CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF KOÇ AND TAMBAŞ v. TURKEY

(Application no. 50934/99)

JUDGMENT

STRASBOURG

21 March 2006

FINAL

21/06/2006

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 Koç and Tambaş v. Turkey,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr R. TÜRMEN,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 28 February 2006,

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

PROCEDURE

1. The case originated in an application (no. 50934/99) 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 two Turkish nationals, Mr Tayfun Koç and Mr Musa Tambaş ("the applicants"), on 3 August 1999.

2. The applicants, who had been granted legal aid, were represented by Ms O. E. Ataman, a lawyer practising in İstanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. On 1 April 2003 the Court decided to communicate the application.

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

5. In a letter of 24 June 2005, the Court informed the parties that in accordance with Article 29 §§ 1 and 3 of the Convention it would decide on both the admissibility and merits of the application.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1974 and 1972 respectively and live in İstanbul. The first applicant is the owner of the monthly magazine "Revolution for Equality, Liberty and Peace" (*Eşitlik, Özgürlük ve Barış için Devrim*) and the second applicant is its editor-in-chief.

8. In the fifth and sixth issue of the magazine, three articles written by Mr C.K. were published. The articles were entitled "The Kurdish problem in Turkey and the peace process 2 and 3" and "The butcher of justice is once again at work".

9. The first two articles "The Kurdish problem in Turkey and the peace process 2 and 3" read, *inter alia*, as follows:

> "The Kurdish problem has taken the shape of an open war for the past thirteen years. (...) It must be firstly stated that the war waged by the State is a dirty war and that the Kurdish national struggle is a righteous resistance with a democratic content. (...) Today's Kurdish problem is considered as a delayed national movement by most of the left and liberals. (...) To consider the Kurdish problem as a delayed national movement could lead to dangerous tendencies for both the Kurdish problem and Turkish politics. (...)[Kurdish] people are crushed (...). An inevitable imperative for the salvation of crushed people is the integration of the social revolution with the right to self determination. (...) In Turkey, the problem of people who are crushed is a Kurdish problem. Those who consider the Kurdish problem as a delayed national movement, see the present movement as a natural continuation of the Kurdish uprisings that occurred in the end of the 19th century and the beginning of the 20th century. (...) However, the main dynamic of the present movement is the (...) oppressed Kurdish people. The Kurdish problem can only be solved by considering it as a product of new colonialism and not by considering it as part of a classical colonial system. (...) The ruin of the region on account of the new colonial capitalism and fascism influenced the Kurdish people to embrace, in mid 1980's, the national war flag of the PKK. (...) The objective revolutionary feature of the PKK (...) is not an excuse to dispense it from criticism. (...) A "democratic peace" struggle is not only to ask for the end of the ongoing war in the region. Of course, a ceasefire is the first and the compulsory step to peace. (...) The request for peace of the oppressed people and proletarians is part of the struggle against imperialism and oligarchy (...)"

10. The third article "The butcher of justice is once again at work" read, *inter alia*, as follows:

> "Oltan Sungurlu, taking behind him a registry tainted by blood, became the Minister of Justice of the MGK Government. Prisoners, relatives of prisoners and human rights advocates know him from old times. Sungurlu, who has been the Minister of Justice for the fourth time, is directly responsible for the prison policies of the ANAP governments. He is against the abolition of death penalty. [He is] the architect of the Regulation of 1st August. He is the minister who transferred the prisoners who were on hunger strike against this Regulation. He is responsible in the first degree for the deaths of M.Y. and H.H.E. who died during a transfer of 12 hours following 35 days of hunger strike (...) Oltan Sungurlu does not deny that they are considering a

> transition to cell-type prisons. He thinks that he can convince the public and those who visit him because he has found a good pretext for the application of this policy. He is trying to legitimise cell-type prisons by [pointing to] the recent bloodshed in Bayrampaşa prison and the quarrels between prisoners. According to Sungurlu, the State cannot protect the life of a 20 year old who it has put into prison (...). The main policy of pressure, targeting particularly political prisoners, is the usurpation of their right to communication and to receive information. (...) Books, journals and magazines are arbitrarily censored by the prison administration. (...) On the other hand, even letters to prisoners are censored (...) the problem of overcrowding is continuing. 60-70 people are imprisoned in dormitories of a capacity of 30-35. (...) The medical assistance to ill prisoners and suspects are arbitrarily obstructed or delayed. (...)"

11. By two indictments, dated 24 June and 9 September 1997, the public prosecutor at the İstanbul State Security Court accused the applicants of disseminating propaganda against the "indivisible unity of the State" and of designating a person as a target in publishing these three articles. The charges were brought under Articles 6 and 8 of the Law no. 3713.

12. On 5 June 1998 the cases before the İstanbul State Security Court were joined.

13. Before the court, the applicants submitted that the content of the articles remained within the limits of freedom of expression.

14. On 24 August 1998 the İstanbul State Security Court convicted the applicants as charged. They were fined 150,000,000 Turkish Liras (TRL) (approximately 500 euros (EUR)) and TRL 75,900,000 (approximately EUR 252) respectively. The court further ordered the closure of the magazine for a month and the confiscation of the fifth and sixth issues of the newspaper.

15. In its decision, the State Security Court relied on the following passages of the articles "The Kurdish problem in Turkey and the peace process 2 and 3":

> "[Kurdish] people are crushed (...). An inevitable imperative for the salvation of crushed people is the integration of the social revolution with the right to self determination. (...) In Turkey, the problem of people who are crushed is a Kurdish problem. The Kurdish problem has taken the shape of an open war for the past thirteen years. It must be firstly stated that the war waged by the State is a dirty war and that the Kurdish national struggle is a righteous resistance with a democratic content."

16. The court held that with the first two articles, the applicants spread propaganda against the indivisibility of the State. As regards the third article, the court found that the article in question referred to the Minister of Justice as a "butcher of justice" and, as a result, designated him as a target for terrorist organisations.

17. On 22 June 1999 the Court of Cassation upheld the judgment of the State Security Court.

18. Following the entry into force on 28 August 1999 of Law No. 4454 concerning the suspension of pending cases and penalties in media-related

offences, the İstanbul State Security Court decided to suspend the execution of the applicants' sentences, for a period of three years, on 24 November 1999 and 14 January 2000 respectively.

19. By an additional judgment (*ek karar*) dated 6 June 2003, the İstanbul State Security Court, taking into account that the applicants had not committed any intentional offence during the three years since the date of deferment, nullified the applicants' condemnation together with all its consequences pursuant to Article 2 of Law no. 4454.

20. At no time during the criminal proceedings were the applicants detained.

II. THE RELEVANT DOMESTIC LAW AND PRACTICE

21. A description of the relevant domestic law at the material time can be found in the following judgment and decisions: *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, §§ 41-42, 10 October 2000, *Güneş v. Turkey* (dec.), no. 53916/00, 13 May 2004, and *Koç and Tambaş v. Turkey* (dec.), no. 46947/99, 24 February 2005.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicants complained that they had been denied a fair hearing on account of the presence of a military judge on the bench of the Istanbul State Security Court which tried and convicted them and that the written opinion of the principal public prosecutor at the Court of Cassation was never served on them, thus depriving them of the opportunity to put forward their counter-arguments. In their observations dated 24 November 2003, they further complained about the length of the proceedings. They relied on Article 6 of the Convention, which in so far as relevant reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... 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."

23. As regards the applicants' complaints concerning their right to a fair hearing by an independent and impartial tribunal, the Court reiterates that it has already held that following nullification of a condemnation pursuant to

Law no. 4454, an applicant can no longer be considered a victim, within the meaning of Article 34 of the Convention of the alleged violation of Article 6 of the Convention (see, in particular, *Güneş* and *Koç and Tambaş,* cited above). The Court finds that the applicants' situation is comparable. It follows that this part of the application should be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

24. As to the applicants' complaint pertaining to the length of the proceedings, the Court notes that for the purposes of Article 6 of the Convention, the criminal proceedings against the applicants were brought to an end on 22 June 1999 when the Court of Cassation upheld the judgment of the first-instance court (see, in particular, *Koç and Tambaş,* cited above) whereas this complaint was introduced to the Court on 24 November 2003. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. 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, 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

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

1. Existence of an interference

28. The Court notes that it is clear and undisputed between the parties that there has been an interference with the applicants' right to freedom of expression on account of their conviction and sentence under Articles 6 and 8 of Law no.3713.

2. Justification of the interference

29. This interference would contravene Article 10 of the Convention unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in 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.

(a) "Prescribed by law"

30. The Court finds that since the applicants' conviction was based on Articles 6 and 8 of Law no. 3713 the resultant interference with their freedom of expression could be regarded as "prescribed by law".

(b) Legitimate aim

31. The Government submitted that the interference in question pursued a legitimate aim, namely protecting territorial integrity, national unity and protecting public officials against the risk of being identified as a target of a terrorist attack. The applicant disputed the Government's arguments.

32. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey at the time of the events (see, among many others, *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2539, § 10, and *Ceylan v. Turkey* [GC], no. 23556/94, § 28, ECHR 1999-IV) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicants can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which relied on the use of violence.

(c) "Necessary in a democratic society"

(i) Arguments of the parties

33. The Government maintained that the interference with the applicants' right to freedom of expression was necessary in a democratic society. In this regard, they submitted that, in the first two articles, the State was considered as waging a "dirty war" against the "oppressed" Kurdish nation and that in the third article the Minister of Justice was designated as the person responsible for the inconveniences and problems in prisons. They further pointed out that the article considered the Minister to be responsible for the death of two prisoners who were on hunger strike. Finally, they submitted that the applicants were sentenced to an insignificant fine which was never enforced and that their condemnations were eventually nullified.

34. The applicants maintained that their conviction for publishing these articles was not necessary in a democratic society. In this regard, they pointed out that the first two articles concerned the author's assessment on how to peacefully solve the Kurdish problem and that the third article criticised the prison policies of the State and, in particular, that of the Minister of Justice at the time of the events.

(ii) The Court's assessment

35. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, *Şener v. Turkey*, no. 26680/95, §§ 39-43, 18 July 2000, *İbrahim Aksoy*, cited above, §§ 51-53, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, §§ 41 42, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999). It will examine the present case in the light of these principles.

36. The Court must look at the impugned interference in the light of the case as a whole, including the content of the articles and the context in which they were diffused. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". The Court takes into account, furthermore, the background to cases submitted to it, particularly problems linked to the prevention of terrorism (see *Karatas v. Turkey* [GC], no. 23168/94, § 54, ECHR 1999-IV).

37. The Court notes that the applicants' published three articles which had been written by Mr C.K. The articles "The Kurdish problem in Turkey and the peace process 2 and 3" consisted of a critical assessment of Turkey's policies since the establishment of the Republic as regards what the author considered to be the Kurdish problem and the possible ways to reach a peaceful solution. The third article, on the other hand, criticised the policies adopted by the State and, in particular, that of the Minister of

Justice in respect of conditions of imprisonment. The Court observes that the State Security Court assessed certain parts of the first two articles "as separatist propaganda against the indivisibility of the State". It further considered that by publishing the third article which referred to the Minister of Justice as a "butcher of justice", the applicants had designated him as a target for terrorist organisations.

38. The Court has examined the articles in question. The Court considers that, although certain particularly acerbic passages paint an extremely negative picture of the Turkish State and of its Minister of Justice and thus give the narratives hostile tones, the articles, taken as a whole, do not encourage violence, armed resistance or insurrection and do not constitute hate speech (see *Birol v. Turkey*, no. 44104/98, § 29, 1 March 2005, 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 addition, the Court considers that, despite certain particularly virulent passages such as the one highlighted by the Government and its provocative title, the third article, read as a whole, cannot be construed as having exposed the Minister of Justice of the time of the events to a significant risk of physical violence (see, *a contrario*, *Gündüz v. Turkey* (dec.), no. 59745/00, ECHR 2003-XI (extracts)). In the Court's view, these are the essential factors in the assessment of the necessity of the measure.

39. The Court further observes that, notwithstanding the eventual suspension and annulment of the sentence imposed on the applicants, they nevertheless faced, for three years, the threat of a penalty. In the Court's opinion, that condition amounts to a prohibition which had the effect of censoring the applicants' very profession and was unreasonable in scope since the measure compelled the applicants to refrain from publishing anything likely to be considered to be contrary to the interests of the State (see, in particular, *Erdoğdu v. Turkey*, no. 25723/94, § 72, ECHR 2000-VI).

40. 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicants claimed 9,358.58 United States dollars (USD), (approximately EUR 7,755), by way of pecuniary damage incurred as a result of the closure of the magazine for a month and the confiscation of its three issues. They further claimed EUR 40,000 in respect of non-pecuniary damage.

43. The Government contested the amounts considering them unsubstantiated and exorbitant.

44. In the absence of any documents or receipts, the Court considers the applicants' claim for pecuniary damage speculative and unsubstantiated. It accordingly, dismisses them. On the other hand, the Court considers that the applicants may be taken to have suffered a certain amount of distress and anxiety in the circumstances of the case. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards them, jointly, EUR 4,000 for non-pecuniary damage.

B. Costs and expenses

45. The applicants claimed the global sum of EUR 14,285.89 for the costs and expenses incurred both before the domestic courts and before the Court. In support of their claims, the applicants submitted a schedule of costs prepared by their representative and İstanbul Bar Association's recommended fees list for 2005. They also submitted receipts of their postal expenses.

46. The Government contested the amounts. They submitted that the applicants had failed to provide any document or receipt in respect of their claims.

47. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 3,000 less EUR 701 received by way of legal aid from the Council of Europe for the proceedings before the Court.

C. Default interest

48. 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. *Declares* the complaint concerning the interference with the applicants' right to freedom of expression admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into new Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 4,000 (four thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 2,299 (two thousand two hundred and ninety nine euros) 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;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

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

Françoise ELENS-PASSOS	Nicolas BRATZA
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Türmen is annexed to this judgment.

N.B.
F.E.-P.

CONCURRING OPINION OF JUDGE TÜRMEN

I voted with the majority in finding a violation of Article 10. The case concerns three articles published in the monthly magazine *Eşitlik, Özgürlük ve Barış için Devrim* for which the owner and the editor-in-chief were convicted and ordered to pay a fine.

I agree that the convictions of the applicants for the first two articles constitute a breach of Article 10 of the Convention. However, I disagree with the majority as regards the third article entitled "The Butcher of Justice is once again at work".

The article was published at a time when violent unrest prevailed in Turkish prisons. The then Government had tried to find a solution by separating prisoners living in overcrowded prison cells and this had met with fierce and violent resistance from the inmates.

In such a context, to depict the then Minister of Justice as "Butcher of Justice", with a past "tainted by blood", clearly made him the potential target of physical violence.

In the *Sürek (no. 1)* judgment of 8 July 1999, where the impugned publication had referred to incumbent and past Prime Ministers of Turkey and had labelled them as a "murder gang" and "hired killers of imperialism", the Grand Chamber expressed the opinion that labels such as these, together with the identification of persons by name, "stirred up hatred for them and exposed them to the possible risk of physical violence" (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV). On that ground the Grand Chamber found that there had been no violation of Article 10.

In the light of the *Sürek (no. 1)* judgment, the majority opinion that there has been a violation of Article 10 in the present case seems to be a major departure from the Court's case-law and not a justified one.

I firmly believe that the interference by the authorities in respect of the third article does not constitute a violation of Article 10.