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

SECOND SECTION

CASE OF ALINAK v. TURKEY

(Application no. 40287/98)

JUDGMENT

STRASBOURG

29 March 2005

FINAL

29/06/2005

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 Alınak v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 31 January 2002 and on 8 March 2005,

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

PROCEDURE

1. The case originated in an application (no. 40287/98) 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, Mahmut Alınak ("the applicant"), on 15 December 1997.

2. The applicant was represented by Ms H. Sarsam, a lawyer practising in Ankara. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged that the seizure order against his book constituted an unjustified interference with his right to freedom of expression by a public authority within the meaning of Articles 9 and 10 of the Convention.

4. The application was 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 application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 31 January 2002 the Court declared the application admissible.

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

8. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1952 and lives in Ankara. He is a lawyer and a former member of the Turkish Grand National Assembly.

10. The applicant wrote a novel entitled "The Heat of Şiro" (*Şiro'nun Ateşi*). The book was based on real events which took place in Ormaniçi village in the province of Şırnak. The book was published in September 1997 by the Berfin Publishing Company.

11. On 14 October 1997 the public prosecutor at the Istanbul State Security Court requested the seizure of copies of the book. The public prosecutor contended that the content of the book incited hatred and hostility by making distinctions between Turkish citizens based on grounds of their ethnic or regional identity.

12. On 14 October 1997 a single judge of the State Security Court accepted the submissions of the public prosecutor and made an interim order for the seizure of copies of the first edition of the book. In its decision (no. 1997/442), the State Security Court held that the book, by attributing extremely disgusting acts to the security forces, identified with names and rank, incited people to hatred and hostility by making distinctions between Turkish citizens based on grounds of their ethnic or regional identity. The court further held that, while artistic expression fell within freedom of expression, that freedom was not absolute and that the dissemination of distasteful and disgusting texts by way of a novel could not be considered to be artistic expression.

13. According to the applicant, copies were then seized. However, the seizure protocol drafted by the police and signed by the owner of the publishing company on 15 October 1997 recorded that copies of the book were not found.

14. The Government in their observations drew attention to following passages on pages 202 and 203 of the book:

> "... Ah, I wish I were strong like before so that I could catch Mizrak in the meadow of Bana. Then he would have understood what the world is like. I would have stripped him under the summer sun; I would have had him walk before Kümeyt and whipped him all day long.

- Then how would you be any different from those tyrants? No matter who does it, cruelty is an ugly thing. Whether it is you or the fox. It does not matter. Cruelty is such a dishonourable thing that, whoever does it, is not a human being.

- I swear that I would turn him inside out. If I had only caught him then he would have understood. I swear upon your head that I would have put a rope around his neck and walked him naked all around Ankara, then I would have skinned him and filled him up with salt, as an example to all tyrants.

- Then you, Şiro, would become the Mizrak of the Bana. Our Mizrak or somebody else's Mizrak, what difference does it make? People like Mizrak should not exist in Bana, Ankara, Damascus or anywhere else. These kind of people contaminate the world. They destroy love and brotherhood.

- I beg you Brother, why do you talk like this? There is no other way to fight these tyrants! You have to talk to them in their own language; there is no other way!

- I used to think just like you, Şiro. However, I went there and realised that Mizrak is not alone.

- See, you have to make all of them disappear; you have to kill all of them.

- You cannot terminate it by killing them. There are too many to kill. Whomsoever you want to kill is only the cog of the machine. Even if you break the cog of the machine there are too many degenerated people out there waiting to become the cog! When you are struggling with the first ones, the same old tyrannising machinery continues to function, and this goes on forever. We have to stop this machinery! That is what we should do. There is no other way. Then you would see how they are running away like cows.

- Where is that power?

- Is there anyone stronger then us, Şiro? When all human beings stand up against this tyrannising machine, see if the machine still continues to function? Then they would see whether it is them or us who are stronger."

15. On 20 October 1997 the applicant appealed against the seizure order. The applicant averred that the seizure order constituted an unjustified interference with his right to freedom of expression guaranteed by the European Convention on Human Rights. However he gave an incorrect case number on his appeal. As a result it appears that the appeal court did not consider the facts of his case, but that of another (relating to a poetry book). On 5 November 1997 the Istanbul State Security Court dismissed the applicant's appeal and upheld the order, together with the single judge's reasons for issuing it.

16. On 21 November 1997 the public prosecutor attached to the Istanbul State Security Court filed a bill of indictment against the applicant and requested that he be convicted and sentenced under the Prevention of Terrorism Act 1991.

17. During a hearing held on 18 February 1998 before the Istanbul State Security Court, the applicant requested the court to annul the interim seizure order against his book. The matter was adjourned to the next hearing, fixed for 15 April 1998.

18. On 2 September 1999 Law No. 4454 concerning the suspension of pending cases and penalties in media-related offences entered into force.

19. On 24 September 1999 the Istanbul State Security Court suspended the proceedings brought against the applicant. The court, however, did not determine the applicant's request to annul the interim seizure order against his book.

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. The relevant domestic law and practice in force at the material time are outlined in the following judgment and decision: *Zarakolu and Belge Uluslararası Yayıncılık v. Turkey*, nos. 26971/95 and 37933/97, § 23, 13 July 2004, and *Alınak v. Turkey* (dec.), no. 40287/98, 31 January 2002.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

21. The applicant contended that the seizure order had violated his rights under Articles 9 and 10 of the Convention.

22. The Court considers that this complaint should be examined from the standpoint of Article 10 alone, which provides, insofar 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, [and] for the prevention of disorder or crime..."

23. The Government maintained that the interference with the applicant's right to freedom of expression was justified under the provisions of the second paragraph of Article 10.

A. Existence of an interference

24. The Court notes that it is clear and undisputed that the seizure order constitutes an interference with the applicant's right to freedom of expression, an integral part of which is the freedom to publish written documents and books (see, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 21, § 41).

B. Justification of the interference

25. This interference will contravene Article 10 of the Convention unless it was "prescribed by law", pursued one or more of the legitimate aims prescribed by paragraph 2 of Article 10, and was "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

26. The Court finds that, since the seizure of the book was based on Article 28 of the Constitution and Article 86 of the Code of Criminal Procedure, the resultant interference with the applicant's freedom of expression was "prescribed by law".

2. "Legitimate aim"

27. The Government submitted that the interim seizure order pursued a legitimate aim, namely the prevention of disorder and crime, since certain passages of the book were capable of inciting people to violence. The applicant refuted the Government's arguments.

28. The Court considers that the impugned measures could be regarded as having pursued at least one of the legitimate aims set out in paragraph 2 of Article 10: the prevention of disorder and crime.

3. "Necessary in a democratic society"

(a) Arguments of the parties

(i) The applicant

29. The applicant maintained that his book was a fictional novel in which members of the security forces committed crimes against villagers and that his book was based on real events which had taken place in the Ormaniçi village in Turkey. He submitted that the domestic courts decided on the interim seizure order without carefully reading his book. In this connection, he pointed out that, had the authorities read it carefully, they would have seen that the book contained fictional characters of different

ethnic origin and that there was no reference to the names or rank of the security forces who had actually taken part in the events in Ormaniçi. He claimed that, one official committing torture and killings in the novel, does not necessarily mean that the book insults all members of the security forces and portrays them as torturers. Consequently, the applicant considered that the interference with his right to freedom of expression was not necessary in a democratic society.

30. The applicant submitted that the State Security Court's decision to suspend the criminal proceedings against him caused further prejudice since the book continued to be seized, and Law No. 4454 did not lay down how its application would affect confiscated books. In this regard, the applicant claimed in his observations dated 13 September 2000 that the interim seizure order against his book was still in place.

(ii) The Government

31. The Government contended that the words and expressions contained in pages 201 and 202 of the book (see paragraph 14 above) amounted to an insult against the security forces and were capable of setting local people against such forces. Consequently, the measures taken against the applicant were proportionate to the aim pursued.

32. The Government averred that the applicant was a former member of the Turkish Grand National Assembly and a well known political figure in the region at the time of the events. They therefore contended that his comments would have had a greater impact on people than any other author.

33. The Government further pointed out that, in the present case, the seizure order could not be carried out since the books had already been distributed to bookstores in Turkey.

(b) The Court's assessment

(i) General Principles

34. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24; *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30; *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103; *Oberschlick v. Austria*, *(no. 1)*, judgment of 23 May 1991, Series A no. 204; and *Observer and Guardian v. the United Kingdom*, judgement of 26 November 1991, Series A no. 216).

35. The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an

independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

36. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. The Court must examine the interference complained of in the light of the case as a whole, determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

37. Article 10 does not prohibit prior restraint on publication as such. This is borne out by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision (see *Sunday Times (no. 1)* cited above, and *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165). However, the dangers inherent in prior restraint are such that they call for the most careful scrutiny by the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. This danger extends to the censorship of publications other than periodicals that deal with a topical issue.

38. The Court therefore considers that these principles may apply to the publication of books in general or other written texts (see *Association Ekin v. France*, no. 39288/98, § 57, ECHR 2001-VIII).

(ii) Application of the above principles to the present case

39. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the article and the context in which it was diffused. In particular, it must determine whether the interference was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

40. The Court observes that the book in issue is a fictional novel inspired by real events. The book also contains some newspaper clippings concerning the real events on which the book is based. In the Court's view, the book does not give a neutral account of those times. The plot of the book concentrates on the ill-treatment to which the villagers were subjected at the hands of security force officials and the villagers' unsuccessful attempts to have them punished for their deeds. The passages referred to by the Government evoke a conversation between a village elder and the main character of the book when the elder learns of the lack of success of their

efforts to have a particular official punished. The Court has examined the whole book but cannot find any reference to the real name or rank of any official.

41. The Court notes that the book contains passages in which graphic details are given of fictional ill-treatment and atrocities committed against villagers, which no doubt creates in the mind of the reader a powerful hostility towards the injustice to which the villagers were subjected in the tale. Taken literally, certain passages might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was a novel, a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media.

42. In that connection, the Court observes that Article 10 includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (see, *mutatis mutandis*, *Müller and Others v. Switzerland* judgment of 24 May 1988, Series A no. 133, p. 19, § 27). Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression (*Müller and Others*, cited above, p. 22, § 33).

43. As to the tone of the book in the present case, it must be remembered that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, *mutatis mutandis*, *De Haes and Gijsels v. Belgium* judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 236, § 48). In this regard, the Court repeats that the impugned book is a novel classified as fiction, albeit purportedly based on real events.

44. The Court further takes into account the background to the case submitted to it - in the present instance the problems linked to the prevention of terrorism (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, pp. 1568-69, § 58). On that point, it takes note of the Turkish authorities' concern about the dissemination of views which they considered might exacerbate the serious disturbances that had been going on in Turkey for some fifteen years (see *Ceylan v. Turkey* [GC], no. 23556/94, § 35, ECHR 1999-IV).

45. The Court observes, however, that the applicant, although a former Member of the Parliament, was at the material time a private citizen expressing his views in a novel which, as already mentioned, would necessarily reach a smaller audience than that afforded by the mass media. This limited its potential impact on “public order” to a substantial degree. Thus, even though some of the passages from the book seem very hostile in tone, the Court considers that their artistic nature and limited impact

reduced them to an expression of deep distress in the face of tragic events, rather than a call to violence.

46. Furthermore, the Court also takes into account the fact that the applicant's appeal was not properly dealt with, given the confusion with another case (see paragraph 15 above). Moreover, it appears from the case file that, despite the applicant's request, no decision was taken in respect of the seizure order during the criminal proceedings brought against the applicant, thus, leaving him in uncertainty as to the future of his book.

47. In these circumstances, the Court concludes that the order to seize the applicant's book was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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."

49. The Court points out that, under Rule 60 of the Rules of Court, any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, "failing which the Chamber may reject the claim in whole or in part".

50. In the instant case, on 5 February 2002, after the application was declared admissible, the applicant was invited to submit his claims for just satisfaction, but he did not do so within the required time-limits. Accordingly, the Court makes no award under Article 41 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

Done in English, and notified in writing on 29 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	J.-P. COSTA
Registrar	President