



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

SECOND SECTION

CASE OF AYHAN ERDOĞAN v. TURKEY

(Application no. 39656/03)

JUDGMENT

STRASBOURG

13 January 2009

FINAL

13/04/2009

This judgment may be subject to editorial revision.

In the case of Ayhan Erdoğan v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 9 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 39656/03) 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 a Turkish national, Mr Ayhan Erdoğan (“the applicant”), on 17 September 2003.

2. The applicant was represented by Ms Ş. Özdemir, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. On 11 September 2007 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the alleged interference with the applicant’s freedom of expression 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 applicant was born in 1952. He is a practising lawyer and lives in Istanbul.

5. On an unspecified date the applicant, on behalf of his client Mr O.M., filed an action with the Istanbul Administrative Court seeking the annulment and suspension of execution of a competition to fill 49 posts announced in the *Akit* newspaper on 10 December 1997 by the office of the

mayor of the Ümraniye district in Istanbul. In his petition, the applicant stated, *inter alia*, that 111 out of 137 workers who had been dismissed on 13 June 1994 had won their cases before the Administrative Courts but despite this fact they had not been reinstated. In this regard, the applicant submitted that the municipality had refused to reinstate 20 of the workers on the ground that there were no available posts. As to the other 91, they had been reinstated for a day before being dismissed again. The applicant complained that pending another set of administrative proceedings against the Municipality regarding a competition announced in the same newspaper on 30 March 1997 for 49 posts, the Municipality had announced this new competition, through which it was aiming to fill the available posts, rendering impossible the enforcement of the court judgments in favour of the dismissed employees, including his client. He further claimed that the vacancy notice had been published only in the editions of *Akit* which were distributed to various associations affiliated with the *Refah* party and not in the normal edition of *Akit* as distributed in Istanbul that same day.

6. In one paragraph of his petition, the applicant made the following remark:

“As stated by political historians, the most dangerous cruel [person] (*zalim*) in the world is the one who considers himself and his acts as fair or who presents himself as such. The elected head of the accused administration, who has placed my clients in their current situation, is such a cruel [person] (*zalim*) and a bigot (*yobaz*) with no regard for the rule of law (*hukuk tanımaz*).”

7. On 24 April 1998 Mr Bingöl, mayor of Ümraniye and member of the *Refah* party, brought an action against the applicant claiming compensation for the damage he had incurred as a result of the applicant’s serious attack on his honour and integrity.

8. In the course of the proceedings before the Üsküdar Civil Court of First Instance (hereafter the “Üsküdar Court”), the applicant unsuccessfully asked the court to appoint expert witnesses to analyse the impugned words and to hear a number of witnesses. In his written observations, the applicant maintained, *inter alia*, that his statements had not been an attack against Mr Bingöl but mere observations, since there were documents proving to what degree the latter had acted in accordance with the laws, the Constitution and ethics over the previous five years. He made a number of accusations regarding Mr Bingöl’s actions as mayor and referred to the fact that the latter and his administration had been the subject of media attention many times. The applicant stated that he had used the impugned words in the course of his defence duties; it had not been his aim to insult Mr Bingöl. He had referred to the plaintiff as “cruel” because the dismissals had had serious adverse effects on the lives of his 137 clients. He had used the word “bigot” as a reference to an intolerant person. In this connection, the applicant also referred to the reasons voiced by the Constitutional Court

when it decided to ban the *Refah* party. The applicant also accused the plaintiff of misleading and lying to the domestic courts.

9. In his written observations Mr Bingöl claimed, *inter alia*, that the applicant's accusations were false and unfounded, that he had repeated his insulting remarks before the Üsküdar Court and that this attack on his personality had transgressed the standards and boundaries of objective debate.

10. On 27 September 1999 the Üsküdar Court ordered the applicant to pay compensation to Mr Bingöl in the amount of 2,500,000,000 Turkish liras (TRL - approximately 5,200 euros [EUR]) plus interest at the statutory rate applicable at the date of the court's decision. The Üsküdar Court considered that the word *yobaz* used by the applicant meant a person "whose religious beliefs were so extreme as to cause discomfort to other persons" and a person who was "provocative, vulgar and unsophisticated". The word was used in daily life to describe an "unlikeable, ignorant and vulgar" person. In any event, the applicant's written submission, when read as a whole, had employed "sharp and harsh" language. According to the Üsküdar Court, whether or not the applicant had had the intention to insult the mayor was irrelevant; what was important was how the public would interpret those words. After all, Mr Bingöl was the elected mayor of a district where one million people lived. The applicant appealed.

11. On 22 February 2000 the 4th Chamber of the Court of Cassation's Civil Division held a hearing and, by a majority, quashed the Üsküdar Court's decision of 27 September 1999 on the ground, *inter alia*, that the applicant's witnesses had not been heard. The president of the Chamber dissented.

12. On 14 December 2000 the Üsküdar Court, considering that hearing the applicant's witnesses and examining the administrative court's case file would not have changed the outcome, insisted on its decision of 27 September 1999. The applicant appealed again.

13. On 20 March 2002 the Grand Chamber of the Court of Cassation's Civil Division rejected the appeal and upheld the Üsküdar Court's decision of 27 September 1999. The court noted that there was no dispute that, *inter alia*, the municipality headed by Mr Bingöl had failed to execute certain court judgments. However, it remained to be determined whether the words used by the applicant in the course of the administrative proceedings had a valid basis and whether these words constituted an attack against Mr Bingöl's personal rights. In this connection, it considered that the applicant had overstepped the standards and boundaries of objective debate by using the terms "bigot", "cruel" and "no regard for the rule of law". The applicant had attacked Mr Bingöl's personal rights. It also considered that the sanctions for the non-execution of a court decision – of which the mayor had been accused – were provided for by statute and that this could not be considered to be a valid reason for the applicant to cross the legally

permissible boundaries and use the words he had. Finally, it held that listening to witnesses or examining the case file before the administrative courts would not have changed the outcome. The Grand Chamber of the Court of Cassation's Civil Division also decided to remit the case to the 4th Chamber of the Court of Cassation's Civil Division for an examination of the applicant's complaints concerning the excessive amount of compensation. A request by the applicant for the review of that decision was rejected on 25 September 2002.

14. On 16 January 2003 the 4th Chamber of the Court of Cassation's Civil Division rejected the applicant's appeal concerning the amount of compensation, which he considered excessive when account was taken of his resources, and upheld the decision of the Üsküdar Court. A request by the applicant for the review of that decision was rejected on 24 April 2003.

15. The applicant paid the due amount of TRL 9,627,000,000 (approximately EUR 5,637¹), in three instalments, on 27 February 2003, 20 March 2003 and 8 May 2003 respectively.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Saygılı and Others v. Turkey* (no. 19353/03, §§ 16-17, 8 January 2008), and *Turhan v. Turkey* (no. 48176/99, § 20, 19 May 2005).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

17. The applicant complained that he had been ordered to pay damages on account of statements made in his capacity as a lawyer, in breach of Article 10 of the Convention, which, in so far as relevant, reads:

“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, ... for the protection of the reputation or rights of others, ...”

¹ This amount now corresponds, given the intervening inflation, to approximately EUR 8,300 at the time of the adoption of the judgment.

A. Admissibility

18. The Court notes that the remainder of 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. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

19. The Government submitted that the interference with the applicant's right to freedom of expression had been based on Article 49 of the Code of Obligations and Article 24 of the Civil Code, and was thus "prescribed by law". Moreover, it had pursued the legitimate aim of protecting the rights and reputation of others. The Government maintained that the interference had also been necessary. In this connection, they considered, with reference to the State's margin of appreciation, that the domestic courts, having examined the facts of the case, had struck a proper balance between protecting Mr Bingöl's reputation and the applicant's freedom of expression. The Government pointed out that no criminal proceedings had been brought against the applicant.

20. The applicant disputed the Government's arguments. In particular, he maintained that the impugned statements had not been intended to insult Mr Bingöl but had been made in the course of judicial proceedings as part of defence submissions. The applicant submitted that the words highlighted by the Government had not been chosen in vain. In this connection, he pointed out that Mr Bingöl had refused to comply with court judgments, thus having no regard for the rule of law. The word "cruel" had been intended to highlight the difficult situation in which Mr Bingöl had put his clients and the word "bigot" to mean conservative. In this connection, the applicant noted that Mr Bingöl had belonged to a party which had subsequently been dissolved by the Constitutional Court for its reactionary actions. Finally, he emphasised that his petition, which contained the impugned statements, had not been disseminated in the press but was in a file in the domestic courts.

2. The Court's assessment

21. It is not in dispute that there has been an interference with the applicant's freedom of expression, prescribed by law and intended to protect "the reputation or rights of others". The Court sees no reason to conclude otherwise.

22. It remains to be established whether the interference was necessary in a democratic society. On this point, the Court relies on the basic principles laid down in its judgments concerning Article 10 (see, in particular, *Nikula v. Finland*, no. 31611/96, §§ 44-46, ECHR 2002-II, *Pakdemirli v. Turkey*, no. 35839/97, §§ 32-33, 22 February 2005, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 88-91, ECHR 2004-XI, *Steur v. the Netherlands*, no. 39657/98, § 38, ECHR 2003-XI, and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, §§ 45-46, ECHR 2007-...). It will examine the present case in the light of these principles.

23. The Court reiterates that in exercising its supervisory jurisdiction it must look at the interference with the applicant's right to freedom of expression in the light of the case as a whole, including the statements concerned, the context in which they were made and also the particular circumstances of those involved (see *Feldek v. Slovakia*, no. 29032/95, § 77, ECHR 2001-VIII). It must ascertain whether on the facts of the case a fair balance was struck between, on the one hand, the need to protect the reputation and rights of Mr Bingöl and, on the other hand, the protection of the applicant's freedom of expression in his capacity as a lawyer (see, *mutatis mutandis*, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 177, ECHR 2005-...).

24. One factor of particular importance for the Court's determination in the present case is the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see *Turhan v. Turkey*, cited above, § 24).

25. Moreover, the Court reiterates that while limits of critical comment are wider if a public figure is involved, as he or she is inevitably and knowingly exposed to public scrutiny and must therefore display a particularly high degree of tolerance (see *Kuliś v. Poland*, no. 15601/02, § 47, 18 March 2008), the reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention (see *Lindon, Otczakovsky-Laurnes and July v. France*, [GC], cited above, § 57, ECHR 2007-...).

26. However, as the Court has previously pointed out, the special nature of the profession practised by members of the Bar must be considered. In their capacity as officers of the court, they are subject to restrictions on their conduct, which must be discreet, honest and dignified, but they also benefit from exclusive rights and privileges that may vary from one jurisdiction to

another – among them a certain latitude regarding arguments used in court (see *Steur v. the Netherlands*, cited above, § 38).

27. In the present case the applicant filed a petition with the administrative court, on behalf of his client, against the municipality in order to annul a vacancy notice. In that petition, he made a number of accusations as regards the manner in which the vacancy notice had been published and the reasons behind it. The applicant also likened Mr Bingöl to a cruel person (*zalim*) and a bigot (*yobaz*) with no regard for the rule of law (*hukuk tanımaz*) (see paragraph 6 above). The domestic courts considered that the applicant's statements, particularly the use of the term "bigot", amounted to an insult against the personal integrity of Mr Bingöl, and awarded the latter compensation.

28. The Court has examined the petition in question and the reasons given in the domestic courts' decisions to justify the interference with the applicant's right to freedom of expression. It has carefully weighed the applicant's professional interest in pleading his client's case and in voicing his criticism against Mr Bingöl's interests, a politician, in being protected against personal insult. In this connection, the Court considers that the language and expressions used in the impugned petition, particularly those highlighted by the domestic authorities, were provocative and inelegant and could legitimately be qualified as offensive. They were, however, value judgments which were made in the context of judicial proceedings by the applicant, who was acting in his capacity of a legal representative, and were set against a particular context connected to those proceedings. As such, the Court considers that they could not be construed as a gratuitous personal attack against Mr Bingöl. It is clear that the applicant's statements, coloured by emotion, were of a nature to discredit the mayor. However, the Court reiterates in this context that the limits of acceptable criticism are wider as regards a politician than as regards a private individual.

29. Moreover, the applicant's value judgments were conveyed in a petition, a medium where his client's rights were naturally to be vigorously vindicated. Hence they were confined to the courtroom, unlike criticism against a third-party voiced in the media, for instance. In this connection, the Court observes that there is no indication in the case file that there was a real risk that the contents of the petition in question would have appeared in the media. In such circumstances the Court finds that the negative impact, if any, of the applicant's words on Mr Bingöl's reputation was therefore quite limited.

30. The Court considers, therefore, that the domestic courts, in their examination of the case, only had regard to the dictionary definition of these words and omitted to set these remarks within the context and the form in which they were expressed.

31. In view of the above, the Court finds 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 it unnecessary for the Court to pursue its examination in order to determine whether the amount awarded in the applicant’s case was proportionate to the aim pursued.

32. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed, in total, EUR 25,500 in respect of pecuniary damage. This sum corresponded to the current value, together with interest, of the amount he had had to pay to the plaintiff in the defamation proceedings, which he assessed at EUR 25,000, and the costs and expenses incurred in those proceedings. He also claimed EUR 20,000 for the non-pecuniary damage suffered as a result of distress and frustration caused by the proceedings.

35. The Government contested the amounts.

36. The Court finds that in the circumstances of the case there is a causal link between the violation found and the alleged pecuniary damage in so far as the applicant refers to the amount which he was ordered to pay by the domestic courts (see *Busuioc v. Moldova*, no. 61513/00, § 101, 21 December 2004). However, it finds the overall amount requested by the applicant excessive. Accordingly, the Court awards the sum of EUR 8,300 by way of pecuniary damage in respect of the amount which the applicant was ordered to pay to the complainant in compensation.

37. With regard to the costs of the domestic proceedings, the Court notes that the applicant’s claim concerns court fees which he had to pay in the course of the compensation proceedings, and that he submitted the corresponding receipts, amounting to EUR 500. The Court considers that this sum sought should be awarded in full since the costs to which the applicant referred were incurred in an attempt to prevent the violation established by the Court.

38. In total, the Court awards the applicant EUR 8,800 in respect of pecuniary damage.

39. As to the claim for non-pecuniary damage, the Court considers that the applicant may be taken to have suffered a certain amount of distress in

the circumstances of the case. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards him EUR 1,000 under this head.

B. Costs and expenses

40. The applicant also claimed EUR 3,111 for costs and expenses incurred before the Court. In support of his claims, the applicant submitted the fee agreement concluded between him and his legal representative, the Istanbul Bar Association's recommended minimum fees list for 2008 and a receipt regarding translation costs.

41. The Government contested the amount considering it excessive.

42. 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 documents in its possession, the complexity of the case and the above criteria, the Court considers it reasonable to award the sum of EUR 2,111 for the proceedings before the Court.

C. Default interest

43. 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 remainder of the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *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 8,800 (eight thousand eight hundred euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 2,111 (two thousand one hundred and eleven euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President