



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

THIRD SECTION

CASE OF DEMİREL AND ATEŞ v. TURKEY (nº2)

(Application no. 31080/02)

JUDGMENT

STRASBOURG

29 November 2007

FINAL

29/02/2008

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 Demirel and Ateş v. Turkey (n°2),

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

Mr B.M. ZUPANČIČ, *President*,

Mr C. BÎRSAN,

Mr R. TÜRMESEN,

Mrs A. GYULUMYAN,

Mr E. MYJER,

Mrs I. ZIEMELE,

Mrs I. BERRO-LEFÈVRE, *judges*,

and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 8 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 31080/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Turkish nationals, Mr Hıdır Ateş and Ms Hünkar Demirel (“the applicants”), on 1 August 2002.

2. The applicants were represented by Mr Ö Kılıç, 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 29 June 2006 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 applicants were born in 1979 and 1951 respectively and live in Istanbul. The first applicant was the editor-in-chief of a weekly newspaper, *Yedinci Gündem*, and the second applicant was its owner.

5. In August 2001, in the tenth issue of the newspaper, an article which contained an interview with Cemil Bayık, who was one of the leaders of an illegal organisation, namely the PKK (the Kurdistan Workers' Party), was published. The relevant parts of the interview read as follows:

“Three years have passed since the PKK declared a ceasefire to stop the bloodshed and to contribute to the peace process. Subsequently, the PKK withdrew its armed forces out of Turkey to maintain peace. However, the state did not take any steps for democratisation or to solve the Kurdish problem.

...

The case brought against our leader Abdullah Öcalan is a case against the Kurdish people. Therefore, it is not our Prime Minister who wishes to be tried before the European Court of Human Rights, but it is our people. The law was violated in İmralı and, consequently, the death penalty imposed on Öcalan and on our people is not legitimate. All things considered, it is natural that our people have expectations from the European Court of Human Rights, the court of Europe which defends democracy, human rights and the rule of law.

...”

6. On 10 September 2001 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicants. By referring to the above-mentioned paragraphs of the interview, the public prosecutor accused the applicants of having allowed the publication of the declarations of an illegal armed terrorist organisation. The charges were brought under Article 6 §§ 2 and 4 of the Law on the Prevention of Terrorism (Law no. 3713), additional Article 2 of the Press Law (Law no. 5680) and Article 36 of the Criminal Code.

7. On 27 December 2001 the Istanbul State Security Court, composed of three civilian judges, convicted the applicants as charged and fined them 2,034,900,000¹ Turkish liras (TRL) and TRL 4,069,800,000² respectively. The first instance court further ordered temporary closure of the newspaper for a period of fifteen days.

8. The applicants appealed. On an unspecified date, the chief public prosecutor at the Court of Cassation submitted his written opinion on the merits of the applicants' appeal. The opinion was not notified to the applicants.

9. On 21 May 2002 the Court of Cassation upheld the judgment of 27 December 2001.

10. On 24 June 2002 the president of the Istanbul State Security Court sent the final judgment to the public prosecutor's office at the Istanbul State Security Court and requested that the order for the newspaper's closure be executed.

11. On 15 July 2002 two police officers executed the order of closure by way of notification of the order in question to the first applicant.

¹ Approximately equivalent to 1,592 euros (EUR) on that date.

² Approximately equivalent to EUR 3,184 on that date.

II. RELEVANT DOMESTIC LAW

12. At the material time Article 6 §§ 2 and 4 of the Law on the Prevention of Terrorism (Law no. 3713) provided:

“Persons, who print or publish declarations or leaflets emanating from terrorist organisations, shall be liable to a fine from five million to ten million Turkish liras.

...

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of Article 3 of the Press Law (Law no. 5680), the publisher shall also be liable to a fine equal to ninety percent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher.”

At the material time additional Article 2 § 1 of the Press Law (Law no. 5680) provided:

“Where there is a conviction for an offence mentioned in additional Article 1 and committed through the medium of press, the court may order the closure of the periodical in which the article that constitutes an offence appeared, for a period of from one day to fifteen days.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

13. The applicants complained that their right to a fair trial was breached as they had not been given an opportunity to reply to the chief public prosecutor's written opinion submitted to the Court of Cassation. Article 6 § 1 of the Convention reads as relevant:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

A. Admissibility

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

B. Merits

15. The Court notes that it has already examined the same grievance and found a violation of Article 6 § 1 of the Convention in its *Göç v. Turkey* judgment (no. 36590/97, § 58, ECHR 2002-V). In that judgment, the Court held that, having regard to the nature of the principal public prosecutor's submissions and to the fact that the applicant was not given an opportunity to make written observations in reply, there had been an infringement of the applicant's right to adversarial proceedings (*loc. cit.* § 55).

16. The Court has examined the present application and finds no particular circumstances which would require it to depart from its findings in the aforementioned case.

17. There has accordingly been a violation of Article 6 § 1 of the Convention as regards the non-communication to the applicants of the chief public prosecutors' submissions before the Court of Cassation.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

18. The applicants complained that their criminal conviction had infringed their right to freedom of expression. In that connection, they 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...”

19. The Government contested that argument.

A. Admissibility

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

B. Merits

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

22. The Court notes that it is not in dispute between the parties that the conviction complained of constituted interference with the applicants' 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. The Court agrees. In the present case the issue is whether the interference was “necessary in a democratic society”.

23. 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).

24. 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 content of the article and the context in which it was diffused. 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*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1568, § 58).

25. The Court observes that the views expressed in the interview in question consisted of a critical assessment of Turkey's policies concerning the Kurdish problem, and the trial and subsequent sentence of Abdullah Öcalan. The domestic court, however, considered that the impugned interview contained separatist propaganda of a terrorist organisation. The Court has examined the judgment in question and it would appear that no sufficient reasoning was given in the judgment to justify the interference with the applicants' right to freedom of expression (see, *mutatis mutandis*, *Sürek v. Turkey* (no. 4) [GC], no. 24762/94, § 58, 8 July 1999). In its view, taken as a whole, the interview in question does not encourage violence, armed resistance or insurrection and, therefore, does not constitute hate speech. As established in the case-law, 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.

26. Having regard to the above considerations, the Court concludes that the applicants' conviction was disproportionate to the aims pursued and therefore not “necessary in a democratic society”. Accordingly, there has been a violation of Article 10 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

27. The applicants further invoked Articles 1, 6 § 1 (in respect of the independence and impartiality of the Istanbul State Security Court), 7, 13, 14, 17, 18 of the Convention and Article 1 of Protocol No. 1.

28. The Court finds nothing whatsoever in the case file which might disclose any appearance of a violation of these provisions. It follows that this part of the application is manifestly-ill founded and must be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicants alleged that their conviction had a negative impact on their professional reputation. They therefore claimed 3,000 euros (EUR) and EUR 5,000 respectively for pecuniary damage and EUR 2,000 and EUR 3,000 respectively for non-pecuniary damage.

31. The Government contested these claims.

32. In the absence of any supporting evidence, the Court considers the applicants' claims for pecuniary damage unsubstantiated. It accordingly dismisses them. On the other hand, the Court considers that the applicants may be taken to have suffered a certain amount of distress and anxiety in the circumstances of the case. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards them, EUR 1,000 each for non-pecuniary damage.

B. Costs and expenses

33. The applicants also claimed EUR 3,250 for legal fees and EUR 400 for the costs and expenses incurred before the Court. In respect of their claims, they relied on the Istanbul Bar Association's list of recommended minimum fees and submitted a document showing the number of hours – 25 hours – spent by the lawyer on their case.

34. The Government contested this claim.

35. The Court may make an award in respect of costs and expenses in so far as these were actually and necessarily incurred and were reasonable as to

quantum (see, for example, *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002). Making its own estimate based on the information available, and having regard to its case-law, the Court awards the applicants jointly EUR 1,000 for the costs and expenses claimed.

C. Default interest

36. 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 complaints concerning the non-communication of the written opinion of the chief public prosecutor at the Court of Cassation and the applicants' right to freedom of expression admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 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 applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into New Turkish liras at the rate applicable at the date of settlement and free of any taxes or charges that may be payable:
 - (i) EUR 1,000 (one thousand euros) each in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros) jointly 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;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 29 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President