



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

SECOND SECTION

**CASE OF ULUSOY v. TURKEY**

*(Application no. 52709/99)*

JUDGMENT

STRASBOURG

31 July 2007

**FINAL**

***31/10/2007***

*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 Ulusoy v. Turkey,**

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

Mrs F. TULKENS, *President*,

Mr A.B. BAKA,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŒ,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Mr D. POPOVIĆ, *judges*,

and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 10 July 2007,

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

**PROCEDURE**

1. The case originated in an application (no. 52709/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Ziya Ulusoy (“the applicant”) on 23 July 1999.

2. The applicant was represented before the Court by Messrs Faruk Nafiz Ertekin, Keleş Öztürk, Tahsin Aycık and Ms Filiz Kılıçgün, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an agent for the purpose of the proceedings before the Court.

3. On 22 November 2005 the Court decided to give notice of the application to the Government. 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**

4. The applicant was born in 1953 and lives in Tunceli, south-east Turkey.

**A. Detention of the applicant and the criminal proceedings brought against him before the Istanbul State Security Court**

5. The applicant, without submitting any documents, submitted the following:

6. On 6 November 1992 he was taken into custody by police officers from the anti-terror branch of the Istanbul police headquarters in the course of which he was subjected to “torture”.

7. On 20 November 1992 the Istanbul State Security Court ordered the applicant's detention on remand. Criminal proceedings were initiated against him before the 3<sup>rd</sup> Chamber of the Istanbul State Security Court.

8. On an unspecified date, the 3<sup>rd</sup> Chamber of the Istanbul State Security Court convicted the applicant under Article 168 of the Criminal Code of membership of an illegal organisation.

9. On 21 December 2000 Law no. 4616, which governed conditional release, suspension of proceedings and execution of sentences in respect of offences committed before 23 April 1999, came into force. The Law stipulated that persons who had committed offences under Article 168 of the Criminal Code were not eligible for parole. Thus, the applicant could not benefit from Law no. 4616.

**B. Criminal proceedings brought against the applicant before the 1<sup>st</sup> Chamber of the Istanbul State Security Court**

10. The following information appears from the parties' submissions and from the documents submitted by them:

11. On 21 July 1993 the public prosecutor at the Istanbul State Security Court filed a bill of indictment with the 1<sup>st</sup> Chamber of that court (hereinafter “the trial court”) against B.G. who is the owner of a monthly review entitled *Emeğin Bayrağı* (“The Flag of Labour”). The public prosecutor charged B.G., in his capacity as owner and editor of the review, with disseminating propaganda against the indivisibility of the State on account of an article published in the review in July 1993, entitled *Yeni Bir Maraş: Sivas Katliamı* (“A New Maraş: The Sivas Massacre”)<sup>1</sup>. The charges were brought under Article 8 § 1 of the Prevention of Terrorism Act (Law no. 3713).

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1. “A New Maraş” is a reference to incidents which took place in the city of Maraş in 1978 during which persons belonging to the extreme right killed 111 people – mostly left wing or Alevi – and injured over a thousand. “The Sivas Massacre”, referred to in the article, relates to the setting on fire by Islamic fundamentalists on 2 July 1993 of a hotel in the city of Sivas where a group of intellectuals, writers, musicians and poets had been holding *Pir Sultan Abdal* (an Alevi poet) cultural events. 35 people lost their lives and dozens were injured.

12. On 28 September 1993 B.G. stated before the trial court that the author of the article was Ziya Ulusoy, i.e. the applicant. The trial court subsequently heard the applicant who confirmed that he was indeed the author of the impugned article.

13. The relevant passages of the article may be summarised as follows:

“... Today, there is a dirty war which continues with the most violent methods in Kurdistan. The State carries on a war with the aim of genocide against the Kurdish people and its leaders. While the legitimate movement of the Kurdish nation aims at political freedom, the State reinforces Turkish chauvinism in order to quieten and weaken the voice of this war. The funerals of the soldiers who die during this war are used to create a racist and chauvinist mass movement... These movements occupy the agenda along with the Kurdish national movement... This State, which aims to oppress the Kurdish workers and the national freedom movement with blood and gunpowder, used the fundamentalist Islamists and the *Hizbullah* against you yesterday. Today, it again uses the fundamentalist Islamist masses under the leadership of *Hizbullah* against Alevis, progressive and democratic people and Turkish intellectuals without making a distinction between Kurdish and Turkish. This massacre, during which houses and offices were burned and more than forty people were killed, is a new *Maraş*. Don't remain silent in the presence of the massacre, demand that it be accounted for by your actions”.

14. On 26 November 1993 the public prosecutor at the Istanbul State Security Court filed a bill of indictment and charged the applicant with the offence of disseminating propaganda against the indivisibility of the State, contrary to Article 8 § 1 of the Prevention of Terrorism Act (Law no. 3713).

15. In the course of the trial the applicant submitted a number of petitions to the trial court in which he submitted, *inter alia*, the following:

“... I am proud to have protested against the Sivas massacre by writing that article... Protesting against such fascist massacres, just like protesting against the actions of Hitler who massacred Jews, is a democratic duty...”.

16. On 15 April 1997 the trial court convicted the applicant as charged and sentenced him to one year and four months' imprisonment and a fine of 133,333,333 Turkish liras (approximately 1,000 US dollars at the time). In its judgment, the trial court considered that the applicant had committed the offence defined in Article 8 of Law no. 3713 by, *inter alia*, having referred to a part of the country as “Kurdistan” and having stated that this part belonged to the Kurdish nation. The trial court further observed that the applicant had defined terrorist acts as a “national liberation movement” and the fight against terrorism as a “dirty war”. In the opinion of the trial court, the opinions expressed by the applicant were negative propaganda capable of destroying the indivisibility and integrity of the Turkish Republic and the nation.

17. On 9 July 1997 the applicant appealed against his conviction. He argued in his appeal petition that he had written the article in order to protest against the massacre of 35 intellectuals in Sivas and to explain the truth behind it. He further stated that the article was an expression of opinion;

punishing persons like him who opposed such massacres would facilitate further massacres.

18. On 5 March 1999 the Court of Cassation rejected the applicant's appeal and upheld the conviction of 15 April 1997.

19. According to the documents, which were drawn up by national authorities and submitted to the Court by the Government, the applicant began serving his prison sentence on 30 April 1999. On 1 November 1999 the Istanbul State Security Court suspended the applicant's prison sentence pursuant to Law no. 4454, concerning the suspension of pending cases and penalties in media-related offences, which had entered into force on 28 August 1999. The court also held that the applicant would continue to serve the remainder of his sentence if, within the next three years, he were to commit one of the offences set out in Article 1 of Law no. 4454.

## II. RELEVANT DOMESTIC LAW

20. A full description of the relevant domestic law may be found in *İbrahim Aksoy v. Turkey* (nos. 28635/95, 30171/96 and 34535/97, §§ 41-42, 10 October 2000), *Incal v. Turkey* (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, §§ 21-33) and *Alınak v. Turkey* ((dec.), no. 40287/98, 31 January 2002).

## THE LAW

### I. COMPLAINTS CONCERNING THE APPLICANT'S ALLEGED DETENTION IN 1992

21. The applicant alleged that, in the course of his detention in the custody of the Istanbul police headquarters between 6 and 20 November 1992 (see paragraphs 6-7 above), he had been subjected to serious forms of torture in violation of Article 3 of the Convention. He further alleged that he had been detained in police custody for a period of 14 days before being brought before the judge at the Istanbul State Security Court on 20 November 1992. In the applicant's opinion, he had not been brought promptly before the judge, in violation of Article 5 § 3 of the Convention. Finally, the applicant alleged that his inability to benefit from early release pursuant to Law no. 4616 on account of the fact that he had been convicted under Article 168 of the Criminal Code (see paragraph 8 above), violated his rights under Article 5 § 1 (a) of the Convention in conjunction with Article 14 of the Convention.

22. The Court stresses that the applicant has not submitted to the Court any documents showing that he had been detained in police custody in 1992 or that he had been convicted and sentenced to a term of imprisonment. Furthermore, other than alleging that “he had been subjected to serious torture” in the course of this alleged detention (see paragraphs 6 and 21 above), he has neither provided the Court with any details of the alleged ill-treatment nor submitted any evidence in support of that allegation.

23. In the light of the above, the Court concludes that the applicant has failed to lay the factual basis for such complaints. It follows that they must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

24. The applicant 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 Istanbul State Security Court which tried and convicted him on 15 April 1997. He invoked Article 6 § 1 of the Convention which provides, in so far as relevant, as follows:

“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.”

### A. Admissibility

25. The Government argued that the complaint was inadmissible as the applicant had not introduced his application until 7 October 1999, i.e. more than six months after his conviction was upheld by the Court of Cassation on 5 March 1999.

26. The Court notes that the applicant sent a letter to the Court on 23 July 1999 in which he set out his complaints under the Convention. On 14 September 1999 the Registry of the Court, in accordance with its practice prevailing at the time, drew the applicant's attention to a number of problems associated with the application and asked him to inform the Court by 8 October 1999 whether he intended to continue with the application. On 7 October 1999 the applicant submitted to the Court his full application form. The Registry informed the applicant on 18 November 1999 that the date of introduction of his application was 23 July 1999.

27. The Court, observing that the application was introduced on 23 July 1999, i.e. less than six months after the final domestic court decision which was taken on 5 March 1999, therefore rejects the Government's objection to the admissibility of this complaint.

28. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be declared admissible.

### **B. Merits**

29. 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).

30. 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 Istanbul State Security Court which convicted the applicant on 15 April 1997.

## **III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION**

31. The applicant complained of a violation of Article 10 of the Convention on account of his conviction for the article written by him. Article 10, insofar as relevant, 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...

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... territorial integrity ...”

### **A. Admissibility**

32. The Government argued that the applicant could not be regarded as a victim within the meaning of Article 34 of the Convention as his prison sentence was not executed.

33. However, the Court observes from the documents submitted by the Government that the applicant did indeed begin to serve his prison sentence on 30 April 1999. It was suspended on 1 November 1999 (see paragraph 19 above).

34. In any event, the Court considers that, although the suspension of the remainder of the applicant's prison sentence might be a relevant factor to be taken into account in assessing the proportionality of that measure to the legitimate aim it pursued, a decision or measure favourable to an applicant is not sufficient in principle to deprive him of his status as a “victim” unless

the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, among other authorities (see, *mutatis mutandis*, *Öztürk v. Turkey* [GC], no. 22479/93, § 73, ECHR 1999-VI; see also *Müslüm Özbey v. Turkey*, no. 50087/99, § 26, 21 December 2006). No such acknowledgement was made in the present case. On the contrary, the applicant's prison sentence was suspended providing that he does not commit one of the offences mentioned in Article 1 of Law no. 4454 (see paragraph 19 above).

35. In the light of the foregoing the Court concludes that the applicant can claim to be a “victim” within the meaning of Article 34 of the Convention. The Government's objection must therefore be dismissed.

36. The Government further argued that the applicant failed to exhaust domestic remedies as he did not claim in the course of the domestic proceedings that there had been an unjustified interference with his right guaranteed by Article 10 of the Convention.

37. 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. To this end, 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).

38. As set out above, in the course of the criminal proceedings the applicant submitted that he had exercised his democratic duty by expressing opinions opposing massacres (see paragraph 15 above). The Court finds that that submission was directly connected to Article 10 of the Convention (see, *mutatis mutandis*, *Fressoz and Roire v. France* [GC], no. 29183/95, §§ 36-39, ECHR 1999-I).

39. The Court further notes that the applicant maintained in his appeal petition that the article written by him was an “expression of opinion” (see paragraph 17 above). It must therefore be considered that the applicant's complaint under Article 10 of the Convention was raised, at least in substance, before the Court of Cassation. The Court consequently rejects the Government's objection.

40. Observing that this complaint is not inadmissible on any other grounds and that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, the Court declares the complaint admissible.

## B. Merits

41. The Court considers that the conviction of the applicant under Article 8 § 1 of the Prevention of Terrorism Act, and the sentence imposed on him constituted an interference with his right to freedom of expression guaranteed in Article 10 of the Convention.

42. The Court has examined a number of cases raising similar issues to those arising in the present case and found a violation of Article 10 of the Convention (see, in particular, the following judgments: *Ceylan v. Turkey* [GC], no. 23556/94, § 38, ECHR 1999-IV; *Öztürk*, cited above, § 74; *İbrahim Aksoy*, cited above, § 80; *Kızılyaprak v. Turkey*, no. 27528/95, § 43, 2 October 2003; and *Han v. Turkey*, no. 50997/99, §§ 27-33, 13 September 2005).

43. The Court considers that the interference with the applicant's right to freedom of expression was prescribed by law – the aforementioned Article 8 § 1 of the Prevention of Terrorism Act – and pursued the legitimate aims of protecting territorial integrity and preventing disorder or crime for the purposes of Article 10 § 2 (see *Yağmurdereli v. Turkey*, no. 29590/96, § 40, 4 June 2002). The Court will therefore confine its examination of the case to the question whether the interference was “necessary in a democratic society”.

44. The Government invited the Court to pay particular attention to the words used by the applicant in his article and to the context in which the article was published. The Government pointed out that the applicant referred to parts of Turkish territory as “Kurdistan” and to terrorist activities as a “national liberation struggle”. In the opinion of the Government, the article was provocative in nature and incited the reader to an armed struggle against the State with its untrue and aggressive comments. The article was published in the context of the security situation in south-east Turkey where, since 1985, serious disturbances had occurred between security forces and members of the PKK<sup>1</sup>, involving very heavy loss of life.

45. The Government further submitted that the article in question provoked hatred among the various groups in Turkish society, thereby endangering human rights and democracy. The applicant's separatist propaganda threatened fundamental interests of the national community such as territorial integrity, national unity and security and the prevention of crime and disorder.

46. The Court has examined the present case in the light of its case-law and considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion from that reached in the above-mentioned judgments. It has had particular regard to the words used in the impugned article and taken into account the background to the

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1. The Kurdistan Workers' Party, an illegal organisation.

case as well as the problems linked to the prevention of terrorism (see *İbrahim Aksoy*, cited above, § 60, and *Incal*, cited above, § 58).

47. In this connection, the Court observes that in the article the applicant expressed his opinion that the State had been involved in the fire in Sivas in which 37 people were killed, and criticised the indifference displayed by the armed forces when the hotel was set on fire. The article also sets out the applicant's critical assessment of Turkey's policies concerning the Kurdish problem, whereas the State Security Court considered that the impugned article contained negative propaganda capable of destroying the indivisibility and integrity of the Turkish Republic and the nation (see paragraph 16 above).

48. The Court has examined the reasons given in the State Security Court's judgment and does not consider them sufficient to justify the interference with the applicant's right to freedom of expression (see, *mutatis mutandis*, *Süreş v. Turkey* (no. 4) [GC], no. 24762/94, § 58, 8 July 1999). It finds that, taken as a whole, the applicant's article does not encourage violence, armed resistance or insurrection and does not constitute hate speech. In the Court's view, this is the essential factor (contrast *Süreş v. Turkey* (no. 1) [GC], no. 26682/95, § 62, ECHR 1999-IV, and *Gerger v. Turkey* [GC], no. 24919/94, § 50, 8 July 1999) in the assessment of the necessity of the measure. Indeed, unlike the Government, the trial court did not consider that the expressions in the article were of a nature to encourage or incite the commission of violent acts.

49. 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

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."

51. On 29 May 2006 the Court forwarded the respondent Government's observations to the applicant and invited him to submit his just satisfaction claims by 7 July 2006. However, he failed to submit his claims in time.

52. Accordingly, the Court considers that there is no call to award the applicant any sum on that account.

53. Nevertheless, the Court considers that where an individual, as in the instant case, has been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents, in principle, an appropriate

way of redressing the violation (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210, *in fine*, ECHR 2005-...).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* admissible the applicant's complaints under Articles 6 § 1 and 10 of the Convention and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 10 of the Convention.

Done in English, and notified in writing on 31 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

F. ELEN-PASSOS  
Deputy Registrar

F. TULKENS  
President