



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

SECOND SECTION

CASE OF FEVZİ SAYGILI v. TURKEY

(Application no. 74243/01)

JUDGMENT

STRASBOURG

8 January 2008

FINAL

08/04/2008

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 Fevzi Saygılı v. Turkey,

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

Françoise Tulkens, *President*,

András Baka,

Rıza Türmen,

Mindia Ugrekhelidze,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 4 December 2007,

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

PROCEDURE

1. The case originated in an application (no. 74243/01) 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 Fevzi Saygılı (“the applicant”), on 24 July 2001.

2. The applicant was represented by Mr K.T. Sürek, 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. The applicant, owner of a daily newspaper, *Günlük Evrensel*, complained that the prohibition of its circulation and distribution in the provinces under a state of emergency had violated his rights guaranteed by Articles 6, 10 and 14 of the Convention.

4. On 26 October 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it also 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 applicant was born in 1966 and lives in Istanbul.

6. The applicant is the owner of a daily newspaper, *Günlük Evrensel*, published in Istanbul.

7. *Günlük Evrensel* released its first issue on 23 July 2001. On the same day, the state of emergency regional governor in south-east Turkey banned the newspaper's entry and distribution in the provinces under his jurisdiction, namely, Diyarbakır, Tunceli, Hakkari and Şırnak. The governor considered that the newspaper was pursuing the same editorial line as another newspaper called *Yeni Evrensel*, the entry and distribution of which had also been banned on 4 January 1999.

8. The governor's decision to ban *Günlük Evrensel*, which contained no reasons, was served on the newspaper's Diyarbakır representative on 23 July 2001. The representative acknowledged its receipt on the same day and the ban took immediate effect.

9. While banned in the state of emergency region, the newspaper was freely distributed elsewhere in Turkey.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The state of emergency region

10. The governor's office of the state of emergency region was set up with special powers after the state of siege was officially declared to be over on 19 July 1987 by Legislative Decree no. 285 of 10 July 1987. A state of emergency was thus decreed in the provinces of Bingöl, Diyarbakır, Elazığ, Hakkari, Mardin, Siirt, Tunceli and Van. On 19 March 1994 the state of emergency was extended to the province of Bitlis, but lifted in the province of Elazığ. It was declared to be over in the provinces of Batman, Bingöl and Bitlis on 2 October 1997, in the province of Van on 30 July 2000 and in the provinces of Tunceli and Hakkari on 1 August 2002. In July 2002 it was extended by four months in the provinces of Diyarbakır and Şırnak.

B. The powers of the governor of the state of emergency region

11. The powers of the governor of the state of emergency region (*Olağanüstü Hal Bölge Valisi*) are set out in the State of Emergency Act (Law no. 2935 of 25 October 1983) and various legislative decrees that were issued after the state of emergency was declared (Legislative Decrees nos. 313, 387, 413, 421, 425, 426, 427, 428, 430, 432 and 481).

12. Section 11(e) of the State Emergency Act reads as follows:

“... If a state of emergency is decreed, the following measures may be imposed with a view to maintaining general security, safety and public order and to preventing any escalation of the violence...:

...

(e) An order prohibiting, either absolutely or without prior permission, the editing, dissemination, publication or distribution of newspapers, reviews, brochures, pamphlets, posters or any similar publications, or the publication or distribution of any such [publications] which have been printed or disseminated outside the state of emergency region ...”

13. Article 1 (a) of Legislative Decree no. 430 provides:

“The printing, dissemination, publication or distribution of books, reviews, newspapers, brochures, posters or other similar publications liable seriously to undermine public order in the region, to cause agitation among the local population or to obstruct the security forces in the course of their duties by giving a false account of operations being conducted in the region shall be prohibited, either absolutely or without the prior permission of the governor of the region to which the state of emergency applies or the governors of the provinces concerned. [Likewise,] the publication or distribution of [any publication of the same type] that has been printed and published outside the state of emergency region shall be prohibited, either absolutely or without the prior permission of the governor of the region to which the state of emergency applies or the governors of the provinces concerned ...”

C. Judicial scrutiny of legislative decrees on the state of emergency and of measures taken by the governor of the state of emergency region

1. Constitutional review of legislative decrees on the state of emergency

14. The relevant part of Article 148 § 1 of the Constitution provides:

“... There shall be no right of appeal to the Constitutional Court to contest the form or substance of legislative decrees issued during a state of emergency, a state of siege or in wartime.”

2. Judicial scrutiny of measures taken by the governor of the state of emergency region

15. Article 7 of Legislative Decree no. 285, as amended by Legislative Decree no. 425 of 9 May 1990, precludes any application in the administrative courts to have an administrative act performed pursuant to Legislative Decree no. 285 set aside.

16. Article 8 of Legislative Decree no. 430 reads as follows:

“No criminal, financial or civil liability may be asserted against ... the governor of the state of emergency region or provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This shall be without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification [*sebepsiz*].”

3. *The case-law of the Constitutional Court*

17. The Constitutional Court has reviewed the constitutionality of Article 7 of Legislative Decree no. 285, as amended by Legislative Decree no. 425 of 9 May 1990, in a judgment of 10 January 1991, which was published in the Official Gazette on 5 March 1992. It stated:

“It is not possible to reconcile that provision [which precludes any judicial scrutiny of acts performed by the governor of the state of emergency region] with the concept of the rule of law ... The system of government when a state of emergency has been declared is not an arbitrary one that escapes all judicial scrutiny. There can be no doubt that individual and regulatory acts performed by the competent authorities while the state of emergency continues must be subject to judicial review. Contravention of this principle is inconceivable in countries run by democratic regimes and founded on freedom. However, the impugned provision is contained in a legislative decree that cannot be the subject of constitutional review ... Consequently, the application for an order quashing that provision must be dismissed as being incompatible *ratione materiae* [yetkisizlik] ...”

18. As regards Article 8 of Legislative Decree no. 430, in two judgments delivered on 3 July 1991 and 26 May 1992 (published in the Official Gazette on 8 March 1992 and 18 December 1993 respectively), the Constitutional Court followed that decision in dismissing as incompatible *ratione materiae* applications for orders quashing the relevant provisions.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

19. The Government argued that the applicant had failed to exhaust domestic remedies as he had not availed himself of the remedy offered by the Law on Compensation of the Losses resulting from Terrorism and the Measures Taken against Terrorism (Law no. 5233 of 27 July 2004). In that connection they claimed that the applicant could have applied to the relevant governorate and obtained compensation for the damage resulting from the ban imposed on the newspaper. Referring to the Court's decision in the case of *İçyer v. Turkey* ((dec.), no. 18888/02, 12 January 2006), the Government claimed that the Court had already acknowledged the effectiveness of the remedy in question.

20. The applicant contended that there was no remedy in domestic law to challenge the state of emergency governor's decisions.

21. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they

have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (*Çetin and Others v. Turkey*, applications nos. 40153/98 and 40160/98, § 37, 3 February 2003).

22. The Court notes at the outset that the Turkish law did not offer, at the relevant time, any remedy to set aside a decision issued by the state of emergency governor (*ibid.*, § 38). As regards the Government's reliance on the *İçyer* decision (cited above) which examined the effectiveness of the remedy offered by Law no. 5233, the Court recalls that in that case the Government did not furnish any example of a decision where a person had successfully obtained compensation in circumstances similar to those of the applicant.

23. Thus, the Court considers that the remedy indicated by the Government is not capable of offering redress for the applicant's grievances. In any event, the payment of monetary compensation is not sufficient in principle to remove an applicant's status as a victim unless the national authorities have acknowledged, either expressly or in substance, for the breach of the Convention as well as providing redress (see, *mutatis mutandis*, *Öztürk v. Turkey* [GC], no. 22479/93, § 73, ECHR 1999-VI).

24. In the light of the foregoing reasons, the Court dismisses the Government's objection. It also considers 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.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicant complained that the ban imposed by the governor on 23 July 2001 on the distribution of the daily newspaper *Günlük Evrensel* in the state of emergency region constituted an unjustified interference in the exercise of his right to impart information or ideas. He relied on Article 10 of the Convention, the relevant part of which provides:

“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 national security, ... [or] for the prevention of disorder or crime, ...”

26. The Government asserted that the interference with the applicant's freedom of expression was prescribed by law, namely by Article 11 (e) of Law no. 2935 dated 25 October 1983, and that it pursued the legitimate aims of preventing disorder and crime and protecting national security as permitted by Article 10 § 2 of the Convention. They maintained that the measure taken against the newspaper was within the authorities' margin of appreciation and that it was justified given the specific circumstances of the case. They submitted in this connection that vital interests of the State were at stake and that the decision to ban was in response to a pressing social need and was proportionate to the legitimate aims pursued.

27. The applicant maintained that the decision to ban the circulation and distribution of the newspaper was unjustified and disproportionate.

28. The Court notes that it is not in dispute between the parties that the interference 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 the prevention of disorder or crime or the protection of national security, 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".

29. The Court would first point out that Article 10 guarantees freedom of expression to "everyone". No distinction is made in it according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom (see, *mutatis mutandis*, *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, pp. 16-17, § 35). It applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information (see, *mutatis mutandis*, *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A no. 178, p. 23, § 47). In the present case, the Court considers that the applicant's ability to exercise his freedom to impart ideas and information to the inhabitants of the state of emergency region was directly at stake, as the ban affected *Günlük Evrensel*, published by the applicant, which reported and commented on, among other things, items of regional news.

30. The Court recalls that in its judgment in the case of *Çetin and Others* (cited above, §§ 57-66), which also concerned a ban imposed on the circulation and distribution of a newspaper in the state of emergency region, it examined the domestic legislation then in force, namely section 11(e) of the State of Emergency Act (Law no. 2935) and Article 1 (a) of Legislative Decree no. 430, and the arguments put to it by the Government, as the impugned measure escaped judicial scrutiny by the domestic courts and the governor of the state of emergency region did not give any reasons for his decision.

31. The Court observed that section 11(e) of the State of Emergency Act and Article 1 (a) of Legislative Decree no. 430 were drafted in very broad terms and granted the governor of the state of emergency region vast powers to impose administrative bans on the publication and distribution of publications.

32. Having carefully examined the extent of governor's exceptional powers, which by their nature could only be justified by very special circumstances, as well as what safeguards existed against their possible abuse in practice, the Court further observed that, although it was possible to counterbalance and limit powers of this type by strict and effective judicial scrutiny, both the provisions conferring the powers on the governor of the state of emergency region and the manner in which the rules were applied escaped such scrutiny. In that regard, sharing the concern expressed by the Constitutional Court, the Court held that it was not possible to reconcile the provision which precluded any judicial scrutiny of acts performed by the governor of the state of emergency region with the concept of the rule of law.

33. As to the Government's arguments that the local population had numerous sources of ideas and information available and that, as journalists, the applicants were involved in the publication of various newspapers and thus had been able to impart their ideas and information along with the rest of the country, the Court reiterated that the press played an essential role in a democratic society. In view of their passive role as recipients of information, citizens must be permitted to receive a variety of messages, to choose between them and reach their own opinions on the various views expressed, for what sets democratic society apart is this plurality of ideas and information.

34. The Court has examined the present case in the light of its findings in the *Çetin and Others* case (cited above) and considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion in this instance.

35. Against this background, the Court observes that, given that the courts have no power to review administrative bans on publications and that the governor of the state of emergency region had not given any reasons for the ban imposed on the circulation and distribution of *Günlük Evrensel*, the applicant was deprived of sufficient safeguards to protect against abuse. Accordingly, it finds that the interference caused by section 11(e) of the State of Emergency Act and Article 1 (a) of Legislative Decree no. 430, and the way in which those provisions were applied in the instant case, cannot be regarded as having been "necessary in a democratic society" and went beyond the requirements of the legitimate aim pursued. There has therefore been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

36. The applicant further complained that he had been denied a fair trial since no court proceedings had taken place before the ban was imposed on the newspaper. He also maintained that he had been denied an effective remedy by which he could have challenged the governor's decision before a national authority.

37. The Court considers that these complaints should be examined from the standpoint of Article 13 of the Convention since they essentially pertain to the applicant's right to an effective remedy. Article 13 reads:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

38. The Government contended that the applicant could have had recourse to the Compensation Law and sought damages for the loss he had sustained as a result of the ban imposed on his newspaper.

39. According to the Court's settled case-law, Article 13 guarantees the availability of a remedy at national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. However, such a remedy is only required in respect of grievances which can be regarded as “arguable” in terms of the Convention (see, among many other authorities, *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52).

40. In the light of the finding of a violation of Article 10 above, the complaint is clearly arguable. The Court must thus verify whether the applicant had a remedy at national level to enforce the substance of his Convention rights.

41. The Court observes at the outset that the applicant's complaint does not pertain to his inability to seek damages in domestic law but to bring court proceedings to set aside the ban imposed on *Günlük Evrensel* by the governor of the state-of-emergency region. It notes that Article 7 of Legislative Decree no. 285 granted exceptional powers to the governor of the state-of-emergency region who could issue decisions which could not be reviewed by the administrative courts. As observed by the Constitutional Court (see paragraph 17 above), such immunity from judicial review is incompatible with the rule of law in a free and democratic society and, in the Court's opinion, renders nugatory the right guaranteed by Article 13.

42. In view of the foregoing considerations, the Court concludes that Turkish law did not provide effective remedies against the ban imposed on *Günlük Evrensel* by the governor of the state of emergency region. There has therefore been a violation of Article 13 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

43. The applicant claimed that the measures imposed on *Günlük Evrensel* disclosed discrimination, invoking Article 14 of the Convention which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

44. The applicant argued that his newspaper was subjected to discrimination on account of its political stance.

45. The Government submitted that the applicant's claim was unsubstantiated.

46. The Court recalls that it has found a violation of Article 10 of the Convention. However, in reaching the conclusion that the ban imposed was not necessary in a democratic society, it was satisfied that the impugned measure pursued the legitimate aims of preventing disorder and crime and protecting national security. There is no reason to believe that the restrictions on the applicant's freedom of expression can be attributed to a difference of treatment based on his national origin or his political opinions.

47. In the light of the foregoing, the Court considers that the applicant's allegations are unsubstantiated. There has therefore been no violation under this head.

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 10,000 euros (EUR) in respect of pecuniary damage and EUR 3,000 for non-pecuniary damage.

50. The Government asserted that no award should be made under this head. They submitted, in the alternative, that should the Court decide to award damages, this should not lead to unjust enrichment.

51. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, ruling on an equitable basis, it awards the applicant EUR 2,500 in respect of non-pecuniary damage (see *Çetin and Others*, cited above, § 73).

B. Costs and expenses

52. The applicant also claimed EUR 2,000 for the costs and expenses incurred before the Court.

53. The Government contended that the applicant's claim was unsubstantiated.

54. According to the Court's case-law, an applicant is entitled to the reimbursement of 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 above criteria and the applicant's failure to substantiate his claim, the Court makes no award under this head.

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 10 of the Convention;
3. *Holds* that there has been a violation of Article 13 of the Convention;
4. *Holds* that there has been no violation of Article 14 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, EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage, to be converted into New Turkish liras at the rate applicable at the date of settlement free of any taxes or charges that may be payable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage point;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President