



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

SECOND SECTION

CASE OF GÜMÜŞ AND OTHERS v. TURKEY

(Application no. 40303/98)

JUDGMENT

STRASBOURG

15 March 2005

FINAL

15/06/2005

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 Gümüş 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 R. TÜRMEŒ,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 2 December 2003 and 22 February 2005,

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

PROCEDURE

1. The case originated in an application (no. 40303/98) 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 five Turkish nationals, Mr Fethi Gümüş, Mr Ali Öncü, Ms Sevtap Yokuş, Mr Sabahattin Acar and Mr Vezir Perişan (“the applicants”), on 9 February 1998.

2. The applicants were represented by Mr M.S. Tanrıkulu, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. By a decision of 2 December 2003, the Court declared the application partly admissible. It retained the applicants’ complaints concerning the alleged interference with their right to freedom of expression, the independence and impartiality of the Diyarbakır State Security Court, the refusal of the Court of Cassation to hold a hearing and the non-communication of the submissions of the Chief Public Prosecutor to the applicants.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The first applicant, Mr Fethi Gümüş, is a Turkish citizen, born in 1947 and living in Diyarbakır. He is a lawyer practising in Diyarbakır. The second applicant, Mr Ali Öncü, is a Turkish citizen, born in 1960 and living in Diyarbakır. He is a member of the TESİŞ Workers' Union (*TESİŞ Sendikası*). The third applicant, Ms Sevtap Yokuş, is a Turkish citizen, born in 1966 and living in Kocaeli. She is a lecturer at the Law Faculty of Kocaeli University. The fourth applicant, Mr Sabahattin Acar, is a Turkish citizen, born in 1964 and living in Diyarbakır. He is a lawyer practising in Diyarbakır. The fifth applicant, Mr Vezir Perişan, is a Turkish citizen, born in 1951 and living in Diyarbakır. He is a member of the Municipal Workers' Union (*Belediye-İş Sendikası*).

5. The edition dated 24 March 1992 of the newspaper "*Diyarbakır Söz*" and the edition dated 25 March 1992 of the newspaper "*Felak*" carried a press statement drafted by a delegation which included the applicants, two former Turkish parliamentarians, Leyla Zana and Hatip Dicle, and twenty representatives of various political parties and democratic public organisations.

The press statement which appeared in the newspapers read as follows:

"The Kurdish nation has enhanced its honourable struggle for its claim to the right to a humane existence. The State, which is a party to the problem, has suddenly carried its war mechanism to the region so as to suppress this legitimate struggle by violence.

The 21st March, the day of the Nevroz festival, was declared to the press as the official starting date of the large-scale operation by the President, the Chief of Staff and the Under Secretary of the National Intelligence Service. The covert war in Şırnak, Cizre and Nusaybin came to light with the images of tanks, armoured carriers and helicopters shown on television. After the mountains, which have been under bombardment since January, it is now the civilian population which is being bombed.

The civilians who celebrated Nevroz in Cizre, Nusaybin, Şırnak and other places where incidents occurred, did not attack or open fire on security forces. That no members of security forces had been killed by gunfire during the Nevroz celebrations was confirmed by official declarations.

For the time being, the consequences of the war are 53 dead, hundreds of wounded, dozens of disappeared persons, thousands of detentions, burials in collective graves reminiscent of genocide and bombed, destroyed and burnt-down houses.

The security forces lack humane and judicial values. During the incidents, the transport of the injured was hindered, the vehicles carrying injured people were fired on, the health professionals and the relatives of the wounded who tried to help were

threatened. Journalists, who tried to observe the incidents, were not allowed to enter the settlement units. They were also threatened, harassed and killed.

The Government cannot control the State. Laws are not respected in the region. The Laws on War to which the State is a party do not apply to this war. The conditions for the application of the 1949 Geneva Conventions exist. We invite the parties to this war to conform to the provisions of the Geneva Conventions.

We invite the public not to be onlookers to the massacre but to act in solidarity with the Kurdish People who are exposed to massacre and whose rights are violated.”

6. On 19 June 1992 the public prosecutor at the Diyarbakır State Security Court initiated criminal proceedings against the applicants and sixteen other individuals who had signed the press statement. Citing the text of the press statement, the public prosecutor charged them with incitement to hatred and hostility by making distinctions between persons on the basis of ethnic origin. The public prosecutor requested the Diyarbakır State Security Court to apply Articles 312 §§ 2 and 3 of the Criminal Code and Article 5 of the Prevention of Terrorism Act 1991.

7. The public prosecutor submitted his observations during the proceedings and requested the court to sever the case of Mr Hüseyin Turhallı from the others, to acquit N.Y., T.K. and S.K., and to apply Article 312 § 2 and Article 5 of the Prevention of Terrorism Act 1991 to the remaining accused persons.

8. In the proceedings before the Diyarbakır State Security Court, the applicants and the other co-accused did not deny that they had drafted the press statement. However, they claimed that the statement was not the same in content as the one which had been published in the newspapers and which formed the basis of the charges against them. They submitted that the public prosecutor had relied on another press statement drafted by the parliamentarians, Mr Hatip Dicle and Mrs Leyla Zana. They also maintained that their press statement had not been included in the case file and, accordingly, they could not be convicted on the basis of the content of their own press statement.

9. On 20 February 1995 the State Security Court, composed of three judges including a military judge, accepted the applicants’ defence as well as that of their co-accused. They were all acquitted of the charges.

10. On 21 February 1995 the public prosecutor appealed to the Court of Cassation which, on 19 May 1995, upheld the acquittal of N.Y., T.K. and S.K., but quashed the acquittal of the applicants and other co-accused. The case was remitted to the Diyarbakır State Security Court.

11. On 24 February 1997 the Diyarbakır State Security Court convicted the applicants and seven of their co-accused of incitement to hatred on the basis of a distinction between regions under Article 312 of the Criminal Code. The court first sentenced them to one year and eight months’ imprisonment and a fine of TRL 100,000. The court noted that the press

statement in question was a summary of the declaration which the accused had drafted. However, having regard to the fact that the applicants and their co-accused had no previous convictions and to their good conduct during the trial, the court suspended their sentences.

12. The applicants and their co-accused appealed against their conviction. On 8 October 1997 the Court of Cassation dismissed their appeal. It upheld the Diyarbakır State Security Court's assessment of the evidence and its reasons for dismissing the applicants' defence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. 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), *Özdemir v. Turkey*, no. 59659/00, §§ 21-22, 6 February 2003 and *Gençel v. Turkey* (no. 53431/99, §§ 11-12, 23 October 2003).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

14. The applicants complained that their criminal conviction had infringed their right to freedom of expression. They relied in that connection on Article 10 of the Convention, which provides, in so far as relevant, as follows:

“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...”

15. 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, *Karkın*, cited above, § 39, and *Kızılyaprak v. Turkey*, no. 27528/95, § 43, 2 October 2003).

16. In the instant case, it considers that the conviction complained of constituted an interference with the applicants' 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 whether the interference was "necessary in a democratic society".

17. 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 15 above). It has had particular regard to the words used in the impugned press statement. It also took 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 v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1568, § 58).

18. In this connection, the Court observes that the press statement in question consisted of a critical assessment of Turkey's policies concerning the Kurdish problem and, in particular, the intervention by the security forces in Cizre, Nusaybin and Şırnak during the Nevroz celebrations in 1992. It further observes that the State Security Court assessed certain parts of the impugned press statement as inciting 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 applicants' right to freedom of expression (see, *mutatis mutandis*, *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 58, 8 July 1999). It considers 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. The Court also takes into account the nature and severity of the penalties imposed when assessing the proportionality of the interference.

19. Having regard to the above considerations, the Court concludes that, the applicants' 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 applicants complain under Article 6 § 1 of the Convention that their right to a fair hearing was breached as they were tried and convicted by the Diyarbakır State Security Court, which lacked independence and impartiality. They further allege under the same heading that they were denied a public hearing before the Court of Cassation. They finally complain under Article 6 § 3 (b) that no copy of the Chief Public Prosecutor's written submission to the Court of Cassation was transmitted to them and that they were denied the right to respond to that submission. The relevant parts of Article 6 provide as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

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; ...”

A. Independence and impartiality of the 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*, cited above, §§ 35-36).

22. As to the instant case, the Court considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion. It considers it understandable that the applicants – 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 they 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 applicants' doubts about that court's independence and impartiality may be regarded as objectively justified (see the aforementioned *Incal* judgment, § 72 *in fine*).

23. In conclusion, the Court considers that the State Security Court which tried and convicted the applicants was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. Accordingly, there has been a violation of this provision.

B. The proceedings before the Court of Cassation

24. Having regard to its finding of a violation of applicants' right to a fair hearing by an independent and impartial tribunal, the Court considers that it is not necessary to examine the other complaints under Article 6 of the Convention relating to the proceedings before the Court of Cassation (see, among other authorities, *Incal*, cited above, § 74).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

25. 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

26. The applicants claimed to have sustained non-pecuniary damage which they assessed at 100,000 euros (EUR).

27. The Government contested those claims.

28. The Court considers that the applicants 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, the Court awards each applicant EUR 2,000 for non-pecuniary damage.

29. 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

30. The applicants also claimed EUR 3,000 for costs and expenses incurred before the Commission and the Court. The applicants did not produce any supporting documents.

31. The Government contested those claims.

32. Making its own estimate based on the information available, the Court considers it reasonable to award the applicants, jointly, the global sum of EUR 1,000 under this head.

C. Default interest

33. 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 HOLDS;

1. that there has been a violation of Article 10 of the Convention;
2. 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. that it is not necessary to examine the other complaints under Article 6 of the Convention;
4. (a) that the respondent State is to pay the applicants, 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 on the date of settlement:
 - (i) EUR 2,000 (two thousand euros) each in respect of non-pecuniary damage;
 - (ii) the global sum of EUR 1,000 (one thousand euros), jointly, 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;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President