility to keep, Kurdistan as a classic colony.

One of the direct political effects of this situation will be Europe's insistence on the direct application of its rules to solve the Kurdish problem. Europe is closely

interested in both national matters and in the Kurdistan problem and has its own experiences of colonialism.

Another political effect is that most of the Kurdish refugee organisations in Europe are supporting and promoting the European solution. This approach considers the future of the Kurdish community in a Turkish Republic associated with Europe. Kurdish intellectuals in Europe are also supporting this approach and conveying their political message to Kurdistan.

Any possible tension with Europe will have a direct effect on the politics of the subject groups. The improvement of relations or a possible customs union with the European Union will benefit this approach and will have increased political effect or will gain more acceptance from the Turkish Government in consequence.

However, the Kurdish Revolution has already abolished the classical colonial conditions and has stressed the need for a local/national solution.

The dimensions of the problem and the strict militarist bureaucracy of the Turkish political structure prove that Europe is not and will not be the determining factor for either Turkey or Kurdistan.”

7. On 13 February 1995 the public prosecutor at the Istanbul State Security Court accused the applicant of disseminating propaganda against the unity of the Turkish nation and the “indivisible unity of the State”. He requested, *inter alia*, that the applicant be convicted under section 8 of Law No. 3713. He relied on the terms of the above article in support of his application. During the proceedings an amendment to section 8 entered into force (Law no. 4126) and, in consequence, the public prosecutor pressed for the applicant's conviction on the strength of the new amendment which increased the level of the fine for the offence with which he was charged but reduced the term of imprisonment which could be imposed.

8. In the proceedings before the Istanbul State Security Court the applicant acknowledged that he had drafted the article and asserted that the expression of an opinion could not constitute an offence.

9. On 13 December 1996 the Istanbul State Security Court, composed of three judges including a military judge, found the applicant guilty as charged. It ruled that the impugned article referred to a particular region of Turkey as “Kurdistan” and that the applicant's comments, taken as a whole, amounted to separatist propaganda. The court sentenced the applicant under section 8(1) of Law no. 3713, as amended by Law no. 4126, to one year, eight months and ten days' imprisonment and a fine of 111,111,111 Turkish liras (TRL) (847 euros (EUR)), to be paid in twenty monthly instalments.

10. On 12 June 1997 the Court of Cassation upheld the judgment of the State Security Court. The judgment of the Court of Cassation was deposited with the Registry of the first-instance court on 10 July 1997.

II. RELEVANT DOMESTIC LAW AND PRACTICE

11. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, §§ 41-42, 10 October 2000; *Mehdi Zana v. Turkey*, no. 26982/95, § 21, 6 April 2004; *Özel v. Turkey*, no. 42739/98, §§ 20-21, 7 November 2002; and *Gençel v. Turkey*, no. 53431/99, §§ 11-12, 23 October 2003.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

12. The applicant complained that his criminal conviction had infringed his rights to freedom of thought and expression. He relied on Articles 9 and 10 of the Convention.

13. The Court considers that this complaint should be examined from the standpoint of Article 10 alone (see, among other authorities, *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1569, § 60), 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...”

14. It is not in dispute between the parties that the conviction complained of constituted an interference with the applicant's right to freedom of expression protected by Article 10 § 1. Nor is it contested that the interference was prescribed by law and pursued a legitimate aim, that of protecting territorial integrity, for the purposes of Article 10 § 2 (see *Yağmurdereli v. Turkey*, no. 29590/96, § 40, 4 June 2002). The Court will therefore confine its examination of the case to the question as to whether the interference was “necessary in a democratic society”.

15. The Court has examined a number of cases raising similar issues to those in the present case and found a violation of Article 10 of the Convention (see, in particular, the following judgments: *Ceylan v. Turkey* [GC], no. 23556/94, § 38, ECHR 1999-IV, *Öztürk v. Turkey* [GC], no. 22479/93, § 74, ECHR 1999-VI, *İbrahim Aksoy*, cited above, § 80).

16. The Court considers in the light of its case-law that the Government have not submitted any facts or arguments capable of leading to a different conclusion in this instance. It has had particular regard to the words used in the impugned article. In this connection, it has taken into account the background to the case and, in particular the problems linked to the prevention of terrorism (see, *Ibrahim Aksoy*, cited above; § 60, and *Incal*, cited above, § 58).

17. The article in issue consisted of a critical assessment of how political developments on the question of the integration of Turkey into the European Union may have a bearing on the solution of the Kurdish problem.

18. The Istanbul State Security Court held that the article at issue contained words aimed at destroying the territorial integrity of the Turkish State and amounted to separatist propaganda. However, the Court has examined the reasons given in the national courts' decisions and does not consider them sufficient to justify the interference with the applicant's right to freedom of expression (see, *mutatis mutandis*, *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 58, 8 July 1999). The Court observes, among other things, that although certain particularly acerbic passages of the article paint an extremely negative picture of the Turkish State and thus give the narrative a hostile tone, they do not encourage violence, armed resistance or insurrection and do not constitute hate speech. In the Court's view, this is an essential consideration (contrast *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV, and *Gerger v. Turkey* [GC], no. 24919/94, § 50, 8 July 1999) in the assessment of the necessity of the measure. The nature and severity of the penalties imposed on the applicant are also factors to be taken into account when assessing the proportionality of the interference.

19. Having regard to the above considerations, the Court concludes that, the applicant's conviction was disproportionate to the aims pursued and therefore not "necessary in a democratic society". Accordingly, there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

20. The applicant submitted that his case had not been heard by an independent and impartial tribunal in breach of Article 6 § 1 of the Convention, having regard to the presence of a military judge on the bench of the Istanbul State Security Court. In addition, he contended that the fairness of the proceedings had also been undermined by other shortcomings. In this connection, he stated that the domestic courts had failed both to give adequate reasons for their decisions and to inform him of the observations which the public prosecutor had submitted during the proceedings at first instance and on appeal. In his submission, these procedural irregularities amounted to a breach of Article 6 §§ 1 and 3 (b) of the Convention, the relevant parts of which provide:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

...”

1. Independence and impartiality of the Istanbul State Security Court

21. The Court has examined a large number of cases raising similar issues to those in the present case and found a violation of Article 6 § 1 of the Convention (see *Özel*, cited above, §§ 33-34, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

22. It considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion in the instant case. It finds it understandable that the applicant – prosecuted in a State Security Court for offences relating to “national security” – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service. On that account he could legitimately fear that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. Consequently, the applicant's doubts about that court's independence and impartiality may be regarded as objectively justified (see *Incal*, cited above, p. 1573, § 72 *in fine*).

23. In conclusion, the Court finds that the State Security Court which tried and convicted the applicant was not an independent and impartial tribunal within the meaning of Article 6 § 1.

2. Fairness of the criminal proceedings

24. The Court observes that it has held in similar cases that a court whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial to persons subject to its jurisdiction.

25. Having regard to its finding that the applicant's right to a fair hearing by an independent and impartial tribunal has been infringed, the Court considers that it is unnecessary to examine the applicant's other complaints under Article 6 (see, among other authorities, *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, §§ 44- 45).

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 10

26. The applicant complained that he was discriminated against on account of his political opinions, contrary to Article 14 of the Convention read in conjunction with Article 10. Article 14 provides:

“The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

27. The Government rejected the applicant's allegation.

28. Having regard to its conclusion that there has been a violation of Article 10 taken separately (see paragraph 22 above), the Court does not consider it necessary to examine the complaint under Article 14 (see, *Arslan v. Turkey* [GC], no. 23462/94, § 53, 8 July 1999).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

30. The applicant claimed compensation for non-pecuniary damage which he assessed at 10,000,000,000 Turkish liras (TRL) (EUR 5,534).

31. The Government did not express an opinion.

32. The Court considers that the applicant may be taken to have suffered a certain amount of distress in the circumstances of the case. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards him EUR 5,000 for non-pecuniary damage.

33. Where the Court finds that an applicant was convicted by a tribunal which was not independent and impartial within the meaning of Article 6 § 1, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted a prompt retrial by an independent and impartial tribunal (*Gençel*, cited above, § 27).

B. Costs and expenses

34. The applicant, who received EUR 640 in legal aid from the Council of Europe in connection with the presentation of his case, claimed

TRL 1,000,000,000 (EUR 553) for costs and expenses incurred in the domestic courts and TRL 5,000,000,000 (EUR 2,767) for those incurred before the Court.

35. The Government did not comment on the applicant's claim.

36. Making its own estimate based on the information available, the Court awards the applicant EUR 2,000 less EUR 630 received by way of legal aid from the Council of Europe.

C. Default interest

37. 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. *Holds* that there has been a violation of Article 10 of the Convention;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the State Security Court's lack of independence and impartiality;
3. *Holds* that it is not necessary to examine the applicant's other complaints under Article 6 of the Convention;
4. *Holds* that no separate issue arises under Article 10 of the Convention taken together with Article 14 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 1,370 (one thousand three hundred and seventy euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (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 applicant's claim for just satisfaction.

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

T.L. EARLY
Deputy Registrar

J-P. COSTA
President