



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

SECOND SECTION

CASE OF TÜM HABER SEN AND ÇINAR v. TURKEY

(Application no. 28602/95)

JUDGMENT

STRASBOURG

21 February 2006

FINAL

21/05/2006

In the case of Tüm Haber Sen and Çınar v. Turkey,

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

Jean-Paul Costa, *President*,

Ireneu Cabral Barreto,

Rıza Türmen,

Karel Jungwiert,

Volodymyr Butkevych,

Danutė Jočienė,

Dragoljub Popović, *judges*,

and Stanley Naismith, *Deputy Section Registrar*,

Having deliberated in private on 31 January 2006,

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

PROCEDURE

1. The case originated in an application (no. 28602/95) 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 Tüm Haber Sen, a trade union, and a Turkish national, Mr İsmail Çınar (“the applicants”), on 21 August 1995.

2. The applicants were represented by Mr D. Selimoğlu, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants alleged, in particular, that the dissolution of Tüm Haber Sen and the enforced cessation of its activities had infringed their right to freedom of association, guaranteed under Article 11 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 Third 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 13 November 2003, the Chamber declared the application partly admissible.

7. 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

8. Tüm Haber Sen is a trade union, now dissolved, which was active between 1992 and 1995. The application was lodged by its former president, İsmail Çınar, a Turkish national who was born in 1954 and lives in Istanbul.

A. The circumstances of the case

9. On 16 January 1992 Tüm Haber Sen was formed when its founding document was lodged with the Istanbul Governor's Office, in application of Article 51 of the Constitution. Its statutes referred, *inter alia*, to the right to conclude collective-bargaining agreements. The founders of Tüm Haber Sen were 851 public-sector contractual staff working in the communications field, in particular for the post office (PTT) and the telecommunications service (Türk Telecom). When it was dissolved the trade union had 40,000 members and 55 local branches.

10. On 20 January 1992 the Istanbul Governor's Office applied to the Şişli public prosecutor's office, seeking the suspension of Tüm Haber Sen's activities and the trade union's dissolution on the ground that State employees could not form trade unions. It referred in its complaint to Article 51 of the Constitution, section 1 of the Trade Union Act (Law no. 2821) and sections 22 and 27 of the State Employees Act (Law no. 657).

11. In a notice of 3 February 1992, the Principal Public Prosecutor called on the Fourth Civil Division of the Şişli District Court to suspend the trade union's activities and to order its dissolution on the ground that under the positive law State employees, who were subject to Law no. 657, were not entitled to form trade unions.

12. In their written observations submitted to the District Court on 26 March 1992, the trade union's representatives argued that the legal provisions in force did not expressly prohibit the formation of trade unions by civil servants and that an obstacle to the exercise of trade-union rights would be in breach of Turkey's international commitments as a signatory to the European Convention on Human Rights, the conventions of the International Labour Organisation, and the European Social Charter.

13. On 15 December 1992 the District Court suspended the trade union's activities and ordered that it be dissolved.

14. The trade union's representatives appealed to the Court of Cassation.

15. On 14 February 1994 the Court of Cassation quashed the District Court's judgment and referred the case back to it. In its reasoning, it stated that the fact that the words "trade union" appeared in the association's title did not make it a trade union in the technical sense, namely that it would be authorised to call strikes and to enter into collective agreements. At the most, the association could be considered as a professional organisation

which aimed to protect the interests of its members, who worked in a specified sector.

16. Before the District Court, the representatives of Tüm Haber Sen argued that it ought to be considered as a trade union which was authorised to call strikes and to enter into collective agreements. On 9 November 1994 the District Court, having examined the arguments submitted by the trade union's representatives, upheld its initial judgment.

17. The trade union's representatives again submitted an appeal on points of law.

18. In a judgment of 24 May 1995, the Court of Cassation, sitting as a full court and ruling at last instance, ordered the dissolution of Tüm Haber Sen. It considered that implementation of the right to form trade unions, as set out in the Constitution, required the enactment of a general principles act. In the absence of any statutory provisions governing the legal status of trade unions for civil servants or public-sector contractual workers, the applicant trade union could not claim to have any legal status. Nor could it be considered as an association or as some form of professional organisation, since its leaders expressly presented it as a full trade union. In spite of Turkey's ratification of International Labour Conventions nos. 87 (on freedom of association and protection of the right to organise) and 151 (on protection of the right to organise and the procedures for determining the conditions of employment in the civil service) on 12 July 1993, the Court of Cassation, sitting as a full court, considered that the trade union could not rely on the conventions in question, since they were not directly applicable in domestic law and the legislature had not yet enacted implementing legislation.

19. The judgment was served on the trade union's representatives on 8 June 1995.

20. Between 26 June 1995 and 2 August 1995, all of Tüm Haber Sen's branches and sections were dissolved on the orders of the Ministry of the Interior.

B. Relevant domestic law

21. The relevant provisions of the Constitution read as follows:

Article 51

(prior to the amendment of 3 October 2001)

“Workers and employers have the right to form trade unions and employers' associations and federations of unions, without prior permission, in order to safeguard and develop their economic and social rights and interests in their labour relations.

In order to form a union or a federation of unions, it shall suffice to submit the information and documents prescribed by law to the competent authority designated by law. If it finds that this information and documentation is not in conformity with

law, the competent authority shall apply to the appropriate court for the suspension of activities or the dissolution of the union or the association of unions.

Everyone shall be free to become a member of or withdraw from membership of a union.

No one shall be compelled to become a member, remain a member, or withdraw from membership of a union.

Workers and employers cannot hold concurrent memberships in more than one trade union or employers' association.

Employment in a given workplace shall not be made conditional on membership or lack of membership of a trade union.

In order to hold a leadership position in a trade union or federation of trades unions, it is necessary to have worked as an employee for at least ten years.

The status, administration, and functioning of trades unions and federations of trades unions should not be inconsistent with the characteristics of the Republic or with democratic principles as defined in the Constitution.”

Article 51

(as amended by Law no. 4709 of 3 October 2001)

“Workers and employers have the right to form trade unions and employers' associations and federations of unions, without prior permission, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations, and to join and withdraw from such entities of their own free will. No one shall be compelled to become a member or withdraw from membership of a union.

The right to form a union may only be restricted by law and for the purposes of safeguarding national security and public order and preventing crime, and for the protection of public health and public morals and the rights and freedoms of others.

The formalities, conditions and procedures to be applied in exercising the right to form a union shall be established by law.

It is not permitted to hold membership of more than one trade union simultaneously within the same sector of employment.

The scope of the rights in this area of civil servants who do not have the status of salaried employee, and the exceptions and limitations applicable to them, shall be established by law in line with the nature of the tasks entrusted to them.

The statutes, administration and functioning of trade unions and their higher bodies should not be inconsistent with the characteristics of the Republic or with democratic principles as defined in the Constitution.”

Article 53

(prior to the amendment of 23 July 1995)

“Workers and employers have the right to conclude collective-bargaining agreements in order to regulate reciprocally their economic and social position and conditions of work.

The procedure to be followed in concluding collective-bargaining agreements shall be regulated by law.

It shall be forbidden to conclude or apply more than one collective-bargaining agreement in a single place of work for the same period.”

Article 53

(as amended by Law no. 4121 of 23 July 1995)

“Workers and employers have the right to conclude collective-bargaining agreements in order to regulate reciprocally their economic and social position and conditions of work.

The procedure to be followed in concluding collective-bargaining agreements shall be regulated by law.

The unions and federations of unions which the public employees mentioned in the first paragraph of Article 128 will be entitled to found and which do not fall under the scope of the first and second paragraphs of the same Article and also Article 54, may appeal to judicial authorities on behalf of their members and may hold collective-bargaining meetings with the administration in accordance with their aims. If an agreement is reached as a result of collective bargaining, a text of the agreement shall be signed by the parties. This text shall be presented to the Council of Ministers so that administrative or judicial arrangements can be made. If such a text cannot be concluded by collective bargaining, the points of agreement and disagreement shall also be submitted by the relevant parties for consideration by the Council of Ministers. The regulations for the execution of this Article shall be set out in legislation.

It shall be forbidden to conclude or apply more than one collective-bargaining agreement in a single place of work for the same period.”

Article 128

“The fundamental and permanent functions required by the public services that the State, State economic enterprises and other public corporate bodies are assigned to perform, in accordance with principles of general administration, shall be carried out by public servants and other public employees.

The qualifications of public servants and other public employees, procedures governing their appointments, duties and powers, their rights and responsibilities, salaries and allowances, and other matters related to their status shall be regulated by law.

The procedure and principles governing the training of senior administrators shall be specially regulated by law.”

22. Section 22 of the State Employees Act (Law no. 657) of 14 July 1965, which was repealed by Article 5 of Legislative Decree no. 2 of 23 December 1972, stated that civil servants were authorised to establish and join trade unions and professional organisations, in accordance with the procedures set out in special laws. Its second paragraph stated that the said professional organisations were authorised to defend the interests of their members before the competent authorities.

Section 1 of Law no. 4275 of 12 June 1997 restored the above provision and supplemented it with a number of conditions. The text now provides:

“Civil servants shall be authorised to establish trade unions and other federations of professional organisations and to join them in accordance with the procedures set out in the Constitution and by special laws.”

Section 27 provides:

“Civil servants are forbidden ... to organise, call or spread propaganda about strikes.

Civil servants may not take part in a strike ... may not support or encourage strike action.”

23. Article 2 of Convention no. 87 of 1948 (of the International Labour Organisation) concerning Freedom of Association and Protection of the Right to Organise provides:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

24. Article 5 of the European Social Charter provides:

“The right to organise

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

25. The applicants complained that the dissolution of Tüm Haber Sen and the enforced cessation of its activities had been ordered in spite of the applicability in domestic law of international treaties which guaranteed the right to organise. They relied on Article 11 of the Convention, the relevant parts of which provide:

“1. Everyone has the right to ... freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society ..., for the prevention of disorder or crime ... This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

A. The parties' submissions

26. The applicants alleged that the Court of Cassation had, through its case-law, previously granted association status to trade unions founded by civil servants. In the instant case, Tüm Haber Sen had been stripped of that status. Its dissolution, following its conclusion of a collective-bargaining agreement, amounted to a violation of its right to freedom of association, guaranteed by the international treaties to which Turkey was a party.

27. The Government emphasised, firstly, that Turkish legislation, while granting public-sector employees the freedom to set up associations to defend their rights, did not guarantee trade-union freedom in the public sector, covering the rights to strike and to conduct collective bargaining. They noted, secondly, that the trade union's representatives had argued from the outset before the national courts that their association was a trade union of public-sector employees and that the concept of trade union included the rights to strike and to collective bargaining. Referring to *National Union of Belgian Police v. Belgium* (27 October 1975, § 39, Series A no. 19) and *Schmidt and Dahlström v. Sweden* (6 February 1976, § 34, Series A no. 21), they asserted that Article 11 of the Convention did not secure any particular treatment of trade-union members by the State or the right to conclude collective-bargaining agreements. They alleged that the Convention's requirement was that trade unions be authorised to strive for the protection of their members' interests through means that the State was free to determine. In the instant case, the decision to dissolve Tüm Haber Sen had

been intended to prevent unlawful unionisation, and the interference had been justified in terms of Article 11 § 2 of the Convention.

B. The Court's assessment

1. General principles

28. The Court reiterates that Article 11 § 1 presents trade-union freedom as one form or a special aspect of freedom of association (see *National Union of Belgian Police*, cited above, § 38, and *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, § 39, Series A no. 20). The words “for the protection of his interests” which appear in Article 11 § 1 are not redundant and the Convention safeguards freedom to protect the occupational interests of trade-union members by trade-union action, the conduct and development of which the Contracting States must both permit and make possible. A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard (see *National Union of Belgian Police*, cited above, §§ 39-40, and *Swedish Engine Drivers' Union*, cited above, §§ 40-41). Article 11 does not, however, secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure the right to be heard (see *National Union of Belgian Police*, cited above, §§ 38-39; *Swedish Engine Drivers' Union*, cited above, §§ 39-40; and *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 42, ECHR 2002-V).

29. The Convention makes no distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer. Article 11 is not an exception to that rule. On the contrary, paragraph 2 *in fine* of this provision clearly indicates that the State is bound to respect the freedom of assembly and association of its employees, subject to the possible imposition of “lawful restrictions” in the case of members of its armed forces, police or administration.

Article 11 is accordingly binding upon the “State as employer”, whether the latter's relations with its employees are governed by public or private law (see *Swedish Engine Drivers' Union*, cited above, § 37).

2. Application of these principles to the present case

(a) Whether there has been an interference

30. The applicants considered that the suspension of Tüm Haber Sen's activities and its dissolution constituted a violation of their rights under Article 11 of the Convention. The Government argued that there had been

no interference since, in their opinion, the domestic courts had penalised the applicant trade union on the ground that it laid stress on its supposed legal attributes to strike and to conduct collective bargaining, attributes which fall outside the scope of Article 11 of the Convention.

31. The Court notes that, at the material time, civil servants were not entitled to set up or join trade unions. The Court of Cassation, sitting as a full court, interpreted the fact that neither the Constitution nor the legislation set out a clear status for trade unions for civil servants as a prohibition of such unions. In the absence of statutory provisions governing the application of International Labour Organisation Conventions nos. 87 and 151, it also held that Turkey's ratification of those texts was insufficient to grant trade-union rights to civil servants.

32. The Court also notes that, when the domestic courts examined the case and gave their decision dissolving the applicant trade union, the latter had not engaged in any collective bargaining, entered into any collective agreements or even organised a strike.

It follows that Tüm Haber Sen was dissolved solely on the ground that it had been founded by civil servants and its members were civil servants.

(b) Whether the interference was justified

33. Such an interference will constitute a breach of Article 11 unless it was “prescribed by law”, pursued one or more legitimate aims under paragraph 2 and was “necessary in a democratic society” for the achievement of those aims.

34. The Court notes that the impugned interference was in accordance with the national law as interpreted by the plenary Court of Cassation. The Court can thus accept that the measure in question, in so far as it sought to prevent a discrepancy between legislation and practice, was intended to prevent disorder.

35. As to whether the interference was “necessary in a democratic society”, the Court reiterates that lawful restrictions may be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the State. However, it must also be borne in mind that the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts (see, for example, *Sidiropoulos and Others v. Greece*, 10 July 1998, § 40, *Reports of Judgments and Decisions* 1998-IV).

36. In the instant case, the Government's arguments provide no explanation as to how the absolute prohibition on forming trade unions,

imposed on civil servants and public-sector contract workers in the communications field by Turkish law as applied at the time, met a “pressing social need”. The mere fact that “the legislation did not provide for such a possibility” is not sufficient to warrant a measure as radical as the dissolution of a trade union.

37. The Court considers that, at the material time, at least two arguments militated in favour of a strict interpretation of the limitation on civil servants' entitlement to form trade unions.

38. In the first place, Turkey had already ratified International Labour Organisation Convention no. 87. Article 2 of that convention secured to all workers, without any distinction between the public and private sectors, the unrestricted right to establish and join trade unions. If the Turkish courts ultimately decided that they could not apply that provision in the instant case, it was on the ground that, at the material time, the Turkish parliament had not yet enacted legislation on the implementation of Convention no. 87.

39. Furthermore, although Turkey was one of only two States (the other being Greece) that had not yet accepted Article 5 of the European Social Charter, the Committee of Independent Experts had construed that provision – which afforded all workers the right to form trade unions – as applying to civil servants as well. The Court can only subscribe to this interpretation by a particularly well-qualified committee. It also notes that Article 5 of the European Social Charter sets out conditions for the possibility of forming trade-union organisations for members of the police and the armed forces. By converse implication, this Article must be considered as applying without restriction to other categories of State employees.

40. Accordingly, in the absence of any concrete evidence to show that the founding or the activities of Tüm Haber Sen represented a threat to Turkish society or the Turkish State, the Court is unable to accept that an argument based solely on an absolute statutory provision was sufficient to ensure that the trade union's dissolution complied with the conditions in which freedom of association may be restricted. In view of the lack of clear legislative provisions on the subject at the relevant time and the broad manner in which the courts interpreted the restrictions on civil servants' trade-union rights, the respondent State failed, at the material time, to comply with its obligation to secure the enjoyment of the rights enshrined in Article 11 of the Convention. That failing amounted to a violation of the provision in question.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 11

41. Finally, the applicants alleged that, when deciding their case, the national authorities had not taken into consideration the international treaties which granted civil servants the right to form trade unions. They

relied on Article 13 of the Convention taken in conjunction with Article 11. Article 13 provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

42. Having regard to its findings under Article 11 of the Convention, the Court does not consider it necessary to examine this complaint separately.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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.”

44. The applicants did not submit any claim for just satisfaction after the decision on admissibility, despite having been informed by a letter of 2 July 1999 that, under Rule 60 of the Rules of Court, any claim for just satisfaction under Article 41 of the Convention must be set out in the written observations on the merits. Accordingly, as the applicants have failed to reply within the time-limit stipulated in the letter accompanying the admissibility decision, the Court holds that no amount shall be awarded in this case (see *Willekens v. Belgium*, no. 50859/99, § 27, 24 April 2003, and *Roobaert v. Belgium*, no. 52231/99, § 24, 29 July 2004).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 11 of the Convention;
2. *Holds* that it is not necessary to examine separately the complaint under Article 13 of the Convention taken in conjunction with Article 11.

Done in French, and notified in writing on 21 February 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Deputy Registrar

Jean-Paul Costa
President