



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

FOURTH SECTION

CASE OF YURDATAPAN v. TURKEY

(Application no. 70335/01)

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 Yurdatapan v. Turkey,

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

Nicolas Bratza, *President*,

Josep Casadevall,

Giovanni Bonello,

Rıza Türmen,

Kristaq Traja

Stanislav Pavlovski,

Ján Šikuta, *judges*,

and Fatoş Aracı, *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. 70335/01) 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 Mehmet Şanar Yurdatapan (“the applicant”), on 1 December 2000.

2. The applicant was represented by Ms Nesrin Ulutürk-Keleş, a lawyer practising in Istanbul and Mr Kerim Yıldız, Ms Anke Stock and Ms Lucy Claridge from the Kurdish Human Rights Project in London. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged, in particular, that he had been tried and convicted by the General Staff Military Court, which was not an independent and impartial tribunal within the meaning of Article 6 of the Convention. He also complained that his right to freedom of expression had been violated in that he had been convicted for distributing a leaflet which contained statements from a conscientious objector.

4. On 8 January 2002 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

5. The applicant was born in 1941 and lives in Istanbul.

6. In 1995, a general civil disobedience movement, called the “Initiative for freedom of expression” (IFE) commenced following the trial of the famous writer, Yaşar Kemal, who was prosecuted for his article published in the German magazine “Der Spiegel”. One thousand and eighty intellectuals protested against Yaşar Kemal's prosecution by re-publishing his articles and other banned articles in a book entitled 'Freedom of Expression'. The aim of the IFE was the amendment of the provisions of the Turkish legislation concerning freedom of expression.

7. The members of the IFE continued their campaign by gathering in front of the Istanbul State Security Court building once a month and distributing leaflets, which included shortened versions of previously banned articles.

8. On 23 July 1999 the applicant distributed the leaflet entitled “Freedom of Thought - No. 38” in front of the Istanbul State Security Court Building. This leaflet was a reproduction of the leaflet entitled “Freedom of Thought - No. 9”, which contained statements made by Osman Murat Ülke, who is a conscientious objector. The same day, the applicant filed a complaint against himself with the Public Prosecutor attached to the Istanbul State Security Court and maintained that he should be prosecuted for re-publishing the leaflet entitled “Freedom of Thought-No. 9”, banned by the General Staff Military Court.

9. On 5 October 1999 the military public prosecutor initiated criminal proceedings against the applicant in the General Staff Military Court, and charged him with seeking to dissuade persons from serving in the military contrary to Article 155 of the Turkish Criminal Code in conjunction with Article 58 of the Military Criminal Code.

10. During a hearing held on 23 November 1999, the applicant refused to answer any questions posed by the military court as regards the merits of the case. He maintained that the trial of a civilian by a military court breached Article 6 of the Convention, which guaranteed the fairness of proceedings. He argued that the military court could not provide him with a fair trial by an independent court and that such a prosecution would be against the Constitution. He further stated that Article 155 of the Criminal Code, which makes it an offence to seek to dissuade persons from serving in the military, was contrary to Article 10 of the Convention. The applicant maintained that he should have been tried by an ordinary criminal court. In this respect, he alleged that by republishing a previously banned article, he had breached Article 162 of the Criminal Code which provides that

re-publication of banned materials is an independent felony and that its perpetrator is subject to the same punishment as the author of the impugned article.

11. The applicant further put forward a plea of unconstitutionality, stating that Article 155 of the Turkish Criminal Code breached Articles 90 and 152 of the Constitution. The Military Court, considering that the applicant's submissions were unsubstantiated, refused his request.

12. On 1 February 2000 the court recalled that Osman Murat Ülke had been convicted in 1997 for breach of Article 155 of the Criminal Code for holding a press conference at the Izmir War Resisters' Association. Accordingly it held that by re-publishing those statements, the applicant had acted with the intention to break the law. The court further quoted the following statements from the leaflet.

“Above all I am not a draft evader, but a conscientious objector. I intend neither to evade nor to accept conscription. I have no reason to evade conscription, because I am in favour of people using their right not to be conscripted without having to hide.

...

Even though I cannot be called a draft evader, I consider it meaningless to go of my own accord. On the contrary, here and now, I will burn this military pass against which my own will rebels. In addition, I will burn the notification paper and send back the rest of the documents to the state by mail. Perhaps they will need them. Also I will send back the money that was given to me by the Ankara Recruiting Office for transportation and food expenses. I am not a soldier and I will never be... But I want to stress that if I'm taken to the barracks by force, I will resist to the end and never perform military service.”

13. The military court held that, pursuant to Article 13 of the Constitution, fundamental rights and freedoms may be restricted by law, in conformity with the latter and the spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health. Moreover, pursuant to Article 10 § 2 of the Convention, the exercise of freedom of expression may be subjected to such formalities, conditions, restrictions or penalties as are described by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety.

14. Consequently, the military court found the applicant guilty under Article 155 of the Criminal Code, in conjunction with Article 58 of the Military Criminal Code, for seeking to dissuade persons from serving in the military. It further sentenced him to two months' imprisonment and a fine.

15. On 16 May 2000 the Military Court of Cassation, finding the reasoning of the first instance court in line with the domestic legislation, refused the applicant application for leave to appeal.

16. On 21 July 2000 the applicant was informed about the final decision of the Military Court of Cassation by the demand sent by the Üsküdar Public Prosecutor's Office that the applicant surrender to serve his sentence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The relevant domestic law and practice in force at the material time are outlined in the following judgment: *Ergin v. Turkey (no. 6)*, no. 47533/99, §§ 15-18, 4 May 2006.

18. Following the amendment introduced on 30 July 2003 by section 6 of Law no. 4963, section 11 of the Constitution of Military Courts Act now reads:

“...Military courts shall not try civilians charged with committing the crimes and lesser offences referred to in Article 58 of the Military Penal Code in time of peace.”

19. The relevant provisions of the now defunct Criminal Code provides:

Article 155

“Whoever, in circumstances other than those indicated in the aforementioned articles, publishes editorials to incite people to violate the laws of Turkey or endangers the security of the country, or makes publications or suggestions that seek to dissuade persons from serving in the military or makes speeches to that end in public meetings or gathering places, shall be imprisoned for a period of between two months and two years and punished with a heavy fine of between 4,500 and 36,000 Turkish liras.”

Article 162

“Republication of banned materials is an independent felony and its perpetrator is subjected to the same punishment as the author of the impugned article.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

20. The applicant complained that the General Staff Court which tried him could not be regarded as an independent and impartial tribunal, given that it was composed of two military judges and an officer, all of whom were bound by the orders and instructions of the Ministry of Defence and the general staff which appointed them. In that connection he submitted that, as a civilian, he should not have been tried in a military court. The

applicant relied on Article 6 § 1 of the Convention, which in so far as relevant reads as follows:

“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.”

A. Admissibility

21. 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

22. The Government submitted that only in exceptional circumstances was a civilian tried in a military court in Turkey. On that point, they maintained that the applicant was only tried before a military court because he was charged with an offence concerning the military service. The Government further maintained that the domestic law provided necessary safeguards to guarantee the independence and impartiality of military courts. Finally, they pointed out that with the adoption of Law no. 4963 Turkish legislation had been amended to bring it into line with the Convention.

23. The applicant maintained his allegations.

24. The Court notes that it has already examined the same grievance in the past and has found a violation of Article 6 § 1 of the Convention in its *Ergin (no. 6)* judgment (cited above, § 54). In that judgment, the Court held that it was understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. On that account the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. Consequently, the applicant's doubts about that court's independence and impartiality could be regarded as objectively justified (*ibid*).

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

26. There has therefore been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

27. The applicant complained that his criminal conviction and sentence for publishing and distributing a leaflet which contained statements from a conscientious objector had infringed his right to freedom of expression as guaranteed by Article 10 of the Convention, which 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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Admissibility

28. 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

29. The Court notes that it is clear and undisputed between the parties that there has been an interference with the applicant's right to freedom of expression on account of his conviction and sentence under Article 155 of the Criminal Code. It further considers that the interference was prescribed by law and pursued a legitimate aim, namely the prevention of disorder (see *Ergin (no. 6)*, cited above, § 28). The Court will therefore confine its examination of the case to the question whether the interference was “necessary in a democratic society”.

30. The Government maintained that compulsory military service in Turkey was necessary in order to protect national and public security. They stated that any action taken against this obligation would amount to a provocation to disobey the law. In this connection, they noted that the applicant, by distributing the leaflet concerning the conscientious objector Osman Murat Ülke in a public area, had committed the offence of inciting others to evade military service.

31. The applicant refuted the Government's arguments. In particular, he asserted that the dissemination of information by way of a leaflet was a peaceful and democratic way to disseminate information and opinions.

32. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, *Şener v. Turkey*, no. 26680/95, §§ 39-42, 18 July 2000; *Öztürk v. Turkey* [GC], no. 22479/93, § 64, ECHR 1999-VI; *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). It will examine the present case in the light of these principles.

33. The Court must look at the impugned interference in the light of the case as a whole, including the content of the leaflet and the context in which it was diffused. In particular, it must determine whether the interference in question was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient” (see *Koç and Tambaş v. Turkey*, no. 50934/99, § 36, 21 March 2006). Furthermore, the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see *Skalka v. Poland*, no. 43425/98, § 42, 27 May 2003).

34. The Court observes that, in the instant case, the applicant was convicted for having distributed a leaflet which contained, in particular, the press statement of Osman Murat Ülke, a conscientious objector, giving the reasons why the latter refused to do his compulsory military service. The General Staff Court considered that, by distributing this leaflet, the applicant had incited others to evade military service.

35. The Court recalls that it had already examined the contents of the leaflet in question in its judgment in the case of *Düzgören v. Turkey* (application no. 56827/00, §§ 23-34, 9 November 2006). It therefore reiterates its considerations in that case where it had held that, although the words used in the impugned leaflet gave it a connotation hostile to military service, they did not encourage violence, armed resistance or insurrection and did not constitute hate speech (see *Ergin (no. 6)*, cited above, § 34; 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 addition, the context in which the opinions were expressed can be distinguished, as regards their potential impact, from that of the *Arrowsmith* case, in which the applicant, a pacifist activist, had distributed a leaflet inciting servicemen to desert at a military camp occupied by troops who were shortly to be posted to Northern Ireland (see *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission's report of 12 October 1978, Decisions and Reports (DR) 19, p. 5). In the present case the offending leaflet was distributed in a public place in Istanbul. It did not seek, either in its form or in its content, to precipitate immediate desertion. In the Court's view, these are the essential factors in the assessment of the necessity of the measure.

36. Finally, the Court considers the applicant's sentencing, in particular the two months' imprisonment, a harsh penalty.

37. Against this background, the Court considers that the reasons given by the General Staff Court, although relevant, cannot be considered sufficient to justify the interference with the applicant's right to freedom of expression.

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

39. 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

40. The applicant claimed 79,864 euros (EUR) in respect of pecuniary damage. He submitted that this amount represented the income that he had been deprived of as a result of his conviction and the costs and expenses incurred in the course of the domestic proceedings. He further claimed EUR 40,000 in respect of non-pecuniary damage.

41. The Government contested the amounts.

42. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 2,000 in respect of non-pecuniary damage (see *Düzgören*, cited above, § 40).

43. 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*, no. 46221/99 [GC], § 210, *in fine*, ECHR 2005-IV).

B. Costs and expenses

44. The applicant also claimed EUR 12,147.87 and 1,364.16 pounds sterling (GBP) for the costs and expenses incurred for his representation by his Turkish and British lawyers, respectively, before the Court.

45. The Government contested these claims.

46. 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 the criteria laid down in its case-law (see, in particular, *Ergin (no. 6)*, cited above, § 64), the Court awards the applicant EUR 1,500 for the costs and expenses claimed.

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 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 sums to be converted into pounds sterling at the rate applicable at the date of settlement and to be paid into the bank account identified by the applicant in the United Kingdom:
 - i. EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
 - ii. EUR 1,500 (one thousand and five hundred euros) for 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;
5. *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.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President