



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

FOURTH SECTION

CASE OF BİRDAL v. TURKEY

(Application no. 53047/99)

JUDGMENT

STRASBOURG

2 October 2007

FINAL

02/01/2008

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 Birdal 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. TÜRMEŖ,

Mr K. TRAJA,

Mr S. PAVLOVSCHI,

Mr J. ŠIKUTA, *judges*,

and Mrs F. ARACI, *Deputy Section Registrar*,

Having deliberated in private on 11 September 2007,

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

PROCEDURE

1. The case originated in an application (no. 53047/99) 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 Akın Birdal (“the applicant”), on 16 October 1999.

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

3. On 31 January 2006 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the applicant's right to freedom of expression and the independence and impartiality of the State Security Court which convicted him 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 1948 and lives in Ankara.

5. On 6 September 1995, on the occasion of World Peace Day, the applicant spoke at a panel discussion which was organised by the United Socialist Party in Mersin.

6. The applicant's speech read as follows:

“We have gathered here for peace. Hello to all who support fraternity for peace. In a system where the imperialist and socialist worlds exist, wars continue and the bloodiest war is in our country. We have reacted against the Serbian brutality over the Bosnian people. However, some of us ignored this dirty war which is against the human dignity. We have observed the consequences of an unjust and dirty war in the country. This war has continued for 11 years as the rights of the Kurdish people have not been recognised. 20,000 persons died as a result of this dirty war. 118 villages were burned down. Kurdish people were thrown out of their villages, off their land. The Kurdish problem exists in Turkey. Turks should also recognise this problem. Turkey is now at a critical point. Solution of the Kurdish problem in a just, democratic and peaceful way has now become a reality in everybody's mind. Then, why do they still want to continue this dirty war? This war caused the displacement of the Kurdish people from their land. Is this war only the problem of the Kurdish people? Is this week of peace only for the Kurdish people? No, it is a problem for the Turkish people, too. While the Kurdish people have been crying for peace for a week, isn't this a problem of the Turkish working class? Isn't the problem of the killing of the children of the Kurdish and Turkish peoples a problem of the Turkish working class? One third of the budget, which is 446 trillion Turkish liras, is used in the east and south-east. All this happens at which price? It is at the price of tears.

We, the Turks, Kurds, Alevis and Sunnis, are all against the war. We want peace. We want the lives of Kurds to be also protected by the Constitution. We want peace for the fraternity of the peoples.”

7. On an unspecified date, the public prosecutor at the Konya State Security Court initiated an investigation against the applicant.

8. On 29 January 1996 the applicant made a statement before the public prosecutor at the Ankara State Security Court. He contended that he had made the speech in question and that he had not committed the offence of incitement to hatred and hostility by making distinctions on the basis of race and region. He maintained that he had talked about the fraternity of the peoples, the peace and the war which should end.

9. On 6 February 1996 the public prosecutor at the Konya State Security Court filed a bill of indictment charging the applicant with making separatist propaganda in contravention of Article 8 § 1 of Law no. 3713.

10. On 10 April 1996 the applicant reiterated his statements of 29 January 1996 before the Ankara State Security Court. He asserted that he had expressed his opinions and that his speech had not contained any element which could constitute an offence.

11. On 2 July 1996 the Konya State Security Court convicted the applicant under Article 312 § 2 of the Criminal Code of incitement to hatred and hostility by making distinctions on the basis of race and region. The applicant was sentenced to one year's imprisonment and a fine of 300,000 Turkish liras (TRL). The first-instance court held that the struggle in the region was directed against the PKK and its acts of terrorism and that in the speech the applicant had alleged that there had been a war in the region directed against the people.

12. The applicant appealed. On 20 April 1998 the Court of Cassation quashed the judgment of the first-instance court, holding that the speech in question consisted of a critical assessment concerning the country's problems and that it did not contain any element which could constitute an offence.

13. Following promulgation of Law no. 4210, which abolished the Konya State Security Court, the Adana State Security Court acquired jurisdiction over the case and the case-file was sent to it.

14. On 16 December 1998 the Adana State Security Court, composed of three judges including a military judge, rendered its judgment. It did not abide by the ruling of the Court of Cassation, and held that the previous judgment of the Konya State Security Court was in accordance with law. It sentenced the applicant to one year imprisonment and a fine. The applicant appealed.

15. On 20 April 1999 the Court of Cassation upheld the judgment of the Adana State Security Court. The court considered that the applicant had committed the offence defined by Article 312 § 2 of the Criminal Code by stating that the struggle of the security forces had been similar to the Serbian brutality and that the villages had been burned down and people had been displaced. The court further held that the applicant incited the people to hatred and hostility by alleging that the lives of the Kurdish citizens had not been protected by the Constitution and that there had been terror as the rights of Kurds had not been recognised.

16. The applicant served his prison sentence in 2000.

17. Following the promulgation of Law no. 4744 on 6 February 2002, which amended Article 312 of the Criminal Code, the applicant applied to the Adana State Security Court and requested a re-trial.

18. In 2004 the State Security Courts were abolished following a constitutional amendment and the applicant's case was transferred to the Adana Assize Court.

19. On 1 February 2005 the Adana Assize Court acquitted the applicant of the charges against him.

20. On 4 December 2004 Law No. 5271 which provided a remedy for persons who have been acquitted following a re-trial whereby they can claim compensation for damages suffered due to the execution of a sentence was adopted. This law entered into force on 1 June 2005. Since the applicant was acquitted on 1 February 2005, he could not claim compensation for the time he had spent in prison.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Article 312 of the Criminal Code, before its amendment on 6 February 2002, provided:

“Non-public incitement to commit an offence

A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

THE LAW

I. ADMISSIBILITY

22. The applicant complained under Article 6 § 1 of the Convention that he had not been tried by an independent and impartial court on account of the presence of a military judge on the bench of the Adana State Security Court which convicted him. He further maintained under Article 10 of the Convention that his criminal conviction and sentence had infringed his right to freedom of expression.

23. The Government suggested that, since the applicant had been acquitted in 2005, he could no longer be considered a victim. They further contended that the applicant's complaint under Article 10 of the Convention should be rejected for non-exhaustion of domestic remedies; since he had not at any stage in the domestic proceedings relied on the provisions of the Convention.

24. As regards Article 6 of the Convention, the Court notes that the applicant was convicted by the Adana State Security Court, composed of three judges including a military judge, and sentenced to one year imprisonment. He served his prison sentence in 2000. It is true that subsequently he had a re-trial and in 2005 he was acquitted of the charges against him. Nevertheless, although he was acquitted, pursuant to domestic law he was not entitled to claim compensation for the time he had spent in prison. The Court therefore concludes that the Government's objection that the applicant can no longer be considered as a victim cannot be upheld.

25. As regards the complaint raised under Article 10, the Court notes that in so far as the Government contend that the applicant cannot be considered a victim of the alleged violation, it reiterates that it has already

examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Yaşar Kaplan v. Turkey*, no. 56566/00, §§ 32-34, 24 January 2006). The Court finds no particular circumstances in the instant case which would require it to depart from its previous findings.

26. As regards the second part of the Government's preliminary objections, the Court recalls that the rule of exhaustion set forth in Article 35 § 1 of the Convention 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 *Erdoğan v. Turkey*, no. 25723/94, § 38, ECHR 2000-VI). In the present case, the Court notes that, during trial, the applicant submitted before the domestic courts that he had not incited to hatred and hostility by making distinctions on the basis of race and region (see paragraphs 8 and 10 above). In the light of the above, the Court concludes that the applicant's 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 and *Kar and Others v. Turkey*, no. 58756/00, §§ 35-38, 3 May 2007). In conclusion, this objection cannot be upheld either.

27. The Court notes that the application 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.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

28. The applicant complained that he had not received a fair trial by an independent and impartial tribunal due to the presence of a military judge on the bench of the Adana State Security Court. In this connection, he invoked Article 6 of the Convention, which reads:

"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."

29. The Court notes that it has examined similar cases in the past and has concluded that there was a violation of Article 6 § 1 of the Convention (see *Özel v. Turkey*, no. 42739/98, §§ 33-34, 7 November 2002, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

30. The Court sees no reason to reach a different conclusion in this case. It is understandable that the applicant who was prosecuted in a State Security Court for disseminating propaganda in support of an armed, illegal organisation should have been apprehensive about being tried by a bench which included a regular army officer and member of the Military Legal

Service. On that account, he could legitimately fear that the Adana State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fear as to the State Security Court's lack of independence and impartiality can be regarded as objectively justified (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1573, § 72 *in fine*).

31. In the light of the foregoing the Court finds that there has been a violation of Article 6 § 1 of the Convention in this respect.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. 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 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, in the interests of ... territorial integrity or public safety, [or] for the prevention of disorder or crime...”

33. 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 also pointed out that, in light of the jurisprudence of the Court, Article 312 of the Criminal Code had been amended, by Law no. 4744 which entered into force on 19 February 2002.

34. 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 this interference was prescribed by law and pursued a legitimate aim or aims, namely the protection of territorial integrity and public order for the purposes of Article 10 § 2. In the present case what is in issue is whether the interference was “necessary in a democratic society”.

35. The Court has examined a number of cases raising similar issues to those 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 v. Turkey* [GC], no. 22479/93, § 74, ECHR 1999-VI; *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, §§ 80, 10 October 2000 and *Kızılyaprak v. Turkey*, no. 27528/95, § 43, 2 October 2003).

36. 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 in this instance. The Court has had particular regard to the words used in the speech and the context in which it was given. In this connection, it has taken into account the background to the case submitted to it, particularly the problems linked to the prevention of terrorism (see *İbrahim Aksoy*, cited above, § 60 and *Incal v. Turkey*, cited above, p. 1568, § 58).

37. The speech in issue consisted of a critical assessment of the situation in the south-east Turkey at the material time. The Adana State Security Court held that the speech in question contained words aimed at inciting people to hatred and hostility.

38. The Court notes that, although the applicant was acquitted of the charges against him eventually, he nevertheless served his prison sentence and there is no remedy under domestic law by which he could request compensation for the damage he had suffered. Against this background, the Court considers that the reasons given by the State Security Court for convicting and sentencing the applicant, cannot be considered sufficient to justify the interference with the applicant's right to freedom of expression (see, *mutatis mutandis*, *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 58, 8 July 1999 and *Üstün v. Turkey*, no. 37685/02, §§ 34-35, 10 May 2007). It considers that, taken as a whole, the applicant's speech does not encourage violence, armed resistance or insurrection and, therefore, does not constitute hate speech. In the Court's view, this is the essential factor (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 the assessment of the necessity of the measure.

39. Having regard to the above considerations, the Court concludes that the applicant's original conviction and sentence 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

40. 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

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

42. The Government contested this claim.

43. 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, it awards him EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

44. The applicant also claimed EUR 510 for translation costs and 4,030 New Turkish Liras (YTL)¹ for the legal fees. In support of his claims, the applicant submitted bills specifying the amount he paid for translation. He also relied on the Ankara Bar Association's list of recommended minimum fees and submitted a schedule of costs.

45. The Government contested these claims.

46. 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 considers it reasonable to award the sum of EUR 2,000 covering all heads.

C. Default interest

47. 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 remainder of the application admissible;
2. *Holds* that there has been a violation of Article 6 of the Convention
3. *Holds* that there has been a violation of Article 10 of the Convention;
4. *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 and free of any taxes or charges that may be payable;

¹ About 2,200 euros.

- (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
- (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses.
- (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 applicant's claim for just satisfaction.

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

Fatoş ARACI
Deputy Registrar

Nicolas BRATZA
President