



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

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SECOND SECTION

CASE OF ŞERİFE YİĞİT v. TURKEY

(Application no. 3976/05)

JUDGMENT

STRASBOURG

20 January 2009

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
02/11/2010**

This judgment may be subject to editorial revision.

In the case of Şerife Yiğit 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,

András Sajó,

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. 3976/05) 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, Ms Şerife Yiğit (“the applicant”), on 6 December 2004.

2. The applicant, who had been granted legal aid, was represented by Mr H. Akbaht, a lawyer practising in Antakya. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged a violation of Article 8 of the Convention.

4. On 15 December 2005 the Court decided to give notice of the application to the Government. By virtue of Article 29 § 3 of the Convention it was also decided to examine the admissibility and the merits of the case at the same time.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1954 and lives in Gaziantep.

6. The applicant was the partner of Ömer Koç (Ö.K.), with whom she entered into a religious marriage (*imam nikah*) in 1976 and had six children. Ö.K. died on 10 September 2002.

A. Action before the İslahiye District Court

7. On 11 September 2003 the applicant brought an action before the İslahiye District Court, in her own name and that of her daughter Emine, seeking to have her marriage to Ö.K. recognised and to have Emine entered in the civil register as the deceased's daughter.

8. In a judgment of 26 September 2003 the İslahiye District Court dismissed the applicant's action regarding the marriage but granted the request for Emine to be entered in the register as Ö.K.'s daughter. No appeal was lodged and the judgment became final.

B. Application to the Hatay Labour Court

9. On an unspecified date the applicant requested the Hatay retirement pension fund (*Bağ Kur*) to grant her and her daughter Emine the benefit of her deceased partner's retirement pension and health insurance rights. On an unspecified date the fund refused the request. On 20 February 2003 the applicant applied to the İslahiye Labour Court to have that decision set aside. On 20 May 2003 the latter decided that it had no jurisdiction *ratione loci* and that the case should be heard by the Hatay Labour Court.

10. In a judgment of 21 January 2004 the Hatay Labour Court rejected the applicant's application in part. Basing its decision on the judgment of the İslahiye District Court, it found that the applicant's marriage to Ö.K. had not been validated. Accordingly, since the marriage had not been legally recognised, the applicant could not be subrogated to the deceased's rights. However, the court set aside the fund's decision in so far as it related to Emine, granting her the benefit of her deceased father's pension and health insurance rights.

11. On 10 February 2004 the applicant appealed on points of law to the Court of Cassation. She pointed out that the extract from the civil register stated that she was the wife of Ö.K., who was registered in the village of Kerküt. The applicant explained that in 1976 she had married Ö.K. in accordance with custom and practice. The couple had had six children, born in 1977, 1980, 1981, 1982, 1985 and 1990. The first five children had been entered in the civil register in 1985 under their father's name, while the last child, Emine, born in 1990, had been entered under her mother's name in 2002. The applicant said that on 10 September 2002, while preparations had been under way for an official marriage ceremony, her partner had died following an illness. She asserted that, unlike the couple's six children, she did not benefit from her late partner's pension or health insurance rights.

12. In a judgment of 3 June 2004, served on the applicant on 28 June 2004, the Court of Cassation upheld the impugned judgment.

II. RELEVANT DOMESTIC LAW

13. Article 143 of the Civil Code provides:

“At the close of the marriage ceremony the official shall issue the couple with a family record book.

The religious ceremony may not be performed unless the family record book is produced.

The validity of the marriage is not linked to the celebration of the religious ceremony.”

14. The sixth paragraph of Article 230 of the new Criminal Code provides:

“Any person who celebrates a religious marriage without having seen the document certifying that a marriage ceremony has been performed in accordance with the law shall be liable to a term of imprisonment of two to six months.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

15. The applicant alleged that the refusal of the domestic courts to grant her the benefit of the health insurance and pension rights of her deceased partner, the father of her children, had breached her right to family life for the purposes of Article 8 of the Convention. The relevant parts of Article 8 provide:

“1. Everyone has the right to respect for his ... family life, ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

16. The Government contested that argument.

A. Admissibility

17. The Government raised an objection of inadmissibility for failure to exhaust domestic remedies. They submitted that the applicant had not appealed against the judgment of the İslahiye District Court of

26 September 2003, which had served as the basis for the judgment of the Hatay Labour Court.

18. The applicant submitted no observations in that regard.

19. The Court observes that the applicant complained that her application concerning her deceased partner's retirement pension and health insurance rights had been rejected by the Hatay Labour Court on 21 January 2004. That judgment was upheld by the Court of Cassation judgment of 3 June 2004, served on the applicant on 28 June 2004. The applicant lodged her application with the Court on 6 December 2004, that is to say, within the six-month time-limit laid down by Article 35 § 1 of the Convention. Accordingly, the Government's objection must be dismissed.

20. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

21. The Government submitted that domestic law did not recognise religious marriages and that only civil marriages were valid. They added that Article 230 of the new Criminal Code made it a punishable offence to celebrate a religious marriage without having first ascertained that a valid civil ceremony had taken place. In the Government's submission, the respondent State possessed a margin of appreciation in determining the exercise of the rights enshrined in Article 12 of the Convention. Under Article 41 of the Constitution, marriage represented the foundation of Turkish society; the conditions and limitations laid down by the law in relation to marriage were necessary in a democratic society. As the Republic of Turkey was a secular State, religious marriages were not recognised as civil marriages. Any such marriage would be null and void.

22. The Government pointed out that no one could benefit from the rights conferred by marriage unless he or she had fully complied with the requirements of the law. In the instant case, the applicant had not been officially married to Ö.K. In the Government's submission, there had been no interference with the family rights of the applicant, who had entered into a religious marriage with Ö.K. in 1976. The couple had not been prevented from living together and had had numerous opportunities to regularise their situation during their thirty-six years together. Referring to the Court's case-law in *Johnston and Others v. Ireland* (18 December 1986, § 68, Series A no. 112), the Government argued that Article 8 could not be interpreted as imposing an obligation to establish a special regime for a particular category of unmarried couples.

23. Lastly, the Government submitted that they had treated the applicant in the same way as other persons in an analogous situation. The restrictions

placed on the applicant's situation were in accordance with the law and necessary in a democratic society.

24. The applicant challenged the Government's assertions. She stated that, according to the remark appended to her entry in the civil register, Ö.K. was considered as her husband. Her maiden name was Yiğit, but the judicial decisions and records of the hearings gave her name as Koç, her partner's surname. She contended that religious marriage was a feature of Turkish life, linked to tradition and mores. She complained of having been deprived of social security entitlements on the pretext that she had not entered into a civil marriage with Ö.K. Furthermore, in such situations it was only the women who suffered and not the men. The law did not protect women in that regard. In her submission, the domestic authorities had been aware of her situation and had taken no steps to remedy it. Under the law, the authorities responsible for maintaining the civil register should have referred the matter to the competent authorities.

25. The Court reiterates that by guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family. Article 8 applies to the "family life" of the "illegitimate" family as well as to that of the "legitimate" family (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31, and *Johnston and Others*, cited above, § 62). The existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties (see *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII). The notion of the "family" is not confined solely to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together outside of marriage (see *Johnston and Others*, cited above, § 55; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and *Al-Nashif v. Bulgaria*, no. 50963/99, § 112, 20 June 2002).

26. Accordingly, when deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have had children together (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 36, *Reports of Judgments and Decisions* 1997-II, and *Merger and Cros v. France*, no. 68864/01, § 45, 22 December 2004).

27. In the instant case the Court observes that the applicant entered into a religious marriage (*imam nikah*) in 1976 with Ö.K. The couple had six children, the first five of whom were entered in the civil register under the father's name, while the last child was entered under the applicant's name. It is not contested by the parties that the applicant and her children lived with Ö.K. until his death in 2002. The Court considers that it does not have jurisdiction to rule on the place or role of religious marriage in Turkish law and its social consequences. It simply notes that the applicant, Ö.K. and their children lived together in such a way that they constituted a "family" within the meaning of Article 8 of the Convention.

28. The Court must consider, in the particular circumstances of the case, whether the judgment of the Hatay Labour Court of 21 January 2004 amounted to a measure interfering with the applicant's family life.

29. The Court observes that in some Council of Europe countries there is currently a social trend, supported by the legislature, towards accepting and even recognising other stable forms of union such as cohabitation or civil partnership alongside the traditional marriage bond. However, the Court notes that Turkish law makes no provision for a union outside civil marriage which has a basis in law and creates a civil partnership allowing two persons of the same or opposite sex to enjoy rights identical or similar to those granted to married couples. Given the margin of appreciation left to the Contracting Parties to the Convention in the matter, the Court cannot require them to legislate in a sphere such as this. In the instant case, according to the domestic law in force, a religious marriage (*imam nikah*) celebrated by an imam does not entail any undertakings *vis-à-vis* third parties or the State. Irrespective of the applicant's arguments, the decisive factor is not the length or mutually supportive nature of the relationship, but the existence of an undertaking carrying with it a body of rights and obligations of a contractual nature. In the absence of a binding legal agreement, it is not unreasonable for the Turkish legislature to afford protection solely to civil marriages. Thus, the Court points out that it has already found that marriage remains an institution that is widely accepted as conferring a particular status on those who enter it (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 65, 29 April 2008, and *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000). Furthermore, Article 8 cannot be interpreted as imposing an obligation to establish a special regime for a particular category of unmarried couples (see *Johnston and Others*, cited above, § 68).

30. In the particular circumstances of the present case, the Court considers that the difference in treatment between married and unmarried couples with regard to survivors' benefits pursued a legitimate aim and was based on objective and reasonable grounds, namely the protection of the traditional family based on the bonds of marriage (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI).

31. Accordingly, there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by four votes to three that there has been no violation of Article 8 of the Convention.

Done in French, and notified in writing on 20 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Tulkens, Zagrebelsky and Sajó is annexed to this judgment.

F.T.
S.D.

JOINT DISSENTING OPINION OF JUDGES TULKENS,
ZAGREBELSKY AND SAJÓ

(Translation)

We do not share the majority's view that there has been no violation of Article 8 of the Convention in this case.

1. The applicant was the partner of Ö.K., with whom she entered into a religious marriage in 1976 in accordance with custom and practice and had six children, born between 1977 and 1990. When Ö.K. died in 2002 the applicant requested that she be granted the benefit of his retirement pension and health insurance rights. The request was refused by a judgment of the Hatay Labour Court on 21 January 2004, upheld by a Court of Cassation judgment of 3 June 2004, on the ground that since the applicant's marriage to Ö.K. had not been validated, it could not be legally recognised and she could not therefore be subrogated to the deceased's rights.

2. Before the Court, the applicant alleged that the refusal of the domestic courts to grant her the benefit of certain social security rights of her late partner, the father of her children, had breached her right to family life under Article 8 of the Convention which, in substance, could also be read in conjunction with Article 14. The Court must confine its attention to the requirements of the Convention, without making any judgment on the place and role of civil and religious marriage in Turkish law.

3. In line with the Court's well-established case-law concerning the concept of family life, the judgment does not contest the fact that the applicant's life with Ö.K. (until his death) and with their children amounted to family life within the meaning of Article 8 of the Convention (see paragraph 27). The Court has, indeed, frequently had occasion to observe that the notion of family life encompasses both marriage-based relationships and other *de facto* relationships (see *Merger and Cros v. France*, no. 68864/01, § 44, 22 December 2004) and that *de facto* situations may lead it to recognise the existence of conventional family life in the absence of legal ties. Factors to be taken into consideration in this connection include whether the couple live together, the length of their relationship and, in general terms, any factors which demonstrate their commitment to each other, such as their having had children together (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 112, 20 June 2002). All these factors were present in the instant case.

4. It is not disputed, either, that the applicant was deprived of the social security entitlements normally granted to a surviving spouse; the Government simply argued that "no one could benefit from the rights conferred by marriage unless he or she had fully complied with the requirements of the law" (see paragraph 22). Hence, it would have been possible to examine the applicant's complaint under Article 1 of Protocol

No. 1 taken in conjunction with Article 14 of the Convention. In that connection, we would point to the Court's very solid case-law on the subject of discrimination in the social security sphere based on nationality (see, among other authorities, *Gaygusuz v. Austria*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV; *Wessels-Bergervoet v. the Netherlands*, no. 34462/97, ECHR 2002-IV; *Willis v. United Kingdom*, no. 36042/97, ECHR 2002-IV; *Koua Poirrez v. France*, no. 40892/98, ECHR 2003-X; *Niedzwiecki v. Germany*, no. 58453/00, 25 October 2005; *Okpiz v. Germany*, no. 59140/00, 25 October 2005; and *Luczak v. Poland*, no. 77782/01, ECHR 2007-XIII), which could also be considered in terms of marital status.

5. Following fairly general reasoning which focuses mainly on the State's margin of appreciation in the sphere of marriage and the fact that the latter remains an institution widely recognised as conferring a particular status on those who enter it (see paragraph 29), the majority bases its conclusion that there has been no violation of Article 8 of the Convention solely on the finding that "the difference in treatment between married and unmarried couples with regard to survivors' benefits pursued a legitimate aim and was based on objective and reasonable grounds, namely the protection of the traditional family based on the bonds of marriage" (see paragraph 30). Whether it is based on Article 8 of the Convention or also on Article 14 – as the Court implies by making at least partial use of the method for assessing compliance with that provision – we are not persuaded by this line of argument, which appears to us to be defective from both a legal and a factual viewpoint.

6. In finding that there was indeed a difference of treatment in the instant case between married and unmarried couples, the majority confines itself to asserting that this was based on "objective and reasonable grounds". However, the Court has made clear in numerous judgments that the requirement of proportionality is inherent in the notion of objective and reasonable grounds: the impugned measure must normally be such as to enable the legitimate aim to be achieved and must be necessary to that end (see *Karner v. Austria*, no. 40016/98, § 41, ECHR 2003-IX, and *Ünal Tekeli v. Turkey*, no. 29865/96, §§ 64 and 65, ECHR 2004-X). However, this was not specifically established, or even suggested, in the present case.

7. Furthermore, as the Court has pointed out on several occasions, Article 8 of the Convention, and also Article 14 in certain cases, may entail positive obligations on States to ensure the effective exercise of the right in question. In the instant case, however, the majority did not provide any response to the applicant's argument that the domestic authorities, given the remark entered in the civil register, had been aware of the situation and had done nothing to remedy it: should those responsible for maintaining the register not have referred the matter to the competent authorities?

8. Lastly, the judgment also omits to address the applicant's other argument, under Article 14, that the sole victims in such situations are women and not men (see paragraph 24). This raises the issue of possible indirect discrimination (see *Hoogendijk v. the Netherlands* (dec.), no. 58641/00, 6 January 2005). Here, we would simply point to Directive 79/7/EEC of the Council of the European Union of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, and Recommendation Rec(2007)17 of the Council of Europe's Committee of Ministers to member States on gender equality standards and mechanisms, dated 21 November 2007 (Part B – Standards in specific areas, point 6 – Social protection, §§ 37 et seq.).