



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

THIRD SECTION

CASE OF TURHAN v. TURKEY

(Application no. 48176/99)

JUDGMENT

This version was rectified on 30 March 2006
under Rule 81 of the Rules of the Court

STRASBOURG

19 May 2005

FINAL

19/08/2005

It may be subject to editorial revision.

In the case of Turhan v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr R. TÜRMESEN,

Mr C. BİRSAN,

Mrs M. TSATSA-NIKOLOVSKA,

Mr E. MYJER,

Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 28 April 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 48176/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Mehmet Talat Turhan¹ (“the applicant”), on 1 April 1999.

2. The applicant was represented by Mr V. Özsoy, a lawyer practising in İzmir. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. By a decision of 28 September 2004, the Court declared the application partly admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1924 and lives in Istanbul. He is the author of a book titled “Extraordinary War, Terror and Contra Guerrilla” (“*Özel Savaş Terör ve Kontragerilla*”).

5. On 6 January 1993 Orhan Sefa Kilercioğlu, the then Minister of State brought a civil action for compensation against the applicant, before the Ankara First Instance Court in Civil Matters. He claimed that the alleged

¹ Rectified on 30 March 2006. The name of Mehmet Talat Turhan read Talat Turhan in the former version of the judgment.

defamatory remarks in the applicant's book constituted an attack on his reputation and requested that the court award him compensation of 100,000,000 Turkish liras (TRL) for non-pecuniary damage.

6. During the proceedings the court evaluated the following passages:

"In an interview I gave in Antalya I commented on the "1 May 1977" massacre and the possibility of a coup d'état during that period. It seems that a magazine carried out research following these assertions and reached some interesting conclusions.

According to the magazine, the Minister of State, Orhan Kilercioğlu, had established contacts with the Special War Department (*Özel Harp Dairesi*). He had been involved in the coup that was co-ordinated by General Namık Kemal Ersun together with Generals Recai Engin, Musa Ögün and Rüştü Naipoğlu. The names of these generals had appeared in several foreign and domestic newspapers where they were presented as the authors of the massacre carried out on 1st of May and of other provocative acts. The magazine interviewed Mr Orhan Kilercioğlu. He said the following:

– Some newspapers and magazines have been presenting you as the author or even the perpetrator of the "1st of May" massacre until last year. You have never commented on those allegations for almost 12 years.

Kilercioğlu: I never thought of replying. The State has everything. It has mechanisms. [Those allegations] have never bothered me.

– Comments regarding your involvement in the "1st of May" massacre were made with reference to an American newspaper. A periodical commented on your involvement in the contra guerrilla [activities].

Kilercioğlu: The State has laws, it has courts. Under such conditions, would they have kept silent until now? Everything has been done.

– Did you exercise your right to reply?

Kilercioğlu: I do not remember.

As one can easily see, Mr Kilercioğlu is disregarding the questions and making a big fuss. By not having exercised his right to reply and not having lodged a complaint with the judicial organs, he must have been aware of the fact that he was implicitly acknowledging these allegations against him. Especially, someone like him: an ex-general and a Minister of State.

Mr Kilercioğlu answered another question:

"I am the purest and the most innocent person that you could ever meet in life," he says. If a person is identifying himself like this, let's just leave the verdict to a doctor!

In an interview he gave after his retirement in 1989 he said: *"As you know, there are groups in the army. They fight among themselves. We fought and lost."* He is probably admitting to having belonged to the junta by identifying himself as a member of the "group".

One can conclude from his statement that he had been a member of the junta. One can also presume that the junta of General Namık Kemal Ersun had had plans to overthrow Demirel's government. Then the question arises: How could Demirel appoint a minister who was involved in a junta against him? Maybe Mr Kilercioğlu is one of Mr Demirel's sins?

...

Let's go back to Kilercioğlu. Although he admitted to having belonged to a "group of fighters", a number of newspapers, some business circles and TRT (*Turkish Radio and Television*) stood as protectors of Kilercioğlu after his retirement. Undoubtedly, this was not due to his "pure" personality. It was more due to his presence in the fascist wing, which dedicated itself to protecting the interests of business circles. After his retirement he was ready to serve those business circles. I wonder: how will he be able to fight against corruption and illegal trade after having flown from the Yaşar Holding to the ministerial chair?"

7. The applicant argued before the court that the passages concerning Mr Kilercioğlu were quoted from an interview published by a magazine. He drew the court's attention to the fact that Mr Kilercioğlu had never exercised his right of reply; nor had he contested the publication of his statements in that magazine. The applicant claimed that he was exercising his right to freedom of expression in making those remarks.

8. On 2 February 1994 the first instance court rejected Mr Kilercioğlu's claims. It decided that the passages in question were merely the applicant's criticisms of Mr Kilercioğlu's statements, in the light of his political beliefs, and they did not constitute an attack on the plaintiff's reputation.

9. Mr Kilercioğlu appealed. On 1 December 1994 the Court of Cassation quashed the decision of the first instance court. It considered that the following extracts from the book went beyond the limits of acceptable criticism. It held that they were based on hearsay alone and they therefore amounted to an attack on the reputation of the plaintiff:

"... he is admitting to having belonged to the junta...", "...his presence in the fascist wing, which dedicated itself to protecting the interests of business circles.", "After his retirement he was ready to serve those business circles. I wonder: how will he be able to fight against corruption and illegal trade after having flown from the Yaşar Holding to the ministerial chair? ..."

10. The Court of Cassation concluded that the plaintiff should be awarded compensation for non-pecuniary damage under Article 49 of the Code of Obligations.

11. On 5 June 1995 the Court of Cassation rejected the applicant's request for rectification of the judgment.

12. On 14 September 1995, after having considered the Court of Cassation's decision, the Ankara First Instance Court in Civil Matters decided to award Mr Kilercioğlu the sum of TRL 100,000,000 as compensation for non-pecuniary damage, together with interest rate of 30% *per annum* running from 4 December 1992.

13. The applicant appealed. On 11 April 1996 the Court of Cassation quashed the decision of 14 September 1995 on the ground that the amount of compensation awarded was disproportionate to the damage suffered by the plaintiff.

14. On 19 July 1996 the Ankara First Instance Court in Civil Matters considered that its decision of 14 September 1995 was in accordance with the law and that the amount of compensation awarded was proportionate to the damage suffered by the plaintiff. It decided not to follow the decision of the Court of Cassation.

15. Mr Kilercioğlu lodged an appeal with the Joint Civil Chambers of the Court of Cassation, which quashed the decision of the Ankara First Instance Court in Civil Matters on 26 March 1997.

16. On 8 October 1997 the Ankara First Instance Court in Civil Matters awarded Mr Kilercioğlu compensation in the amount of TRL 60,000,000 for non-pecuniary damage, together with interest rate of 30% *per annum* running from 4 December 1992. Upon Mr Kilercioğlu's request, the court also ordered the publication of its decision in a newspaper.

17. The applicant appealed. On 19 March 1998 the Court of Cassation upheld in part the judgment dated 8 October 1997. It considered that the amount of compensation awarded to the plaintiff was in accordance with law. However, the plaintiff's request to the first instance court asking for publication of its decision was not raised before the Court of Cassation. It therefore quashed that part of the decision.

18. On 30 September 1998 the Ankara First Instance Court in Civil Matters followed the Court of Cassation's decision of 19 March 1998. The applicant was notified of this decision on 23 January 1999.

19. On 19 February 1999 the applicant paid TRL 231,500,000 to the plaintiff as compensation.

II. RELEVANT DOMESTIC LAW

20. Article 49 of the Code of Obligations provides as follows:

“Any person who alleges that his personality rights have been illegally violated can claim compensation for non-pecuniary damage.

The judge shall take into account the parties' socio-economic situation, their occupation and social status when determining the amount of compensation.

The judge may also decide on a form of redress other than compensation or may restrict himself to condemning the violation. He may also order the publication of the decision.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicant complained that his sentence for defamation of Mr Kilercioğlu violated Article 10 of the Convention which in so far as relevant reads 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...”

22. The Court notes that it is not in dispute between the parties that the injunction complained of constituted “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 reputation or rights of others, for the purposes of Article 10 § 2. The dispute in the case relates to the question whether the interference was “necessary in a democratic society”.

23. The Court reiterates its well-established case-law, whereby the test of necessity in a democratic society requires the Court to determine whether the “interference” complained of corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62).

24. One factor of particular importance for the Court’s determination in the present case is the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 28, § 46, and *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, p. 27, § 63). However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any

factual basis to support it may be excessive (*Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II).

25. The Court observes in the present case that the impugned remarks were the applicant's opinion on Mr Kilercioğlu's certain statements given in an interview, which was already published in a magazine. They were value judgments on an issue of public interest, as it concerned a minister, that is a public figure in respect of whom the limits of acceptable criticism are wider than for a private individual.

26. The Court reiterates that the truthfulness of a value judgment is not susceptible of proof. The necessity of a link between a value judgment and its supporting facts may vary from case to case according to the specific circumstances (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII.). In the present case, the Court considers that the value judgment made by the applicant was based on information which was already known to the general public, both because Mr Kilercioğlu's professional life prior to his political life was known and because his statements were already published in a magazine.

27. The Court of Cassation did not convincingly establish any pressing social need for putting the protection of the personality rights of a public figure above the applicant's right to freedom of expression and the general interest in promoting this freedom where issues of public interest are concerned. In particular, it does not appear from the domestic courts' decisions that the applicant's statement affected Mr Kilercioğlu's political career or his professional and private life.

28. In conclusion, the Court finds that the reasons adduced by the domestic courts cannot be regarded as a sufficient and relevant justification for the interference with the applicant's right to freedom of expression. The national authorities therefore failed to strike a fair balance between the relevant interests.

29. Accordingly, the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. The relatively small amount which the applicant was ordered to pay to the plaintiff cannot affect the position.

30. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicant claimed TRL 231,350,000 in compensation for pecuniary damage. That sum corresponded to the amount which he had to pay, together with the interest, to the plaintiff in defamation proceedings which form the subject-matter of his application. Moreover he claimed 50,000 euros (EUR) for the non-pecuniary damage suffered as a result of distress and frustration caused by the proceedings.

33. The Government contested those claims.

34. The Court notes that the applicant suffered pecuniary damage in that he had been ordered to pay the plaintiff TRL 231,350,000. It therefore awards him EUR 600.

35. As to the claim for 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, the Court awards him EUR 1,000 for non-pecuniary damage.

B. Costs and expenses

36. The applicant left the issue of costs and expenses to the discretion of the Court.

37. The Government expressed no opinion.

38. On the basis of the information in its possession, the Court considers it reasonable to award the applicant EUR 1,500 by way of reimbursement of his costs and expenses.

C. Default interest

39. 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*
 - (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 600 (six hundred euros) in respect of pecuniary damage;
- (ii) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage;
- (iii) EUR 1,500 (one thousand five hundred 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;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 May 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

BOŠTJAN M. ZUPANČIČ
President