



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

THIRD SECTION

CASE OF ALBAYRAK v. TURKEY

(Application no. 38406/97)

JUDGMENT

STRASBOURG

31 January 2008

FINAL

07/07/2008

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 Albayrak v. Turkey,

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

Boštjan M. Zupančič, *President*,

Corneliu Bîrsan,

Rıza Türmen,

Elisabet Fura-Sandström,

Alvina Gyulumyan,

Egbert Myjer,

David Thór Björgvinsson, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 10 January 2008,

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

PROCEDURE

1. The case originated in an application (no. 38406/97) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Mehmet Emin Albayrak (“the applicant”), on 15 September 1997.

2. The applicant was represented by Mr M.E. Adıyaman and Mr I. Cantepe, lawyers practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Convention institutions.

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. By a decision of 16 November 2000 the Court (Second Section) declared the application partly admissible. It retained the applicant's complaint concerning the alleged infringement of his right to freedom of expression and the alleged discrimination in the enjoyment of that right on account of his ethnic origin.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1967 and lives in Istanbul.

7. On 12 February 1993 the applicant started working as a judge in Tufanbeyli district in Adana.

A. The disciplinary proceedings

8. On 14 August 1995 the General Command of the Gendarmerie submitted a formal complaint to the judicial inspection board attached to the Ministry of Justice concerning the applicant's behaviour. A disciplinary investigation into the allegations was conducted by a judicial inspector.

9. On 1 March 1996 the judicial inspection board notified the applicant in writing that a disciplinary investigation had been carried out under Section 82 of Law no. 2802 into a number of acts which he had allegedly committed and which were considered incompatible with his status as a judge. The letter set out the charges against the applicant and he was requested to submit his defence in writing.

10. The charges, five in all, included the accusation that the applicant had undermined the honour and dignity of the judiciary as well as respect for his own position as a judge (the first charge). The other four charges related, *inter alia*, to reported incidents of his conflictual behaviour towards his colleagues and to his failure to respect the dress code of the profession and working hours.

11. The judicial inspector drafted a report dated 27 March 1996, according to which there was no evidence to justify opening an investigation into the first set of charges. However, he stated that evidence had been obtained that the applicant had behaved in a conflictual way with his colleagues and that he shaved only once a week, came late to work and did not wear a tie. This report was submitted to the judicial inspection board of the Ministry of Justice. The Government submitted that the judicial inspector heard evidence from the Governor, the public prosecutor, the applicant and his colleagues.

12. On 29 April 1996 the Minister of Justice approved the transfer of the whole case file to the Supreme Council of Judges and Public Prosecutors ("the Supreme Council") with a view to the consideration of possible disciplinary measures under Section 87 of Law no. 2802.

13. With regard to the first set of charges concerning the accusation that the applicant had undermined the honour and dignity of the judiciary as well as respect for his own position as a judge, the applicant was accused of introducing himself at various social events as being "of Kurdish origin"

and of behaving in a manner which displayed his sympathy for the PKK¹. It was stated that the applicant had said: "If they throw me out of the judiciary, I will go to Germany to join the organisation." It was further alleged that the applicant talked to Kurdish-speaking citizens in Kurdish in order to gain their sympathy. He was also accused of regularly reading a legal publication of the PKK, *Özgür Ülke*, until it was banned and of watching Med TV a PKK-controlled television channel, via a satellite, antenna at his home.

14. In respect of the remaining sets of charges, the applicant was accused of quarrelling on various occasions with the public prosecutor, of shaving only once a week, of not wearing a tie at work and of coming to work late.

15. In his written submissions to the Supreme Council, the applicant denied the accusations against him, maintaining that they were false, inaccurate and incomplete or had been misinterpreted. He assumed that the evidence against him consisted of statements given by his colleagues and other civil servants. He alleged that certain persons were hostile to him since he had previously lodged formal complaints against them. In this connection, he submitted that, in the past, he had made formal complaints against the public prosecutor, Mr H.A. and the elected major, Mr H.K. The applicant therefore maintained that the public prosecutor, as a result of certain personal and professional disagreements which they had had, spread false accusations against him and had convinced other local government officials to make further similar accusations. The applicant gave some examples of situations where he had been in conflict with the public prosecutor. He affirmed that he believed in all the fundamental principles of the Turkish Republic and served the State faithfully.

16. He admitted, *inter alia*, that, on certain occasions and during private conversations, he had stated that he was a Kurd, had criticised certain unlawful acts of the State authorities and had maintained that a distinction should be made between the innocent population of Kurdish origin and the PKK. The applicant submitted that he condemned terrorist acts and that it was an insult to suggest that he sympathised with the PKK. He asserted that while none of his family members and close friends had ever been interrogated for terrorist offences, the public prosecutor's brothers were in custody on allegations of aiding and abetting the PKK and his nephew had been remanded in custody for alleged PKK membership.

17. The applicant further admitted reading *Özgür Ülke* which, in his opinion reported, on the events in south-east Turkey, albeit in a biased manner. He argued that the incidents reported in the region were a problem which the country was facing and he, like everyone else, had the right to be informed about them. He pointed out that he also read various other lawful publications for the same purpose. Moreover, he argued that the fact that he

¹ The Kurdistan Workers' Party; an illegal armed organisation.

read certain lawful partisan publications did not convey his approval of the views expressed therein. As to the allegation that he regularly watched *MedTV* at home, the applicant explained that he had never been able to watch the channel due to technical difficulties with the reception. He argued that, even if he had watched the channel in question, this was not unlawful. The applicant further refuted the remainder of the accusations brought against him.

18. On 11 July 1996 the Supreme Council, after assessing the evidence in the file as well as the written defence previously submitted by the applicant, found by a majority that the evidence in the file was sufficient to conclude that the allegations against the applicant were well-founded. In respect of the first set of accusations, the Supreme Council concluded that the applicant should be transferred to another jurisdiction as a sanction pursuant to Section 68 (a) and (b) of Law no. 2802. In respect of the remaining accusations, the applicant received a reprimand. The contents and the sources of the evidence in the file which were relied on were not restated in the decision.

19. On 4 November 1996 the applicant requested the Supreme Council to rectify its decision. In his petition, he reiterated his previous submissions and requested that evidence be heard from his colleagues. The applicant maintained, *inter alia*, that the accusations against him were the result of lies propagated by the public prosecutor and his friends. He affirmed that he had always maintained his impartiality. He also submitted that as a young judge he might have made certain mistakes due to his inexperience, but that he should not be punished in such a harsh manner for his mistakes.

20. On 14 November 1996 the Supreme Council unanimously rejected the applicant's request for a rectification of its decision.

21. On 17 April 1997 the Supreme Council's appeals board dismissed the applicant's objections.

22. The applicant was transferred to Şenpazar district in Kastamonu.

B. Subsequent events

23. Following an enquiry by the applicant, the Supreme Council decided on 2 October 1997 that the applicant could not be promoted for a period of two years on account of the disciplinary sanction of transfer to another jurisdiction imposed on him pursuant to Section 30 § 4 of the Law no. 2802.

24. The applicant was subsequently appointed to Çamoluk district in Giresun. His requests of 9 January 1998 and 29 December 1998 to be appointed to a region carrying a higher rank were rejected by the Supreme Council in decisions of 12 February 1998 and 14 April 1999 respectively.

25. On 9 December 1999 the Supreme Council dismissed the applicant's request for a retroactive promotion. It noted that the disciplinary sanction against the applicant had been erased pursuant to Law no. 4455 and that it

would not be an obstacle to future promotions. However, it considered that this situation did not render null and void the Supreme Council's decision not to promote the applicant for two years.

26. Following a fresh set of disciplinary proceedings, the applicant unwillingly resigned from his post in 2001. The applicant now practises as a lawyer.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. General information on the Supreme Council of Judges and Prosecutors is outlined in the following decision: *İmrek v. Turkey* (dec.), no. 57175/00, 28 January 2003.

28. The relevant provision of Law no. 2802 on judges and prosecutors reads as follows:

Section 68

“Transfer to another jurisdiction shall mean the transfer to a jurisdiction one degree lower than the one in which the person concerned is currently working, for a minimum term of service, if:

a) he/she undermines the honour and dignity of the judiciary and respect for his/her own position as a judge by his/her conduct and relations.

b) if he/she by his/her action and conduct gives the impression that he/she cannot perform his/her duty in a correct and an impartial manner.

...”

29. Law no. 4455 grants civil servants an amnesty in relation to disciplinary offences committed prior to 23 April 1999 and annuls any resulting penalties or restrictions. However, it does not provide the possibility to claim for any pecuniary loss incurred as a result of disciplinary sanctions.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

30. The Government suggested that the applicant was no longer a victim since the consequences of the disciplinary measure imposed on him had been the subject of an amnesty. In that respect they submitted that the disciplinary sanction against the applicant had been erased from his record on 22 October 1999 and that he had been promoted in August 1999. The

Government invited the Court to declare the application inadmissible or, alternatively, to strike it out of the Court's list of cases in accordance with Article 37 of the Convention.

31. The applicant disagreed with the Government's arguments and maintained his complaints.

32. The Court reiterates that “a decision or measure favourable to the applicant is not in principle sufficient 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 *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36, and *Rotaru v. Romania* [GC], no. 28341/95, § 35, ECHR 2000-V). Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see, for example, *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003).

33. In the instant case, the Court notes that the disciplinary sanction against the applicant was the subject of an amnesty. The amnesty in question did not, however, acknowledge that there had been any breach of the applicant's rights nor did it provide the possibility for the applicant to reclaim any alleged loss of earnings caused by the impugned disciplinary sanction. Therefore, the Court does not consider that the domestic authorities have recognised or redressed the violation alleged by the applicant. He remains a “victim” of those alleged violations.

34. Accordingly, the Government's objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant complained that the disciplinary sanction imposed on him had infringed his right to freedom of expression since he had been punished for reading a daily newspaper and watching a television channel. He relied on Article 10 of the Convention, 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, territorial integrity or public safety, for the prevention of disorder or crime...”

A. The parties' submissions

36. The Government referred to their earlier submissions and maintained 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 submitted that the disciplinary sanction against the applicant had not been based on his habit of reading publications of the PKK or for watching *MedTV*. In this connection they stated that the investigation conducted against the applicant had established, *inter alia*, that the applicant had been emphasising the differences between ethnic origins and therefore created the impression that he was no longer impartial. In addition, they noted that he had failed to observe the profession's regulations as regards hours and clothing as well as maintaining good relations with his colleagues. The Government stressed that by reading a publication of the PKK which had been subsequently banned and by behaving in a manner which displayed sympathy for the terrorist organisation, the applicant had undermined the honour and dignity of the judiciary as well as respect for his own position as a judge and that therefore the disciplinary measure imposed on him had been proportionate.

37. The applicant maintained his allegations. He claimed, in particular, that people were automatically accused of being separatists or terrorists if they affirmed their Kurdish identity. He alleged that there existed a general policy of neutralising the influence of Kurdish civil servants by appointing them to certain regions or insignificant posts. The applicant submitted that despite the fact that he was a senior judge, he was appointed to lower-ranking jurisdictions. The applicant alleged that investigation were been opened against him for no reason. He maintained that he was unable to follow the publications he wanted to read for fear of misinterpretation.

B. The Court's assessment

38. The Court notes that it is undisputed between the parties that there has been an interference with the applicant's right to freedom of expression on account of the disciplinary sanction imposed on him for undermining the honour and dignity of the judiciary as well as respect for his own position as a judge. It further considers that, since the disciplinary measure was based on Section 68 of Law no. 2802, the interference was prescribed by law and pursued a legitimate aim, namely maintaining the authority and impartiality of the judiciary (see *Altın v. Turkey* (dec.), no. 39822/98, 6 April 2000). The Court will therefore confine its examination of the case to the question whether the interference was "necessary in a democratic society".

39. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, *Ibrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, § 51-53, 10 October 2000, *Vogt*

v. Germany, judgment of 26 September 1995, Series A no. 323, pp. 25-26, §§ 52-53, and *Wille v. Liechtenstein* [GC], no. 28396/95, §§ 61-62, ECHR 1999-VII). It will examine the present case in the light of these principles.

40. The Court must look at the impugned interference in the light of the case as a whole. It must determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547-48, § 51).

41. In the *Vogt* case, cited above, the Court held as follows, in connection with the dismissal of a civil servant: “These principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2. In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the 'duties and responsibilities' referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.”

42. Given the prominent place among State organs which is occupied by the judiciary in a democratic society, the Court considers that this is particularly so in the case of restrictions on the freedom of expression of a judge in connection with the performance of his functions, albeit the judiciary is not part of the ordinary civil service (see *Pitkevich v. Russia* (dec.), no. 47936/99, ECHR 2001).

43. At the outset the Court observes that two separate disciplinary measures were imposed on the applicant in respect of the five sets of different charges brought against him (see paragraph 18 above). The applicant's complaint pertains to the first set of charges. The Court therefore does not find it relevant to assess the other set of charges brought against the applicant for the purposes of determining whether the disciplinary sanction imposed on him was proportionate to the aim pursued.

44. The Court notes that the applicant was transferred to a lesser jurisdiction because the Supreme Council considered that he had

undermined the honour and dignity of the judiciary as well as respect for his own position as a judge and by his action and conduct had given the impression that he could not perform his duty in a correct and an impartial manner. The Government argued that the applicant had given the impression that he was no longer impartial by following PKK-related media and through his comments. The applicant refuted these allegations.

45. The Court observes that neither the decisions of the domestic authorities nor the Government's submissions before the Court give a clear and precise indication as regards the applicant's impugned comments or behaviour or the exact grounds on which the Supreme Council found it established that the applicant had breached Section 68 (a) and (b) of Law no. 2802. The only information available to the Court are the accusations put vaguely to the applicant (see paragraph 13 above) and the latter's submissions concerning various incidents or events that might have triggered these accusations (see paragraphs 15-16 above).

46. The Court finds no reference in the case file to any known incident which would suggest that the applicant's impugned conduct, including that of following PKK-related media, had a bearing on his performance as a judge and, particularly, during any previous, pending or imminent proceedings (see, *Wille*, § 69, cited above). It also notes that no evidence was adduced by the Government to demonstrate that the applicant had overtly associated himself with the PKK or behaved in a way which could call into question his capacity to deal impartially with related cases coming before him. In the Court's view, these are the essential factors in assessing the necessity of the measure taken by the authorities.

47. In the absence of any such information, the Court cannot but assume that the authorities attached a considerable weight to the fact that the applicant followed or attempted to follow PKK-associated media. In this connection the Court reiterates that freedom of expression requires that care be taken to dissociate the personal views of a person from received information that others wish or may be willing to impart to him or her (see, *mutatis mutandis*, *Halis v. Turkey*, no. 30007/96, § 34, 11 January 2005).

48. Having regard to the circumstances of the case as a whole and notwithstanding the national authorities' margin of appreciation, the Court considers that the interference with the applicant's freedom of expression was not based on sufficient reasons to show that the interference complained of was "necessary in a democratic society". This finding makes unnecessary for the Court to pursue its examination in order to determine whether the disciplinary sanction imposed on the applicant was proportionate to the aim pursued.

49. It follows that there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

50. The applicant complained that he had been discriminated against on account of his ethnic origin. He maintained that if a judge of Turkish ethnic origin had watched that particular television channel or followed that particular publication, he or she would not have been sanctioned. The applicant relied on 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.”

51. The Government disputed the applicant's allegations.

52. The Court has examined the applicant's allegation. However, it finds that the evidence before it does not disclose any appearance of discrimination on the basis of the applicant's ethnic origin.

53. It follows that there has been no violation of Article 14.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant claimed pecuniary damage for loss of earnings. He estimated that his loss was around 20,000 euros (EUR) at the date of his just satisfaction claims and that it would reach around EUR 150,000 by 2005. The applicant pointed out that, since a judge's salary depended on various factors, he was unable to give a precise sum. He submitted pay statements of judges at various grades in support of his claims under this head. He further claimed EUR 500,000 in respect of non-pecuniary damage. The applicant claimed that he and his family had suffered due to the fact that he had to work in small and socially backward provinces and that he had lost two years' seniority.

56. The Government contested the amounts.

57. The Court accepts that the applicant must have incurred some pecuniary loss due to the fact that he was not eligible for promotion for two years. However, the Court finds it difficult to determine a precise amount since - as pointed out by the applicant - the salary and promotion scales of

judges are dependent upon various factors. The Court also notes that, since 2001, the applicant is no longer a judge but works as a lawyer.

58. The Court further considers that the applicant may be taken to have suffered a certain amount of distress given the circumstances of the case.

59. Making an assessment on an equitable basis, the Court awards the applicant EUR 5,000 for pecuniary damage and EUR 1,000 for non-pecuniary damage.

B. Costs and expenses

60. The applicant claimed EUR 15,000 in respect of costs and expenses incurred before the Court. He did not submit any documents to support his claim under this head.

61. The Government contested the amount.

62. Since the applicant submitted no justification as regards costs and expenses as required by Rule 60 of the Rules of Court, the Court makes no award under this head.

C. Default interest

63. 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. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that there has been no violation of Article 14 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 according to 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:
 - (i) EUR 5,000 (five thousand euros) in respect of pecuniary damages;
 - (ii) EUR 1,000 (one thousand euros) in respect of non-pecuniary damages;
 - (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 31 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Boštjan M. Zupančič
President