



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

THIRD SECTION¹

CASE OF DİCLE v. TURKEY

(Application no. 34685/97)

JUDGMENT

STRASBOURG

10 November 2004

FINAL

10/02/2005

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

¹ In its composition before 1 November 2004.

In the case of Dicle v. Turkey,

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

Mr G. RESS, *President*,

Mr I. CABRAL BARRETO,

Mr L. CAFLISCH,

Mr B. ZUPANČIČ,

Mr J. HEDIGAN,

Mrs H.S. GREVE, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 14 November 2002 and 21 October 2004,

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

PROCEDURE

1. The case originated in an application (no. 34685/97) 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 Mehmet Hatip Dicle (“the applicant”), on 12 December 1996.

2. The applicant was represented by Ms B. Boran and Mr M.N. Özmen, lawyers practising in Ankara. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government appointed Mr Feyyaz Gölcüklü as *ad hoc* judge to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 2).

4. By a decision of 14 November 2002, the Court declared the application partly admissible. It retained the applicant’s complaints concerning the independence and impartiality of the Istanbul State Security Court, the alleged interferences with his rights to freedom of thought and freedom of expression as well as the complaint that the interferences with his above-mentioned rights did not pursue aims that are legitimate under the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and was imprisoned in the central prison of Ankara at the time of the introduction of his application. He currently lives in Ankara.

6. On 31 May 1995 an article titled “The International Atatürk Peace Award” (“*Uluslararası Atatürk Barış Ödülü*”) was printed by the applicant in the daily *Yeni Politika* newspaper. On the same day the newspaper was seized by security forces upon the order of the Istanbul public prosecutor at the printing office, before being distributed.

The impugned article read:

“Peace, just like freedom, is a sacred creation of human consciousness and desire. This treasure deserves constant struggle, sincerity, alertness and solidarity for it. Peace, just like freedom, requires sacrifice and effort.

It is certain that all peoples of the world understood the value and meaning of keeping peace better after the two world wars whose pain will continue to horrify the human consciousness for centuries. The rise of the anti-war movements, both at the national and international level, is the reflection of this consciousness. In fact, history has proven that for a permanent peace it is essential that an end be put to all forms of exploitation and discrimination and that the social system rest on the foundations of tolerance, mutual respect for rights, justice and the rule of law. This undisputable principle is also the only guarantee for today, both nationally and internationally.

Nowadays, peace movements in many countries, in addition to their own peace efforts in their countries, monitor the events out of their countries like a radar device and try to offer solidarity with people who fight for peace and freedom. In order to realize this purpose, national committees are being set up and the peace efforts of individuals and institutions are supported with annual peace awards. These committees’ decisions are generally taken after meticulous inquiries concerning the nominees. Among these awards, the Nobel Peace Prize is the most distinguished one.

As it is known, in the recent years the Republic of Turkey, having been influenced by the above-mentioned activities, introduced the International Atatürk Peace Award. By doing this, the statesmen, who have stripped concepts like freedom, equality, democracy, justice and law of their substance and who believe that they have succeeded in deceiving their own people and the international community with poor caricatures of those concepts, likewise have diluted and distorted the concept of peace.

First of all, those who cannot establish democracy in all the institutions and regulations of their country, those who ignore human rights and who want to destroy all values of the people with racist and ravaging policies should not have the right to use a high concept like peace, insincerely, for their political purposes. Which country, where people are tortured and killed in custody, made to “disappear”, shot in the middle of a street; where villages and towns are evacuated, forests are burned down,

gives a peace award? No. Nobody has the right to pollute the concept of peace and no one should.

It is known that the roots of the increasingly dirty war in Turkey today go back to the first years of the Republic. And who is responsible for the period between 1925 and 1938 when the identity and rights of the Kurdish people were denied and the experiments of brutal genocide were put into practice? Who is the architect of the policies of the Republic of Turkey which aimed at denying and exterminating Kurds from history? What is it, if not hypocrisy, to pronounce the name of the person who is the godfather of today's dirty war together with the word 'peace' and to organize a peace prize in his name? No!...No!... No one should have the right to abuse a mighty concept like peace in such a way. In fact the reason for which Nelson Mandela, who became a symbol by fighting against racist discrimination in South Africa, refused to accept the International Atatürk Peace Award is this hypocrisy and the inhuman policies pursued against the Kurds.

A committee consisting, *inter alia*, of state officials gave the International Atatürk Peace Award of 1995 to the Red Crescent on 19 May. As its name suggests, it is an international prize. Does not the fact that by giving the prize to a national institution and not to a peace defender outside Turkey, thereby, trying to avoid the risk of being rejected as it was the case with Mandela, demonstrates the helplessness and loss of credibility of the state? Is it not the Red Crescent which ignores the Kurdish villagers who were forced to live in plastic tents in urban shanty towns after their villages have been burned down, distributing candies to Kurdish children who were forced to shout "How happy I am that I am a Turk" by soldiers during the occupation of Southern Kurdistan. It also acted as a camouflage for the agents of the MIT (The National Intelligence Organisation) who were bribing in Duhok. It is the Red Crescent which was warned and censured several times by the International Red Cross for disregarding the Geneva Conventions. It should not be a surprise if this award is given to the Special War Unit next year. It is a peculiar manifestation of history that while the State of Turkey is lowering itself, peace awards from Denmark, Germany and Vienna are being given to the Diyarbakır MP of the DEP in prison, Leyla Zana, for being a symbol of the Kurdish people's fight for freedom and democracy. Leyla Zana is also a strong candidate for the Nobel Peace Prize.

Here is the state policy for an unjustified and hypocritical war on one side and the legitimate and just fight for freedom on the other side. These are the two sides of the same medal and their difference reflects itself on the international level. Once more history gives its final judgment: those who try to block the way of the wheel of history will lose and those who are correct and who support peace and freedom will absolutely win."

7. On 19 July 1995 the public prosecutor at the Istanbul State Security Court filed a bill of indictment charging the applicant under Article 312 § 2 and 3 of the Criminal Code with incitement to hatred and hostility by making distinctions on the basis of race and region.

8. In the context of the criminal proceedings against him, the applicant acknowledged that he drafted the article. He further asserted that he expressed his opinions and that his article did not contain any element which could constitute an offence.

9. On 3 April 1996 the Istanbul State Security Court, composed of three judges including a military judge, found the applicant guilty as charged and sentenced him to two years' imprisonment and a fine of 600,000 Turkish liras. The judgment reasoned as follows:

“Considering the article titled “The International Atatürk Peace Award” in its entirety, the court is of the opinion that the accused committed the offence of incitement to hatred and hostility by making distinctions on the basis of race and region since he stated that people with Kurdish origin living in the eastern and south-eastern regions of Turkey were subjected to inhuman treatment on the basis of their identity.”

10. On 3 July 1996 the Court of Cassation upheld the judgment of the first-instance court.

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: *Karkın v. Turkey*, no. 43928/98, §§ 17 and 19, 23 September 2003, *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 ARTICLES 9 AND 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 these complaints should be examined from the standpoint of Article 10 of the Convention alone (see *İncal 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. The Court notes at the outset that it 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 v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, 10 October 2000, § 80).

15. In the instant case, it considers that the conviction complained of constituted an interference with the applicant's right to freedom of expression protected by Article 10 § 1. It notes 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".

16. The Court has examined the present case in the light of its case-law and considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion than in the above-mentioned judgments (see paragraph 14 above). It has had particular regard to the words used in the impugned article. It also took into account the background to the case and, in particular, the problems linked to the prevention of terrorism (see the *İbrahim Aksoy* and *İncal* judgments, cited above, § § 60 and 58 respectively).

17. In this connection, the Court observes that the article in question consisted of a critical assessment of Turkey's policies concerning the Kurdish problem whereas the State Security Court opined that the impugned article contained words aimed at inciting the people to hatred and hostility. The Court has examined the reasons given in the State Security Court's judgment 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). It considers, 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 the essential factor (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. Furthermore, the edition of 31 May 1995 of *Yeni Politika*, which contained the impugned article, was seized at the printing office, before being distributed, thus, preventing the applicant to disseminate his opinions to the readers of the newspaper. The Court also takes into account the nature and severity of the penalties imposed when assessing the proportionality of the interference.

18. 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 § 1 OF THE CONVENTION

19. 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. The relevant parts of Article 6 § 1 of the Convention provide:

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

20. 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*, cited above, §§ 35-36).

21. It considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion in the instant case. It considers 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, § 72 *in fine*).

22. In conclusion, the Court considers 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 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

23. The applicant alleged that the restrictions on his right to freedom of expression, applied pursuant to Article 312 of the Criminal Code, were inconsistent with the legitimate aims set out in Article 10 § 2 and were thus contrary to Article 18 of the Convention, which provides:

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

24. The Court found that the restrictions which were applied to the applicant's right to freedom of expression were consistent with the legitimate aims contained in Article 10 § 2 of the Convention (see paragraph 15 above).

25. It considers therefore that there has been no violation of Article 18 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

26. 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

27. The applicant claimed to have sustained pecuniary damage which he assessed at 42,000 euros (EUR) due to loss of income.

28. He also claimed compensation for non-pecuniary damage which he assessed at EUR 45,000.

29. The Government contested those claims.

30. As regards the alleged loss of income, the Court considers that the evidence submitted does not lend itself to a precise quantification of the applicant's loss of earnings resulting from the violation of Article 10 of the Convention (for a similar finding, see *Karakoç and Others v. Turkey*, nos. 27692/95, 28138/95 and 28498/95, § 69, 15 October 2002). The Court accordingly dismisses this claim.

31. With regard to non-pecuniary damage, 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.

32. 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

33. The applicant also claimed EUR 6,036 for costs and expenses incurred in the domestic courts and EUR 4,174.8 for those incurred before the Commission and the Court.

34. The Government contested those claims.

35. Making its own estimate based on the information available, the Court considers it reasonable to award the applicant EUR 3,000 under this head.

C. Default interest

36. 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;
3. *Holds* that there has been no violation of Article 18 of the Convention;
4. *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;
 - (iii) EUR 3,000 (three thousand euros) in respect of costs and expenses;
 - (iv) 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 November 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President