



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

SECOND SECTION

CASE OF SAYGILI AND FALAKAOĞLU v. TURKEY

(Application no. 39457/03)

JUDGMENT

STRASBOURG

21 October 2008

FINAL

21/01/2009

This judgment may be subject to editorial revision.

In the case of Saygılı and Falakaoğlu v. Turkey,

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

Françoise Tulkens, *President*,

Antonella Mularoni,

Vladimiro Zagrebelsky,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 29 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 39457/03) 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 Fevzi Saygılı and Mr Bülent Falakaoğlu (“the applicants”), on 12 November 2003.

2. The applicants were represented by Mr K.T. Sürek, Mr D. Avcı and Mr S. Mutlu, lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 16 October 2007 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1966 and 1974 respectively and live in Istanbul.

5. The first applicant, Fevzi Saygılı, and the second applicant, Bülent Falakaoğlu, are, respectively, the owner and the editor of *Yeni Evrensel*, a newspaper published in Istanbul.

6. On 22 February 2001 *Yeni Evrensel* published an article entitled “Abductions are on the increase”. It read:

“Yesterday Mr Büyükşahin, the deputy secretary-general of the HADEP (the People’s Democracy Party), drew attention to the illegal pressure and threats directed at the HADEP and stated that the authorities have still not provided an explanation as to the whereabouts of Serdar Tanış and Ebubekir Deniz¹, who have disappeared in Silopi. He went on to state that such threats and abductions had been carried out in Bingöl-Karlıova and Şırnak-Cizre. Various people, identifying themselves as members of the security forces, had raided houses in Karlıova and detained Mustafa Boylu, Mehmet Özen, Remzi Genç and Selahattin Oge. Büyükşahin added that, subsequent to his detention, Selahattin Oge had been found lying in a coma next to a school. Following applications made to the prosecutors by the detainees’ relatives, the authorities had acknowledged these detentions. He further said that Mehmet Dilsiz, chairman of the HADEP’s Cizre branch, had been threatened, arrested and detained by the Gendarmerie Command on the basis of fake documents and without any evidence. Mr Büyükşahin stressed that the life of Mehmet Dilsiz, who had been threatened by the Şırnak Gendarme Brigade Colonel L.E, was in danger. Mr Büyükşahin speculated as to whether those who were currently threatening Mehmet Dilsiz were the same persons as those who had caused Tanış and Deniz to disappear. Alleging that the commander was threatening Mehmet Dilsiz, just as he had previously threatened Tanış, he asked what L.E.’s role had been in the disappearances of the HADEP’s Silopi members. Mr Büyükşahin condemned these incidents and called on the authorities to take up the victim’s cause and reveal the truth.”

7. On 7 March 2001 *Yeni Evrensel* published an article entitled “Cizre incidents contain clues for Silopi”. This article also concerned the issue of forced disappearances in south-east Turkey. However, this article did not explicitly mention Colonel L.E.

8. On 25 July 2001 the prosecutor at the Istanbul State Security Court filed a bill of indictment with that court and charged the applicants and Mr Veli Büyükşahin with offences defined in Section 6 § 1 of the Anti-Terrorism Act (Law no. 3713), namely disclosing the identities of public officials who are involved in the fight against terrorism and thus rendering such persons targets for terrorist organisations. According to the prosecutor, the articles had endangered the life of Colonel L.E. In addition, he called for the application of Additional section 2 of the Press Act (Law no. 5680).

9. In the course of the trial the applicants maintained that the content of the impugned articles remained within the limits of freedom of expression. They relied on the case-law of the Court of Cassation and the European Court of Human Rights.

10. On 9 April 2002, the Istanbul State Security Court delivered its judgment. It acquitted the applicants in respect of the charges concerning the second article and convicted them in respect of the charges regarding the first article. The court considered that the first article was written, under the guise of news, with the aim of presenting Colonel L.E. as a target for

¹ See the judgment in the case of *Tanış and Others v. Turkey*, no. 65899/01, ECHR 2005-VII in which the Court found it established that both Serdar Tanış and Ebubekir Deniz had disappeared after they attended the Silopi district gendarmerie command on 25 January 2001.

terrorist organisations. The court found that the applicants bore responsibility for publishing the remarks made by Mr Büyüksahin. The first applicant was ordered to pay a “heavy fine” of 757,080,000 Turkish liras (TRL) and the second applicant was ordered to pay a heavy fine of TRL 378,540,000. The first-instance court further ordered, in accordance with Additional section 2 § 1 of Law no. 5680, the temporary closure of the newspaper for a period of three days.

11. The applicants and the prosecutor appealed. In their appeal petition, the applicants requested the Court of Cassation to hold a hearing. As to the merits of their appeal, the applicants maintained, *inter alia*, that the article in question was a news item of major public interest and that all they had done was to impart - in a manner consistent with their obligations and responsibilities - information on a matter of public interest. In addition, they maintained that the fine imposed on them was excessive and complained about the application of Additional section 2 § 1 of Law no. 5680.

12. On 3 July 2003, the Court of Cassation, pursuant to Article 318 of the Criminal Procedure Code, rejected the request for a hearing and upheld the judgment.

13. The closure order for the newspaper was executed from 24 to 27 September 2003. The first applicant paid the fine on 24 January 2004. The second applicant paid on 19 November 2004.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. A description of the relevant domestic law at the material time can be found in *Özgür Gündem v. Turkey* (no. 23144/93, § 32, ECHR 2000-III), and *Demirel and Ateş v. Turkey* (no. 2) (no. 31080/02, § 12, 29 November 2007).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

15. The applicants complained that their conviction and sentence under section 6 of Law no. 3713 and the temporary closure of the newspaper had infringed their right to freedom of expression. They relied in that connection on Article 10 of the Convention, which, in so far as relevant, 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...

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, ... for the prevention of disorder or crime, [or] for the protection of the reputation or rights of others...”

A. Admissibility

16. 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

1. The applicants’ conviction and sentence under Article 6 § 1 of Law no. 3713

(a) The parties’ submissions

17. 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. In particular, they pointed to the manner in which Mr L.E. had been portrayed in the article in question and submitted that the explicit mention of his name had made him a target for terrorist organisations. The Government argued that the content of the article was likely to provoke violence and hate crimes in the region.

18. The applicants maintained their allegations.

(b) The Court’s assessment

19. The Court notes that it is not in dispute between the parties that the applicants’ conviction and sentence constituted an interference with their 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, namely the prevention of crime 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”.

20. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, the following judgments: *Şener v. Turkey*, no. 26680/95, §§ 39-43, 18 July 2000, *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, §§ 51-53, 10 October 2000; *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, §§ 41-42, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61,

ECHR 1999-IV, and *Kuliś v. Poland*, no. 15601/02, §§ 36-41, 18 March 2008). It will examine the present case in the light of these principles.

21. The Court must look at the impugned interference in the light of the case as a whole, including the content of the article 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”. Furthermore, the Court takes into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see *Üstün v. Turkey*, no. 37685/02, § 30, 10 May 2007).

22. However, the pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, *inter alia*, for the prevention of disorder or crime and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders (see *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 43). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

23. In addition, the Court reiterates that news reporting based on interviews or declarations by others, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of “public watchdog”. The punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to the discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so (see, for example, *Kuliś v. Poland*, no. 15601/02, § 38, 18 March 2008). A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas (see, for example, *Thoma v. Luxembourg*, no. 38432/97, § 64, ECHR 2001-III).

24. Turning to the facts of the case, the Court notes that the article in question concerned a statement by a politician, Mr Büyükşahin, on the issue of forced disappearances in south-east Turkey. In the article, Mr Büyükşahin criticised the State for not doing enough to find those responsible for these disappearances. He also made a number of serious allegations. Mr Büyükşahin, firstly, accused Colonel L.E. of threatening a HADEP member and, secondly, made implicit reference to the latter’s possible involvement in the disappearance of two other HADEP members.

The Court observes that the State Security Court assessed that the article in question was written with the aim of presenting Colonel L.E. as a target for terrorist organisations and held that the applicants were responsible for publishing it.

25. The Court has examined the article in question. It considers, firstly, that the subject of the article, namely forced disappearances in south-east Turkey, was undoubtedly a matter of public interest. However, the Court notes that Mr Büyüksahin's statements contain serious allegations of misconduct by the security forces and, in particular, by Colonel L.E., and as such his statements, if untrue, were defamatory and capable of exposing the colonel to public contempt. In this connection, the Court reiterates that it may be necessary to protect public servants from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold (see *Nikula v. Finland*, no. 31611/96, § 48, ECHR 2002-II). Nevertheless, the Court notes that this was not in issue in the instant proceedings where the applicants were charged under the Prevention of Terrorism Act and not for defamation (see *Falakaoğlu and Saygılı v. Turkey*, no. 11461/03, § 26, 19 December 2006).

26. The Court has examined the reasons given in the national courts' decisions. It does not consider them sufficient to justify the interference with the applicants' right to freedom of expression for the following reasons. Firstly, the Court notes that the State Security Court appears in its judgment not to have relied on or given any special weight to the nature of the accusations brought against Colonel L.E. in the reasoning leading to the conviction of the applicants (see, *mutatis mutandis*, *Halis v. Turkey*, no. 30007/96, § 35, 11 January 2005). Secondly, the issue of whether Colonel L.E.'s name and role in fighting terrorism were already in the public domain and whether he was in any actual danger as a result of this disclosure was never taken into account; as such, the State Security Court failed to weigh the interest in protecting the identity of the colonel, who, on account of his status, would have been well known at least in his district, as opposed to disclosing it for reasons of public interest. The Court notes in this context that, despite particularly libellous passages, the article, read as a whole, cannot be construed as incitement to violence against a public official and thus as having exposed Colonel L.E. to significant risk of physical violence (see *Koç and Tambaş v. Turkey*, no. 50934/99, § 38, 21 March 2006). In the Court's view, these are the essential factors in assessing the necessity of the measure.

27. Having regard to the circumstances of the case as a whole and notwithstanding the national authorities' margin of appreciation, the Court reiterates that the interference with the applicants' 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

it unnecessary for the Court to pursue its examination in order to determine whether the applicants' conviction under criminal law and their sentence was proportionate to the aim pursued.

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

2. The temporary closure of the newspaper in accordance with Additional section 2 § 1 of Law no. 5680

29. Having regard to the facts of the case, the submissions of the parties and its finding of a violation under Article 10 above, the Court considers that it has examined the main legal question raised in the present application. The Court concludes therefore that there is no need to give a separate ruling on the applicants' remaining complaint under Article 10 (see, for example, *Eser Ceylan v. Turkey*, no. 14166/02, § 33, 13 December 2007, *K.Ö. v. Turkey*, no. 71795/01, § 50, 11 December 2007, *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 43, 17 July 2007, and *Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007).

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

30. The applicants complained that they were denied a fair hearing by an independent and impartial tribunal. In this connection, they complained about the structure of the State Security Court and the attachment of the judges sitting on the bench of this court to the Supreme Council of Judges and Public Prosecutors. In addition, the applicants complained about the lack of reasoning before the Court of Cassation and the latter's refusal to hold a hearing in their case.

31. The Court observes that it has previously examined and rejected grievances of this kind (see, amongst others, *Maçın v. Turkey (no. 2)*, no. 38282/02, § 31, 24 October 2006, *Falakaoğlu v. Turkey (dec.)*, no. 77365/01, 5 June 2003, and *Emire Eren Keskin v. Turkey (dec.)*, no. 49564/99, 16 December 2003). The Court finds no particular circumstances in the instant case which would require it to depart from its earlier findings. Consequently, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicants claimed, in total, 2,496 euros (EUR) in respect of pecuniary damages. This sum included the damage incurred as a result of the closure of the newspaper for three days and the fines paid by the applicants (EUR 664 and EUR 332 respectively). In addition, the applicants claimed EUR 10,000 in respect of non-pecuniary damage.

34. The Government contested the amounts.

35. In the absence of any pertinent documents, the Court considers the applicants' claim regarding the pecuniary damage sustained due to the temporary closure of the newspaper as speculative and unsubstantiated. It accordingly dismisses it. However, the Court finds that there is a causal link between the violation found and the fines the applicants had to pay. The Court awards the full amount claimed by the applicants in this respect.

36. In addition, the Court considers that the applicants may be assumed 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, jointly, EUR 3,000 for non-pecuniary damage.

B. Costs and expenses

37. The applicants also claimed EUR 3,000 for the costs and expenses incurred before the Court.

38. The Government contested the amount.

39. Since the applicants submitted no substantiation of their claim for costs and expenses, as required by Rule 60 of the Rules of Court, the Court makes no award under this head.

C. Default interest

40. 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 complaint concerning the alleged interference with 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 10 of the Convention on account of the applicants' conviction and sentence;
3. *Holds* that there is no need to examine separately the applicants' remaining complaint under 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 sums, to be converted into new Turkish liras at the rate applicable at the date of settlement:
 - (i) EUR 664 (six hundred and sixty-four euros) to Mr Saygılı and EUR 332 (three hundred and thirty-two euros) to Mr Falakoğlu for pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros), jointly, in respect of non-pecuniary damage;
 - (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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 October 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President