CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF HAN v. TURKEY

(Application no. 50997/99)

JUDGMENT

STRASBOURG

13 September 2005

FINAL

13/12/2005

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 Han 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. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Ms D. JOČIENĖ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 30 November 2004 and 25 August 2005,

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

PROCEDURE

1. The case originated in an application (no. 50997/99) 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 Tahir Han ("the applicant"), on 2 August 1999.

2. The applicant was represented by Mr S. Kaya, a lawyer practising in Ankara. In the instant case, the Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The application was allocated to the Fourth 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.

4. On 5 May 2003 the Court decided to communicate the application to the Government (Rule 42 § 1).

5. 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).

6. By a decision of 30 November 2004, the Court declared the application partly admissible. It retained the applicant's complaints concerning the alleged interference with his right to freedom of expression, the independence and impartiality of the Ankara State Security Court, and the non-communication of the submissions of the Chief Public Prosecutor to the applicant.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1960 and lives in Adana.

8. At the time of the events, the applicant was a member of the Peoples' Democracy Party (*Halkın Demokrasi Partisi*, hereinafter "HADEP").

9. On 26 June 1994 the applicant made a speech during HADEP's first annual congress. According to the text of the speech, transcribed by three police officers on 30 June 1994, he stated the following:

> "Dear Chairman, dear delegates and dear guests, I welcome you all. We are holding this first congress of our party at a time when extraordinary circumstances are affecting the Kurdish nation and the Turkish proletariat. Our historical duties and obligations are ever more important at this time. At around this time last year most of us present had gathered at DEP's first congress. The attacks against us and against our people were at their peak. The imperialist savagery aimed at our nation and our country had been continuing before the eyes of the world. When we were talking that day, we underlined what policies our democracy should follow in the light of the developments which were taking place. Important social and political developments have taken place since then. It was happening so fast that before we had a chance to think and analyse what was going on, new developments were taking place. These developments have proved us right. Without repeating what we said one year ago, I would like to remind you of the following: the biggest hurdle for the democratisation of Turkey is the existence of the problem of Kurdistan. The reality is that Kurdistan is a colony. It is not possible for Turkey to be a democracy without solving the status of Kurdistan. The precondition for democracy to be established is to defend and to support the Kurdish nation's right to self-determination. Therefore, any means employed by the Kurdish nation in order to exercise this right in a free atmosphere is legal and justified.
>
> As we have said before, it is impossible not to collide with all the legal constraints and formalities imposed by the Republic of Turkey. This is because the existing legal system of the Republic of Turkey is formulated in such a way as to make the colonisation of Kurdistan lawful. For us, on the other hand, it is not what is lawful that should be the starting point in our struggle, but what is legal.
>
> What Kurds mean to the [Turkish] Parliament has been evident in the practice of the last seventy years. To the world at large, the presence of the Kurdish parliamentarians in Parliament has always been interpreted as evidence that Parliament represents the political will of both the Turkish nation and the Kurdish nation. When, therefore, Parliament is presented as a legal entity, the imperialist terror imposed on Kurdistan has become lawful. The fact is, however, that for the Kurds this Parliament has done nothing other than legislate laws sending Kurds into exile, sentencing them to death, assimilating them, adopting the Takriri Sükun Act[1] and creating emergency regions and declaring martial law.

1. The Maintenance of Order Law, promulgated on 4 March 1925. By virtue of this Act, Martial Law was declared and the Government were granted broad powers to ban all kinds of organisations, propaganda and publications that could lead to a reaction and rebellion against Turkish public order and security.

Unfortunately, these realities have not been adequately dealt with during the time of DEP. This last year has shown us just how right we were in our conclusions. The imperialist violence has increased day by day and a large number of settlements has been evacuated and destroyed and hundreds of thousands of people have been forced to flee. Hundreds of people have become martyrs. Thousands have been injured. Tens of thousands of our people have been detained and tortured. On the one hand, the poor people have been made to bear the cost of this unjustified imperialist war and, on the other hand, the masses in the metropolitan areas have been indoctrinated by chauvinistic propaganda. But, despite all this, people have not been made to take action. No resistance was created. Backward steps have been taken instead of resisting the embargoes and seizures created by the imperialist terror. The people were not shown a target. People have been isolated. But all this did not help anyone. Parliamentarians, party members and chairmen have been killed. The Parliament of the Turkish Republic, which was called upon to help, has kicked six parliamentarians out. They were arrested. Subsequently, DEP was closed down and its remaining parliamentarians were kicked out of Parliament. Despite these failures of the politicians in the legal arena, the Kurdish nation continued its struggle for freedom with decisiveness and self-sacrifice.

Unfortunately, the Kurdish nation has been deprived of any active support it expected from us. No doubt, our friends' understanding of the legal struggle has played a big role in this. This has resulted in the disintegration of different struggles. Different struggling parties were then alienated from each other. As a result, and as planned by the Turkish Republic, these different struggling parties became inactive. Unfortunately, this social resistance did not fit into our party colleagues' understanding of legality. In order to make it fit we have to make the Kurdish nation a nation of slaves. Members of the Kurdish nation have never accepted and will never accept slavery.

What is expected from us is very obvious. Firstly, the rights of these oppressed people who want to govern themselves must be recognised without any question. Secondly, and as part of our democratic characteristics, we have to carry out our duties. We cannot escape from this historical obligation. Running away and taking backward steps will not result in anything other than our surrender. The prevailing circumstances have shown us once again that making attempts at reconciliation and doing nothing else will not help us to overcome our existing problems. We will not get anywhere by repeating our mistakes.

Therefore HADEP should, in accordance with its historical mission, put into action policies which would direct the peoples' anger at heightened resistance. A party programme which does not correspond to our problems, which does not contain solutions and which is confined to legal boundaries is bound to be unsuccessful. ..."

10. At this point the applicant was stopped by the chairman of the congress from continuing his speech. He was rebuked for criticising the Party's constitution.

11. On 31 January 1996 the public prosecutor at the Ankara State Security Court filed an indictment in which he accused the applicant of disseminating propaganda against the indivisible integrity of the State, an offence under Article 8 of the Prevention of Terrorism Act.

12. The applicant was kept in detention on remand between 14 November 1996 and 16 December 1996.

13. At a hearing which took place on 16 December 1996 before the Ankara State Security Court, the applicant's lawyer did not deny that his client had used words such as "Kurdish" and "Kurdistan" in his speech. However, he maintained that, taken as a whole, the speech had not disseminated propaganda against the indivisible integrity of the State. The lawyer further referred to his client's right to freedom of speech, guaranteed by Article 10 of the Convention, and requested the court to acquit his client.

14. On 22 January 1997 the Ankara State Security Court, which was composed of three judges including a military judge, found the applicant guilty of an offence under Article 8 § 1 of the Prevention of Terrorism Act, and sentenced him to one year's imprisonment and a fine. It concluded, in particular, that the applicant, by stating that any means employed by the Kurdish nation in order to exercise its right to self determination were justified, had disseminated propaganda against the indivisible integrity of the State.

15. The applicant appealed against the judgment. In his appeal, the applicant stated that he had made his speech during a party political meeting, and that he had merely conveyed opinions about the economic and social improvement of the country, doing so in the exercise of his right to freedom of expression.

16. The Chief Public Prosecutor at the Court of Cassation submitted his written opinion on the merits of the applicant's appeal. The opinion was not notified to the applicant.

17. On 1 March 1999 the Court of Cassation upheld the judgment of the Ankara State Security Court, finding that the applicant's grounds of appeal were unfounded.

18. On 21 December 2000 Law No. 4616 on Conditional Release, Deferral of Procedure and Punishments was promulgated. Accordingly, on 12 February 2001 the Ankara State Security Court decided to defer the applicant's sentence. As a result, the applicant did not pay the fine or serve his prison sentence.

II. RELEVANT DOMESTIC LAW

19. A full description of the relevant domestic law may be found in *İbrahim Aksoy v. Turkey* (nos. 28635/95, 30171/96 and 34535/97, §§ 41-42, 10 October 2000), *Incal v. Turkey* (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, §§ 26-33) and *Göç v. Turkey* ([GC], no. 36590/97, § 34, ECHR 2002-V).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. As regards the independence and impartiality of the Ankara State Security Court

20. The applicant complained under Article 6 § 1 of the Convention that he had not received a fair trial by an independent and impartial tribunal due to the presence of a military judge on the bench of the Ankara State Security Court. The relevant part of Article 6 § 1 provides as follows:

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

21. The Government maintained that the State Security Courts were established by law to deal with threats to the security and integrity of the State. In the instant case there was no basis for finding that the applicant could have any legitimate doubts about the independence of the Ankara State Security Court. They further referred to the constitutional amendment of 1999 whereby military judges could no longer sit on State Security Courts.

22. The Court notes that it has examined similar cases in the past and has concluded that there was a violation of Article 6 § 1 of the Convention (see *Özel v. Turkey*, no. 42739/98, §§ 33-34, 7 November 2002, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

23. The Court sees no reason to reach a different conclusion in this case. It is understandable that the applicant, who was prosecuted in a State Security Court for disseminating propaganda against the indivisible integrity of the State, should have been apprehensive about being tried by a bench which included a regular army officer and member of the Military Legal Service. On that account, he could legitimately fear that the Ankara State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fear as to the State Security Court's lack of independence and impartiality can be regarded as objectively justified (see *Incal*, cited above, p. 1573, § 72 *in fine*).

24. In the light of the foregoing the Court finds that there has been a violation of Article 6 § 1 of the Convention in this respect.

B. As regards the remainder of the complaints submitted under Article 6 § 3 (b) of the Convention

25. The applicant further maintained that the principle of equality of arms had been violated since he had not been notified of the public prosecutor's observations at the appeal stage. In this connection, he invoked Article 6 § 3 (b) of the Convention (the right to adequate time and facilities in the preparation of his defence).

26. Having regard to its above 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 remaining complaint under Article 6 § 3 (b) of the Convention (see *Yanıkoğlu v. Turkey*, no. 46284/99, §§ 22-23, 14 October 2004, and *Gümüş and Others v. Turkey*, no. 40303/98, § 24, 15 March 2005).

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

27. The applicant contended that his conviction and sentence constituted an unjustified interference with his rights to freedom of thought and freedom of expression. He invoked Article 10 of the Convention, the relevant part of which provides 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 ..."

28. The Government maintained that the interference with the applicant's right to freedom of expression was compatible with the provisions of the second paragraph of Article 10. The interference was based on Article 8 of the Prevention of Terrorism Act and the applicant's conviction was necessary in order to maintain national security and public safety. The Government also stressed that the applicant's speech contained provocative views.

29. 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*, cited above, § 80, *Kızılyaprak v. Turkey*, no. 27528/95, § 43, 2 October 2003, and *Gümüş and Others*, cited above, §§ 14-19).

30. 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 whether the interference was "necessary in a democratic society".

31. 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 from that in the above-mentioned judgments. It has had particular regard to the words used in the impugned speech. It has also taken into account the background to the case and, in particular, the problems linked to the prevention of terrorism (see *İbrahim Aksoy*, cited above, § 60, and *Incal*, cited above, § 58).

32. In this connection, the Court observes that the speech in question consisted of a critical assessment of Turkey's policies concerning the Kurdish problem, whereas the State Security Court considered that the impugned speech contained separatist propaganda (see paragraph 13 above). 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 that, taken as a whole, the applicant's speech does not encourage violence, armed resistance or insurrection and, therefore, does 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.

33. 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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

35. The applicant requested the Court to award 7,500 euros (EUR) in respect of pecuniary damage and EUR 7,500 in respect of non-pecuniary damage.

36. The Government submitted that these claims were excessive and unacceptable.

37. On the question of pecuniary damage, the Court considers that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. Moreover, 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 *Dicle v. Turkey*, no. 34685/97, § 30, 10 November 2004). The Court accordingly dismisses this claim.

38. In respect of non-pecuniary damage concerning Article 10, the Court recalls its finding above (paragraph 33), and considers that the applicant should be awarded compensation for non-pecuniary damage since he must have suffered a certain amount of distress in the circumstances of the case. Accordingly, having regard to the sums it has awarded in comparable cases and deciding on an equitable basis as required by Article 41 of the Convention, the Court awards the applicant EUR 5,000 in this respect.

39. The Court further considers that the finding of a violation of Article 6 constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant (see *Incal*, cited above, p. 1575, § 82, and *Çıraklar*, judgment of 28 October 1998, *Reports* 1998-VII, § 45).

40. 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 v. Turkey*, no. 53431/99, § 27, 23 October 2003).

B. Costs and expenses

41. The applicant claimed EUR 5,000 for costs and expenses incurred before the domestic courts and the Court, without producing any supporting documents.

42. The Government contested those claims.

43. Making its own estimate based on the information available, the Court considers it reasonable to award the applicant, EUR 1,000 under this head.

C. Default interest

44. 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 6 § 1 of the Convention as regards the complaint relating to the independence and impartiality of the Ankara State Security Court;

2. *Holds* that there is no need to examine the complaint submitted under Article 6 § 3 (b) of the Convention;

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

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for non-pecuniary damage in respect of Article 6 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 in accordance with Article 44 § 2 of the Convention, the following amounts free of any tax that may be chargeable, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement:
      (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage for his complaint under Article 10 of the Convention;
      (ii) EUR 1,000 (one thousand euros) in respect of costs and expenses;
   (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 13 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President