



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

FOURTH SECTION

CASE OF YARAR v. TURKEY

(Application no. 57258/00)

JUDGMENT

STRASBOURG

19 December 2006

FINAL

19/03/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

This version was rectified on 17 January 2008 under Rule 81 of the Rules of Court.

In the case of Yarar v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr R. TÜRMEŒ,

Mr K. TRAJA,

Mr S. PAVLOVSCHI,

Mr L. GARLICKI, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 28 November 2006,

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

PROCEDURE

1. The case originated in an application (no. 57258/00) 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 Erol Mehmet¹ Yarar (“the applicant”), on 20 March 2000.

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

3. On 14 June 2004 the Court decided to give notice of the application to the Government.

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.

¹ Rectified on 17 January 2008. The applicant’s name previously read “Mehmet Erol” and was changed.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in Istanbul. He was the president of MÜSİAD¹ at the time of the events.

7. On 4 October 1997 the applicant made an opening speech at a consultation meeting with the members of MÜSİAD. The applicant submitted that the meeting was held in private and that no journalists were allowed. During lunch, a journalist, Mr T.Y. approached the applicant and asked a couple of questions. The applicant gave some short answers.

8. On 5 October 1997, a daily newspaper "*Hürriyet*" published an article entitled "Weird criticisms" about the event. The text was as follows:

"Erol Yarar who braces himself for the leadership of the Islamic section in view of the likelihood of the closure of the Welfare Party, stated that 'the head of he who wants to bring back Article 163 [of the Criminal Code] would be cut off', [and] continued to say that 'what rests with us is to start a democratic independence struggle'. In the consultation meeting of the professions committee, arranged by the Ankara Branch of MÜSİAD, Yarar criticised what he called the 'absolute atheist education' [and] asserted that 'Today, Turkey is debating topics which even the Greek and British occupation forces of Istanbul had not dared to raise although they might have desired to do so'. Yarar who alleged that those who bring up this topic on the agenda of Turkey cannot be believers and that 'attempts to punish even the circumcision festivities as a religious activity must be the work of those without circumcision'.

Yarar who alleged that uninterrupted compulsory education is designed to pave the way for establishing the legal foundation of an absolute atheist life [and] reached to the ongoing preparations for the re-introduction of a new criminal law similar to Article 163. Stating that the most important problem in Turkey was that of the people who while posing themselves as faithful Muslims by saying 'I am a Muslim too', prepared the legal foundation for an atheist life. He went on to state that 'what rests with us in that regard is to start a democratic independence struggle [against] those who would own up to such a draft law, if there is any. It is now our duty to do that'. Yarar then continued to state that 'Today, another problem of Turkey, which is as important as the unrecorded economy, is the unrecorded holders of State power. Holders of State power who do not derive their authority from the Nation, who are afraid of the Nation's will, who fear to express their own real faith to the Nation, who are in fact cowards but seek to oppress the nation through their unrecorded powers and who expect material and political premium from all this. [This] constitutes the single biggest problem of Turkey. But as long as the Nation's resolution to struggle continues, although they may raise their voices from time to time, their voices shall diminish when the Nation strikes back. Then we have a duty. We have to continue our struggle.'

1. Müstakil Sanayiciler ve İşadamları Derneği - Association of Independent Industrialists and Businessmen.

Yarar, emphasising that the new arrangements under preparation would provide for heavy punishment and fines for those who support religious schools and religious meetings, stated that 'the head who wants to control everything through punishment; this is the head [*kafa*] which has to be changed in Turkey. It is a head which has to be invited to repent. It is a head which we the Nation have to seek to change. After having exhausted all our efforts, if it still does not want to come around to a reasonable point, then it has to be cut off. Turkey can get nowhere with such a head. Alleging that there was such a head in Turkey which prepares such law, he continued 'Perhaps there are one or two or three of them. But they are in positions to bring up such topics on the agenda. Perhaps they are behind their words, perhaps fearing people they cannot come out but they have to know that no one can impose today on the Nation what the English General did not dare to do. In today's circumstances, this Nation will give its response very strongly, by a democratic independence struggle. Yarar concluded as follows; 'Such an agenda should not discourage our will to invest, to open up to the world and to work in the spirit of the incursionist. The dog barks and the caravan moves. Dogs will always bark, the caravans have to move.'

9. In the meantime, two other daily newspapers also published similar articles concerning the event with the titles "An absolute irreligious life" and "Solution is democratic liberation struggle". The applicant claims that these newspapers took the story from *Hürriyet*.

10. On 13 October 1997 Mr Ç.B., the Second Chief of the General Staff, denounced the applicant to the Istanbul public prosecutor's office. He requested that criminal charges be brought against him.

11. On 20 October 1997 the General Directorate of Criminal Affairs of the Ministry of Justice requested the Istanbul public prosecutor's office to take legal action against the applicant.

12. On 30 October 1997 the Istanbul public prosecutor's office decided that it lacked competence *ratione materiae* and transferred the case file to the public prosecutor at the Istanbul State Security Court. The latter decided that it lacked competence *ratione loci* and transferred the case file to the public prosecutor at the Ankara State Security Court.

13. On 26 December 1997 the public prosecutor at the Istanbul State Security Court decided not to initiate criminal proceedings against the author of the article, Mr T.Y., and the editor-in-chief of *Hürriyet* since it considered that the article had been published without any accompanying comments with a view to imparting information on an event which had a news value.

14. On 30 April 1998 the public prosecutor at the Istanbul State Security Court heard the applicant. The applicant submitted that he did not remember whether he had said the words published in *Hürriyet* since he spoke impromptu at the meeting and that his speech had been a criticism of the general economic situation of Turkey. He denied the allegation that he had incited people to hatred and hostility and submitted that the phrases read out to him could not be construed as such.

15. On 20 May 1998 the public prosecutor at the Ankara State Security Court filed a bill of indictment against the applicant accusing him of

inciting people to hatred and hostility on the basis of a distinction between class and religion. He requested that the applicant be convicted and sentenced under Article 312 § 2 of the Criminal Code.

16. The following statements were highlighted in the indictment;

“Yarar criticised what he called the 'absolute atheist education' [and] asserted that 'Today, Turkey is debating topics which even the Greek and British occupation forces of Istanbul had not dared to raise although they might have desired to do so'.

(...) the uninterrupted compulsory education is designed to pave the way for establishing the legal foundation of an absolute atheist life (...)

(...) that those who bring up this topic on the agenda of Turkey cannot be believers and that 'attempts to punish even the circumcision festivities as a religious activity must be the work of those without circumcision'.

(...) It is a head which we the Nation have to seek to change. After having exhausted all our efforts, if it still does not want to come around to a reasonable point, then it has to be cut off.

(...) the dog barks and the caravan moves (...)”

17. On an unspecified date the criminal proceedings against the applicant commenced before the Ankara State Security Court.

18. The court requested various authorities to investigate whether the applicant's speech had been recorded. It was informed by the Ankara Security Directorate that, according to their investigation, the speech had not been recorded by anyone.

19. On various dates, the court heard the testimony of witnesses. Mr A.F. affirmed that he did not hear the applicant saying the phrases highlighted by the prosecution. Mr R.A. and Mr M.A.H stated that they did not remember the contents of the applicant's speech. Mr Y.R.S. submitted that the applicant had talked about current economic issues. Mr N.B. affirmed that he only remembered that the applicant had used the phrase “the dog barks and the caravan moves”.

20. On 11 May 1998 Mr T.Y. was heard by the public prosecutor at the State Security Court. He affirmed that he had recorded the speech of the applicant but since there had been no request for a disclaimer he erased the cassette. He claimed that he had been a journalist for twelve years, that he had not added any comments to the article and that the applicant had still not requested a disclaimer for the article.

21. In the course of the proceedings, the applicant denied the charges against him. In his written submissions, dated 20 July 1998, the applicant stated, *inter alia*, that he had never said anything about cutting heads off and alleged that the journalist had either added certain remarks which he did not say or twisted the remarks he had made to him during the interview and made it look as if they were part of the speech he had made. He further

submitted that his speech criticised economic, political and social policies of the Government.

22. On 15 February 1999 the Ankara State Security Court heard as a witness, Mr Ö.T., a journalist at *Milli Gazete*. He submitted that he was unable to remember the contents of the applicant's speech since the events had taken place over a year ago. He claimed that when the article appeared in *Milli Gazete* the press officer of MÜSİAD had called him and told him of his displeasure and that the applicant had not made such a speech. He submitted that he had told the press officer to send a disclaimer. He maintained that he took the story from Mr T.Y. who had told him that he had spoken with the applicant over lunch.

23. On 17 March 1999 Mr T.Y. reiterated his previous submissions before the Ankara State Security Court. He further claimed that he had not interviewed the applicant. He also submitted that when the police asked him about the cassette he had told them that there was no cassette since it had already been erased. The applicant submitted that he did not accept the statements of the journalist.

24. On 21 April 1999 the Ankara State Security Court convicted the applicant of incitement to hatred and hostility on the basis of a distinction between class and religion and sentenced him to one year imprisonment and to a fine of 3,000 Turkish liras (TRL). The court decided to suspend the execution of the applicant's sentence pursuant to Law no.647.

25. In its decision the court considered that the testimony of the journalist was sincere since he did not have any reason to incriminate the applicant and that the latter did not request a disclaimer of the article. It noted that similar articles had been published in other newspapers. Taking into account the speech as a whole, the court held, in particular, that the applicant had divided society into two groups, namely believers and non-believers. It found that the applicant considered those who were in favour of eight years of compulsory and consecutive primary education and the reintroduction of Article 163 of the Criminal code as non-believers and those against as believers. The court considered that the applicant had set these two groups against each other and incited the religious feelings of the sincere Muslim masses. It concluded that the applicant had been trying to divide the society into two enemy camps according to their beliefs.

26. However, the court found that since the impugned speech had been given before a limited number of people and on a day which did not have any specific importance, it did not endanger public security.

27. On 6 October 1999 the Court of Cassation upheld the judgment of the Ankara State Security Court.

28. The Government informed the Court that the criminal record of the applicant had been erased.

II. THE RELEVANT DOMESTIC LAW

29. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Karkin v. Turkey*, no. 43928/98, §§ 17-19, 23 September 2003; *Özel v. Turkey* no. 42739/98, §§ 20-21, 7 November 2002; and *Öcalan v. Turkey* [GC], no. 46221/99, §§ 52-54, ECHR 2005-...).

30. By Law no. 5190 of 16 June 2004, published in the Official Journal on 30 June 2004, State Security Courts were abolished.

THE LAW

I. ADMISSIBILITY

31. The Court considers that the application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

32. The applicant first complained that he had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge sitting on the bench of the Ankara State Security Court which tried and convicted him. Secondly, he claimed that the court had been influenced by the Army since the proceedings against him had been prompted by the request of the Second Chief of the General Staff. Finally, he maintained that he had been convicted solely on the basis of the statements of the journalist who had a personal interest in incriminating him. The applicant relied on Article 6 of the Convention, which in so far as relevant reads 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.”

A. Independence and impartiality of the State Security Court

33. The Court has examined a large number of cases raising similar issues to those in the present case and found a violation of Article 6 § 1 of the Convention (see *Özel*, cited above, §§ 33-34; and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

34. The Court finds no reason to reach a different conclusion in the instant case. Accordingly, the Court concludes that there has been a violation of Article 6 § 1.

B. Fairness of the proceedings

35. Having regard to its finding of a violation of the applicant's right to a fair hearing by an independent and impartial tribunal, the Court considers that it is not necessary to examine the remaining complaints under Article 6 of the Convention relating to the fairness of the proceedings before the domestic courts (see, among other authorities, *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1568, § 74).

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

36. The applicant complained that his criminal conviction and sentence had infringed his right to freedom of expression. He relied 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.”

37. The Government submitted that the interference with the applicant's right to freedom of expression was justified under the provisions of the second paragraph of Article 10. They maintained that the interference was proportionate since the applicant's sentence had been suspended. Finally, they pointed out that Article 312 of the Criminal Code had been amended, in light of the jurisprudence of the Court, by Law no. 4744 which entered into force on 19 February 2002.

38. The applicant maintained his allegations. In particular, he submitted that he had been convicted on the basis of remarks which he did not make. He claimed that even if he had made such a speech, it did not constitute an incitement to hatred or hostility on the basis of a distinction between class and religion.

39. The Court notes that it is not in dispute between the parties that the conviction 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 or aims, namely prevention of disorder or crime and the protection of the rights of others for the purposes of Article 10 § 2. The Court agrees. In the present case what is in issue is whether the interference was “necessary in a democratic society”.

40. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, *Karın*, cited above, §§ 27-30; and *Gündüz v. Turkey*, no. 35071/97, § 37-41, ECHR 2003-XI). It will examine the present case in the light of these principles.

41. The Court must look at the impugned interference in the light of the case as a whole, including the content of the speech and the context in which it was delivered. 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” (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). Furthermore, the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see *Skalka v. Poland*, no. 43425/98, § 42, 27 May 2003).

42. The Court observes that the applicant- a well known public figure being the president of MÜSİAD at the time of the events- was convicted on account of a speech he had made during a meeting of MÜSİAD and which was considered by the State Security Court to have amounted to an incitement to hatred and hostility on the basis of a distinction between class and religion. In reaching this conclusion, the domestic court relied, in particular, on the passages highlighted by the prosecution (see paragraph 16 above).

43. The Court has examined the speech in question as it appeared in the *Hürriyet* newspaper. It notes the following phrases highlighted by the prosecution: “It is a head which we the Nation have to seek to change. After having exhausted all our efforts, if it still does not want to come around to a reasonable point, then it has to be cut off” and “that those who bring up this topic on the agenda of Turkey cannot be believers and that 'attempts to punish even the circumcision festivities as a religious activity must be the work of those without circumcision’”. It is true that these passages from the speech could, if viewed alone, be interpreted as a call to violence or the

promotion of hatred based on religious intolerance. However, for the Court the domestic courts omitted to set these remarks in the context of the speech as a whole, which, on any reading, could not be construed as an incitement to hatred or violence (see by way of 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).

44. Furthermore, in the instant case, since it was the press that reported the applicant's comments, some of which the applicant subsequently denied making, including the above remarks, the Court finds that it is not possible to hold him responsible for everything that appeared in the published article (see *Amihalachioaie v. Moldova*, no. 60115/00, § 37, ECHR 2004-III; and *Erbakan v. Turkey*, no. 59405/00, § 67, 6 July 2006).

45. Finally, the Court observes that, notwithstanding the fact that the execution of the sentence imposed on the applicant was suspended, he nevertheless faced the threat of a heavy penalty (see, among other authorities, *Halis v. Turkey*, no. 30007/96, § 37, 11 January 2005).

46. Against this background, the Court considers that the reasons given by the Ankara State Security Court for convicting and sentencing the applicant, although relevant, cannot be considered sufficient to justify the interference with his right to freedom of expression.

47. 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.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

49. The applicant claimed 100,000 United States dollars (USD), (approximately 83,104 euros (EUR)) in respect of non-pecuniary damage.

50. The Government contested the claims.

51. 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, it awards him EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicant also claimed the global sum of USD 90,257 (approximately EUR 75,007) for the costs and expenses incurred both before the domestic courts and before the Court. The applicant submitted documentation, such as fee notes and receipts, in support of his claims.

53. The Government contested the claims.

54. The Court reiterates that only those costs and expenses that were actually and necessarily incurred in connection with the violation or violations found, and are reasonable as to quantum, are recoverable under Article 41 (see, for example, *Şahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003). It further reiterates that, where it finds that there has been a violation of the Convention, the Court may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see, among other authorities, *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 14, § 36; and *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI,, p. 2334, § 63). In this connection, the Court considers the applicant's claims excessive. Making its own estimate based on the information available and the above criteria, the Court considers it reasonable to award the applicant EUR 3,000 covering costs and expenses under all heads.

C. Default interest

55. 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 application admissible;
2. *Holds* that there has been a violation of Article 6 of the Convention as regards the complaint relating to the independence and impartiality of the Ankara State Security Court;
3. *Holds* that it is not necessary to consider the applicant's other complaints under Article 6 of the Convention;
4. *Holds* that there has been a violation of Article 10 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 to be converted into new Turkish liras at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;

(ii) EUR 3,000 (three thousand 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;

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

Done in English, and notified in writing on 19 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President