



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

SECOND SECTION

CASE OF KAR AND OTHERS v. TURKEY

(Application no. 58756/00)

JUDGMENT

STRASBOURG

3 May 2007

FINAL

03/08/2007

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

In the case of Kar and Others v. Turkey,

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

Mrs F. TULKENS, *President*,

Mr I. CABRAL BARRETO,

Mr R. TÜRMESEN,

Mr M. UGREKHEDIDZE,

Mr V. ZAGREBELSKY,

Mrs A. MULARONI,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 3 April 2007,

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

PROCEDURE

1. The case originated in an application (no. 58756/00) 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 four Turkish nationals, Mr Nazmi Kar, Mr Zekeriya Özen, Mr Fuat Başarılı and Mr Osman Yavuz (“the applicants”) on 3 April 2000.

2. The applicants were represented by Messrs Süleyman Çetintulum and Mehmet Refik Korkusuz, lawyers practising in İzmir. The Turkish Government (“the Government”) did not designate an agent for the purposes of the proceedings before the Court.

3. The applicants alleged, in particular, that their right to a fair hearing was breached on account of the presence of a military judge on the bench of the Ankara State Security Court which convicted them for the words uttered by them as actors during a play and sentenced them to various terms of imprisonment. They invoked Articles 6 and 10 of the Convention.

4. On 31 January 2006 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the fairness of the criminal proceedings and the applicants’ right to freedom of expression. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1972, 1969, 1969 and 1968 respectively and live in Turkey. Between 20 March 1997 and 8 April 1997 they took part in a play, entitled “An Enemy of Justice” (*Bir Hak Düşmanı*), as actors. The play was staged on eight occasions in a number of towns and cities in Turkey.

6. A number of newspapers and TV stations devoted coverage to the play and several provisions of the Criminal Code, which the applicants were supposed to have breached, were cited in some of those newspapers. On 20 April 1997 the daily *Hürriyet* newspaper ran the headline “The play that led the general to rebel”, referring to an army general having severely criticised the ruling *Refah Party* and its leader Necmettin Erbakan because of the play staged by the applicants.

7. On 24 April 1997 the first, third and fourth applicants were arrested by police officers from the anti-terror Branch of the İzmir police headquarters and placed in custody. The second applicant was arrested and detained the following day. The reason for their arrest was a criminal investigation opened by the prosecutor at the Ankara State Security Court in connection with the play. The applicants did not have access to their lawyers while in police custody.

8. On 1 May 1997 the applicants appeared before the judge at the State Security Court in Ankara. According to the verbatim records of this meeting, the applicants were accused of the offence of “incitement of the public to an armed uprising against the armed forces”, contrary to Article 149 § 1 of the Criminal Code in force at the time.

9. The applicants all stated that there was nothing in the play which could be interpreted as an incitement to an uprising. Nevertheless, the judge ordered their detention on remand, pending the introduction of criminal proceedings.

10. On 26 May 1997 the prosecutor at the Ankara State Security Court filed an indictment with that court and charged the applicants and 35 other persons with the above mentioned offence. One of the 35 persons is the playwright. The other 34 people had assisted in the staging of the play in various cities in one way or another.

11. According to the indictment, the play was based on the perception that there was a risk of an attack, in the form of a military coup, against Muslims. In one part of the play, a number of Muslims are gathered and discuss possible ways of avoiding that risk. One person suggests that Muslims should establish an armed force as a deterrent, regardless of the existence or otherwise of the risk of a military coup. At the end of the play a

military coup takes place and the leader of the Muslims is sentenced to death.

12. Criminal proceedings commenced before the First Chamber of the Ankara State Security Court (hereinafter “the trial court”) while the applicants were being held in detention pending the outcome. One of the three judges on the bench of the trial court was a military officer. In their defence petitions submitted to the trial court, the applicants stated, *inter alia*, that the play was set in an imaginary country called “Zargonya” and had nothing to do with Turkey; the dialogue in the play constituted “artistic events”. The play included a number of expressions and opinions, but it was not possible to regard them as incitement to armed rebellion.

13. During the criminal proceedings, the prosecutor requested the trial court to convict the applicants of the offence of “incitement to hatred or hostility on the basis of a distinction between social classes, race, religion, denominations or region”, contrary to Article 312 § 2 of the Criminal Code then in force, and not for the offence mentioned in the indictment.

14. On 11 September 1997 the trial court found the applicants guilty of the offence under Article 312 § 2 of the Criminal Code and sentenced them to two years and four months’ imprisonment and the payment of a fine. The playwright was sentenced to three years’ imprisonment¹. The other 34 defendants were acquitted.

15. The applicants appealed against the judgment and argued that the mental element (*mens rea*) of the offence was lacking; the words uttered by them as actors should be regarded as “artistic events”.

16. The prosecutor also appealed against the judgment and argued that the applicants had staged the play at various locations and, as such, they should have been convicted and sentenced separately in respect of each occasion.

17. On 23 March 1998 the Court of Cassation quashed the judgment in so far as it concerned the applicants and the playwright, and upheld the acquittal of the other 34 defendants. The Court of Cassation, in line with the prosecutor’s submissions, held that the applicants had staged the play at various locations and, therefore, they should have been convicted and sentenced in respect of each occasion.

18. Following the decision of the Court of Cassation, the case was referred back to the trial court and the criminal proceeding against the applicants recommenced. In their observations submitted to the trial court, the applicants argued that the play staged in the eight locations had been based on the same script. They could not, therefore, be regarded as multiple offences.

¹ The playwright also lodged an application with the Court (*Mehmet Vahi Yazar v. Turkey*, no. 58709/00, 31 January 2006), and this was joined to the present application. However, it was subsequently struck out of the Court’s list of cases pursuant to Article 37 § 1 (a) of the Convention.

19. On 4 August 1998 the trial court convicted the applicants once more of the offence under Article 312 § 2 of the Criminal Code and sentenced them to two years' imprisonment for each time the offence had been committed, i.e. 16 years, and the payment of a fine. In assessing the sentence, the trial court considered as aggravating factors "the time and the locations where the plays were staged, the identities and personalities of the applicants and their social status".

20. The applicants appealed and argued that they were students and young amateur actors who were not well known. The play had been staged in theatres with an audience of approximately 150-200 persons. Due to the fact that the staging of the play in different locations was regarded both as an aggravating element as well as a separate offence, they were being punished multiple times. The applicants also submitted that, although they had staged the play a total of eight times, in three of the locations they had staged the play twice in one day, which, they argued, should count as one offence only.

21. On 22 February 1999 the Court of Cassation quashed the judgment and held that the staging of the play on the same day on more than one occasion should have been regarded as one offence for the purpose of sentencing.

22. On 13 May 1999 the trial court again convicted the applicants of the offence defined in Article 312 § 2 of the Criminal Code and sentenced each applicant to five years and six months' imprisonment as well as to the payment of 4,729,999 lira fine (approximately 12 US dollars at the time). Taking into account the time the applicants had already spent in prison, i.e. 2 years and 18 days in the case of the second applicant and 2 years and 19 days in the case of the remaining applicants (see paragraph 7 above), the trial court ordered their release. The playwright was sentenced to 11 years' imprisonment for having written the script.

23. Parts of the script that were reproduced in the trial court's judgment, included the following:

“– So, what else did Allah mention in his book, did he mention taking up arms and rebelling against the State?

– If that State does not rule by the rules of Allah and instead adopts laws as it wishes, enforces those laws against its citizens in order to force them to obey, resorts to the use of arms when they refuse to obey, then yes, just like the State behaves.”

24. According to the trial court, the play had given a message to Muslims about a perceived need for the public to take up arms against the armed forces of the State. By mentioning the possibility of a military coup, the military had been portrayed as an oppressive group. Members of the armed forces were referred to as non-religious persons or as persons affiliated to other religions. A need by real Muslims to take up arms against such members of the armed forces had thus been depicted in the play. This,

in the opinion of the trial court, amounted to incitement to hatred and enmity on the basis of a distinction based on class, race and religion, within the meaning of Article 312 § 2 of the Criminal Code.

25. The appeal lodged by the applicants was rejected by the Court of Cassation on 11 October 1999.

II. DOMESTIC LAW AND PROCEDURE

26. A full description of the relevant domestic law may be found in *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, §§ 21-33.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicants complained that they 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 them. They further complained that their right to the presumption of innocence, guaranteed under Article 6 § 2 of the Convention, had been violated on account of the actions of the media (see paragraph 6 above), including the citing by a number of newspapers of the provisions of the Criminal Code which they were supposed to have breached. Finally, invoking Article 6 § 3 (c) of the Convention, the applicants complained that national legislation prevented them from having access to their lawyers during the first four days of their police custody.

28. Article 6 of the Convention, in so far as relevant, provides 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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing....”

A. Admissibility

29. 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. Indeed, the Government have not objected to the admissibility of this complaint. It must therefore be declared admissible.

B. Merits

1. *Independence and impartiality of the State Security Court*

30. The Court has examined a large number of cases raising issues similar to those arising in the present case and found a violation of Article 6 § 1 of the Convention (see, in particular, *Incal*, cited above, §§ 61-73; see also, more recently, *Akgül v. Turkey*, no. 65897/01, § 25, 16 January 2007).

31. The Court, finding no reason to reach a different conclusion in the instant case, concludes that there has been a violation of Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the Ankara State Security Court which convicted the applicants on 13 May 1999.

2. *Fairness of the proceedings*

32. Having regard to its finding of a violation of the applicants' 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 (see, among other authorities, *Incal*, cited above, § 74).

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicants alleged that their conviction and sentence under Article 312 of the Criminal Code constituted an unjustified interference with their right to freedom of expression, guaranteed under Article 10 of the Convention, which provides, insofar as relevant, 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 ... for the prevention of disorder or crime...”

A. Admissibility

34. Referring to the case of *Ahmet Sadık v. Greece* (judgment of 15 November 1996, *Reports* 1996-V, §§ 32-33), the Government submitted that the applicants, by failing to claim during the proceedings before the national courts that there had been an unjustified interference with their rights under Article 10 of the Convention, had failed to exhaust domestic remedies, contrary to the requirement in Article 35 § 1 of the Convention.

35. The Court reiterates that the purpose of the rule of exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. It further reiterates that the rule must be applied with some degree of flexibility and without excessive formalism; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, before the national authorities (see, *inter alia*, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, §§ 65-69).

36. The Court observes that it is not in dispute between the parties that the applicants were tried and convicted solely on the basis of a number of statements made by them in their capacity as actors in the course of a play staged at various locations.

37. The applicants submitted in the course of the trial that the words uttered by them as actors should be regarded as “artistic events” and that they could not be regarded as an incitement to armed rebellion (see paragraphs 12 and 15 above).

38. In the light of the above, the Court concludes that the applicants’ complaint under Article 10 of the Convention was thus brought, at least in substance, to the attention of the domestic courts (see, *mutatis mutandis*, *Fressoz and Roire v. France* [GC], no. 29183/95, §§ 36-39, ECHR 1999-I). It therefore rejects the Government’s objection.

39. Furthermore, the Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

40. The Court considers that the conviction of the applicants under Article 312 § 2 of the Criminal Code and the sentences imposed on them constituted an interference with their right to freedom of expression guaranteed in Article 10 of the Convention. It further considers that the interference was prescribed by law – the aforementioned Article 312 § 2 of the Criminal Code – and pursued a legitimate aim, namely the prevention of

disorder or crime as described in Article 10 § 2 of the Convention. The Court will therefore confine its examination of the case to the question whether the interference was “necessary in a democratic society”.

41. The applicants argued that, in the play, they had depicted a need to react by the public to a military coup which was about to take place in an imaginary country. They had also depicted criticism of the lack of a consensus among members of the public to do so. They submitted that military coups were important events affecting society as a whole. Expressing opinions about such an important event should be regarded, therefore, as a contribution to public debate. Punishing such interaction of information was a restriction on freedom of expression. Theatre-goers were persons who paid for their tickets to see a play; presuming that they would have been incited to hatred and enmity as a result of watching a play would amount to an insult. In the opinion of the applicants, persons sympathetic to the official *status quo* in Turkey enjoyed greater freedom to express their opinions than those who disagreed with it; in a democracy, all opinions should be expressed freely.

42. The Government submitted that the applicants had made discriminatory speeches based on religious beliefs, encouraged violence, and had provoked hostility and hatred among different segments of Turkish society. Furthermore, certain segments of Turkish society were invited to make an armed rebellion. In the Government’s opinion, the interference in the present case was necessary in a democratic society and the sentences were proportionate to the legitimate aim pursued.

43. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, *Müller and Others v. Switzerland* judgment of 24 May 1988, Series A no. 133, § 27; *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, § 49; *Başkaya and Okçuoğlu v. Turkey*, nos. 23536/94 and 24408/94, § 66, ECHR 1999-IV; *Karataş v. Turkey* [GC], no. 23168/94, §§ 49-50, ECHR 1999-IV, and *Fressoz and Roire* [GC], cited above,). It will examine the present case in the light of those principles.

44. In examining whether the interference in question was necessary in a democratic society, the Court will determine whether the interference in question was “proportionate to the legitimate aims pursued”.

45. The applicants were prosecuted and convicted on account of having taken part in a play as actors. In this connection, the Court observes that Article 10 includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (see, *mutatis mutandis*, *Müller and Others*, cited above, § 27). Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is

essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression (*ibid*, § 33).

46. The medium through which the applicants vocalised the impugned statements was a play which was only staged on eight occasions. The Court considers that the limited potential impact the play might have is a relevant factor for its examination (see, *mutatis mutandis*, *Karataş v. Turkey* [GC], cited above, § 49).

47. Although some of the words uttered during the play might have been regarded as offensive by certain members of the armed forces (see paragraph 6 above) and were held by the trial court to constitute incitement to hatred and enmity (see paragraph 24 above), sight must not be lost of the fact that the freedom of expression within the meaning of Article 10 applies not only to “information” or “ideas” which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” (see *Handyside*, cited above, § 49).

48. The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see, *inter alia*, *Başkaya and Okçuoğlu*, cited above, § 66). To this end, the Court is struck by the extreme severity of the sentences imposed on the applicants; i.e. five years and six months’ imprisonment, of which the applicants served over two years before they were released (see paragraph 22 above).

49. Having regard to the above considerations, especially the harshness of the sentences, the Court concludes that the conviction of the applicants and the sentences imposed on them were disproportionate to the aim pursued and they were therefore not “necessary in a democratic society”. There has accordingly been a violation of Article 10 of the Convention in respect of all four applicants.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. Each of the four applicants claimed the sum of 7,722 euros (EUR) in respect of their loss of earnings during the period they had spent in prison. This amount was calculated by multiplying the monthly minimum wage in Turkey (EUR 286, according to the applicants) by the number of months they had spent in prison, i.e. 27. Beyond arguing that actors earn more than the minimum wage in Turkey, the applicants did not submit any particulars to prove their earnings.

52. Each of the applicants also claimed the sum of EUR 4,320 which they submitted had been incurred by their families when visiting them in prison.

53. Finally, each applicant claimed EUR 50,000 in respect of their mental suffering occasioned by the violation.

54. The Government argued that the total amount claimed by the applicants in respect of pecuniary damage was excessive and, in any event, unsubstantiated on account of the applicants' failure to submit evidence in respect of their financial losses. The Government invited the Court to reject the applicants' claims for pecuniary damage or, if need be, to award the applicants an equitable amount.

55. As regards the applicants' claims for non-pecuniary damage, the Government were of the opinion that the amounts claimed by the applicants were excessive and therefore unacceptable. The Government asked the Court to dismiss these claims in view of the fact that "the state of evidence to substantiate the merits of the case is insufficient". According to the Government, any finding of a violation was in itself sufficient to compensate the applicants' alleged sufferings.

56. Making its assessment on an equitable basis and taking into account the severity of the punishment imposed, the Court awards each applicant a global sum of EUR 10,000 in respect of their damage claims.

57. Furthermore, the Court considers that, where an individual has been convicted by a court which did not meet the Convention requirements of independence and impartiality, as in the circumstances of the present case, a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see *Öcalan v. Turkey*, no. 46221/99 [GC], § 210, *in fine*, ECHR 2005-IV).

B. Costs and expenses

58. The applicants claimed EUR 8,000 in respect of the fees for their legal representatives before the domestic courts. They claimed EUR 12,000 for the costs and expenses incurred in the proceedings before the Court, which amount comprised:

- (a) EUR 4,500 in respect of the lawyers meeting the first applicant;

- (b) EUR 1,000 in respect of the lawyers meeting the second applicant;
 - (c) EUR 3,500 in respect of the lawyers meeting the third applicant;
 - (d) EUR 1,000 in respect of the lawyers meeting the fourth applicant;
- and
- (e) EUR 2,000 costs incurred by the applicants' lawyers when travelling to the Court in order to hand over the application form and in contacting the Court on a number of occasions.

59. The Government argued that the amounts claimed by the applicants were excessive and lacked itemisation and justification. No receipts or documents were produced in support of their alleged expenses. The Government asked the Court to dismiss the applicants' claims.

60. Making its own estimate based on the information available, and having regard to the awards made in similar cases (see, in particular, *Mehdi Zana v. Turkey* (no. 2), no. 26982/95, § 54, 6 April 2004, and *Alınak v. Turkey*, no. 34520/97, § 51, 4 May 2006), the Court awards the applicants jointly the sum of EUR 4,000, covering costs under all heads.

C. Default interest

61. 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 § 1 of the Convention on account of the presence of a military judge on the bench of the Ankara State Security Court which tried and convicted the applicants;
3. *Holds* that there is no need to examine the remaining 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, 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 10,000 (ten thousand euros) to each applicant in respect of their damage claims;
- (ii) EUR 4,000 (four thousand euros) to the applicants jointly in respect of their 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 3 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President