



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

THIRD SECTION

CASE OF SAYGILI AND FALAKAOĞLU v. TURKEY (no. 2)

(Application no. 38991/02)

JUDGMENT

STRASBOURG

17 February 2009

FINAL

17/05/2009

This judgment may be subject to editorial revision.

In the case of Saygılı and Falakaoğlu v. Turkey (no. 2),

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

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele,

Işıl Karakaş,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 27 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 38991/02) 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 26 July 2002.

2. The applicants were represented by Mr K.T. Sürek, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants alleged that their conviction by the Istanbul State Security Court and the closure of their newspaper for three days for having published declarations of detainees who were being kept in prisons in Turkey had amounted to a violation of their rights protected by Articles 6 and 10 of the Convention.

4. On 18 January 2008 the President of the Third Section decided to give notice of the application to the Government. It was 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

5. The applicants were born in 1966 and 1974 respectively and live in Istanbul. They are, respectively, the owner and the editor-in-chief of a daily newspaper called *Yeni Evrensel*.

6. On 23 October 2000, on payment of a certain amount of money, *Yeni Evrensel* newspaper published three declarations by detainees who were being kept in several prisons in Turkey and who were either convicted or being tried on charges of having been involved in the activities of left-wing illegal armed organisations. By these declarations the detainees protested mainly against the F-type prison system put in place by the Government. They stated, in particular, that they would go on hunger strike until the Government abolished the F-type prison system. They also made a number of other requests to the Government, such as the abrogation of Law no. 3717 (Anti-Terrorism Law), the state security courts and anti-democratic laws as well as prosecution of those who tortured detainees.

7. The first declaration on page 9 of the newspaper was entitled “We warn the Government which tries to put in place a cell system, we will not enter the cells”, and in its relevant parts stated as follows:

“As we fought off the 12 September Junta’s policies of controlling the prisons,

As the circulars of 1 August were torn off,

As the Eskişehir coffin house (prison) was forced to close down in 1991,

As we forced the authorities to close down the Eskişehir coffin house once again in 1996 by our hunger strikes and we set up a barricade against the attacks on the people, today we the revolutionary prisoners who have come across the same duties will fight off this attack as well. We will pay off whatever it costs. But we will not enter the cells. From now on the strong voice of the resistance will resonate in the prisons of our country. As detainees of the DHKP-C and TKP (ML) cases kept in various prisons, we start an indefinite hunger strike from 20 October 2000 until the F-type cell assault ends and our demands are met...

We will die but we will not enter the cells,

Long live our general resistance,

We will win...”

8. The second declaration on page 10 of the newspaper was entitled “We are on indefinite hunger strike, we will die but we will not enter the cells”, and stated in its relevant parts:

“...With these beliefs and determination, and together with the prisoners of DHKP-C and TKP (ML) cases, we started our hunger strike resistance for an indefinite period. We call on all revolutionary prisoners, including the prisoners of PKK cases, to unite under the resistance flag and to set up a stronger and indestructible barricade of revolutionist mind.

The fundamental requests of our resistance are as follows:

- * Abolish F-type prisons immediately,
- * Reinstate all rights seized in prisons,
- * Abolish the Anti-Terrorism Law,
- * Abolish the tripartite protocol,
- * Abolish the state security courts and invalidate the outcome of all judgments delivered by these courts, and
- * Try the torturers and perpetrators of massacres.

...

We call on the working class, labourers, all oppressed people and revolutionary people and ask them to support us in this resistance, for which we are ready to sacrifice our lives for human honour. We call on you to fight off the cell system which is the most critical chain of assault aiming at turning our lives into cells.

We will die but we will not enter the cells!

Long live resistance, long live victory!

In the name of TKIP detainees in all prisons.”

9. Finally, the third declaration, which appeared on page 10 of the newspaper, was entitled “To the public” and made calls similar to the first two declarations above. In particular, it called on all forces struggling to gain political freedom and class independence to take a stand against the fascist establishment and to spread the existing movement and actions and not to content themselves with mere declarations. It also called on these “forces” to use the request “F-type prisons should be closed” as leverage for their own political requests.

10. On 2 November 2000 the Chief Public Prosecutor at the State Security Court filed an indictment charging the applicants with publishing the declarations of terrorist organisations. The charges were brought under section 6/2 of Law no. 3713, section 2/1 of Law no. 5680 (Press Law) and Article 36 of the former Criminal Code.

11. On 17 April 2001 the applicants made their defence submissions to the Istanbul State Security Court. They argued that they had merely published declarations on payment of a certain amount of money and that

they had had no intention of publishing the view of any terrorist organisation. They maintained that their trial by a state security court for exercising their right to impart ideas would amount to a breach of Articles 6 and 10 of the European Convention on Human Rights.

12. Following the hearing of 17 April 2001, the Istanbul State Security Court convicted the applicants as charged and sentenced them to heavy fines, of 10,995,840,000 Turkish liras (TRL) (6,380 euros (EUR)) and TRL 183,240,000 (EUR 105) respectively, which sums corresponded to 90% of the newspaper's average sales in the previous month. The court further decided to ban the publication of *Yeni Evrensel* for three days.

13. On 20 April 2001 the applicants appealed, arguing that they were innocent of the crime and that the sanction imposed on them was disproportionate.

14. On 17 September 2001 the Court of Cassation quashed the Istanbul State Security Court's judgment, holding that the fine imposed on the applicants was miscalculated.

15. On 11 December 2001 the Istanbul State Security Court delivered its reasoned judgment. Relying on Article 10 § 2 of the Convention and the *Zana v. Turkey* judgment (25 November 1997, *Reports of Judgments and Decisions* 1997-VII), the court held that publication of terrorist organisations' declarations was not protected by the right to freedom of expression. It also noted that freedom of expression was not absolute and that Article 10 § 2 of the Convention did not permit the publication of views expressed by armed terrorist organisations.

16. On 12 December 2001 the applicants appealed again and asked the Court of Cassation to hold a hearing and to quash the State Security Court's judgment of 11 December 2001. They claimed that the incriminated declarations did not incite violence or harm national security. They only exercised their duty to impart political opinions. The applicants also challenged the constitution of the state security courts.

17. On 15 April 2002 the Court of Cassation dismissed the applicants' request for a hearing and upheld the judgment of the Istanbul State Security Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. 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

19. 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

20. 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

21. 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. They argued that the content of the declarations was likely to provoke violence and disturbances.

22. The applicants maintained that they had published these declarations for commercial and journalistic purposes and that therefore their content should not be seen as their own views.

(b) The Court’s assessment

23. 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”.

24. 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*, 8 July 1986, §§ 41-42, Series A no. 103; *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I; *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.

25. The Court must look at the impugned interference in the light of the case as a whole, including the content of the declarations and the context in which they were published. 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 public disorder and terrorism (see *Falakaoğlu and Saygılı v. Turkey*, nos. 22147/02 and 24972/03, § 31, 23 January 2007).

26. Since the applicants were convicted of disseminating propaganda of terrorist groups through the medium of the newspaper of which they were the owner and editor-in-chief, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy (see *Lingens*, cited above, § 41, and *Fressoz and Roire*, cited above, § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see *Sürek (no. 1)*, cited above, § 62).

27. Turning to the facts of the case, the Court notes that the applicants were convicted of publishing the declarations of terrorist organisations. These declarations were prepared by the detainees who were being kept in several prisons for their affiliation to various terrorist groups and carried messages concerning their dissatisfaction with the new F-type prison system which led to their “resistance by hunger strikes for an indefinite period”. The detainees called on the public, including other prison inmates and

“revolutionary groups”, to support them by action in their struggle against the “fascist establishment” until their demands were met by the authorities (see paragraphs 7-9 above).

28. In the Court’s opinion, what is in question in these declarations is not the suggested goals that must be achieved; i.e. abolishment of the state security court, punishment of perpetrators of torture etc. There is no doubt that it is perfectly legitimate to make suggestions to achieve these goals. However, the problem results from the wording of the overall message given to the readers, where their authors state that they will rather die than enter the cells and call on others to take action in order to support their general resistance and not to content themselves with mere declarations. It is clear that the message given is not a peaceful one and cannot be seen as a mere criticism of the new prison system. While it is true that the applicants did not personally associate themselves with the views contained in these declarations, they nevertheless provided their writers, who expressed their affiliation to illegal armed groups, with an outlet to stir up violence and hatred. Accordingly, the content of these declarations must be seen as capable of inciting violence in the prisons by instilling an irrational reaction against those who introduced or were in charge of the new incarceration system. In other words, the message which is communicated to the readers is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor who wants to turn their lives into prison cells (see paragraph 8 above). It is to be noted that in a similar case the Court had already expressed its concern about the making of such declarations at a time when serious disturbances had taken place in several prisons between the security forces and detainees, resulting in the deaths and injuries of parties to the conflict (see *Falakaoglu and Saygili*, cited above, § 33). In such a context, the Court considers that there were indeed reasons to fear for violent reactions and thus to be reticent in view of the events that had taken place in the prisons in less than two months after the publication of the impugned declarations (*ibid.*)

29. This being so, the Court cannot accept the applicants’ argument that they should be exonerated from any criminal liability for the content of the declarations on account of the fact that they only published them for commercial reasons. As the owner and editor-in-chief of the newspaper, the applicants were vicariously subject to the “duties and responsibilities” which the newspaper’s editorial and journalistic staff undertakes in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension (see *Sürek* (no. 1), cited above, § 63).

30. Finally, the Court observes that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference. In this connection, it concludes that the heavy penalty imposed on the applicants as the owner and editor-in-chief of

the newspaper could reasonably be regarded as answering a “pressing social need” and that the reasons adduced by the authorities for the applicants’ conviction are “relevant and sufficient”.

31. For these reasons and having regard to the margin of appreciation which national authorities have in such a case, the Court considers that the interference in issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention in the circumstances of this case.

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

32. Having regard to the facts of the case, the submissions of the parties and its finding of a no violation under Article 10 above, the Court considers that it has examined the main legal question raised in the present application. It 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

33. 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.

34. 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). It 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.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the alleged breach of the applicants' right to freedom of expression admissible and the remainder of the application inadmissible;
2. *Holds*, by five votes to two, that there has been no violation of Article 10 of the Convention in respect of the conviction of the applicants;
3. *Holds*, by five votes to two, that there is no need to give a separate ruling on the applicants' remaining complaint under Article 10.

Done in English, and notified in writing on 17 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
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 Gyulumyan and Power is annexed to this judgment.

J.C.M
S.Q.

JOINT DISSENTING OPINION OF JUDGES POWER AND GYULUMYAN

The criminal prosecution of the applicants as owner and editor-in-chief of a daily newspaper, the imposition upon them of a heavy financial penalty and the closure of their newspaper for three days constituted, in our view, a violation of Article 10 of the Convention and we voted in favour of such a finding. Their newspaper published declarations of detainees who called for support and resistance in their campaign against what they regarded as an oppressive and dehumanising prison regime. In their unsuccessful appeal against conviction before the domestic courts, the applicants claimed that they exercised their duty to impart political opinions and that the declarations published did not incite violence or harm national security.

Freedom of the press is a value to be guarded, jealously, in a democratic society. For the flourishing of the common good of that social order, many journalists work in difficult situations and often at great personal risk. Whilst assassinations and disappearances of journalists who impart politically controversial opinion indicate the collapse of democratic order, their criminalisation undermines its very foundations. Given their critical function in the maintenance of democracy, the pre-eminent role of the press as “public watchdog” has been acknowledged, repeatedly, by this Court.¹ Thus, it has held that due to its “chilling effect” upon the profession, there can be no justification whatsoever for the imprisonment of journalists who are alleged to have defamed within the context of a debate on matters of public interest.² In certain cases, the fact alone of a criminal conviction of a journalist, even if minor, can be considered excessive.³

While the “closest scrutiny” of an impugned expression is required to see if it could be integrated within a public interest debate⁴ even a cursory examination of the declarations in this case demonstrates that the matters in question - the nature and conditions of prisoners’ detention - are issues of obvious public concern. The detainees’ “fundamental requests” included the abolition of “F” Type prison cells, the reinstatement of prisoners’ rights, the abrogation of an anti-terrorism law, the abolition of state security courts and the bringing to trial of torturers and perpetrators of massacres. Their grievances bear a remarkable resemblance to matters that come, not infrequently, before this Court. The potential vulnerability of prisoners, as a specific social group, is frequently acknowledged in Strasbourg and without the press one wonders how otherwise their voices might be heard?

1. *Dalban v. Romania* [GC], no. 28114/95, § 49, ECHR 1999-VI; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236.

2. *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 116, ECHR 2004-XI.

3. *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 32, ECHR 2003-XI.

4. *Incal v. Turkey*, 9 June 1998, § 46, *Reports of Judgments and Decisions* 1998-IV.

It appears from the reasoning of the majority, that the problem is not with the prisoners' goals *per se* but rather with "*the wording of the overall message*", namely, their willingness to die for their convictions and their call for support in their resistance. The majority considers that the message conveyed by the newspaper was "*not a peaceful one*" and that it went beyond "*a mere criticism*" of the new prison system (§ 28). Such a consideration is disquieting. 'Watchdogs' are not meant to be peaceful puppies; their function is to bark and to disturb the appearance of peace whenever a menace threatens. A new and, in our view, a dangerous threshold in the protection of free speech has been reached if expression may be suppressed, lawfully, because it is neither "peaceful" nor confined to "mere criticism". Such qualifications are new conditions precedent to the right to exercise such freedom and are not reflected in this Court's case law.

There was nothing peaceful in the "virulent remarks" describing the Turkish government's actions as "terror" and part of a "special war" against "the Kurdish people" in the case of *Incal v Turkey*. Nevertheless, the Court found that such words could not "be taken as incitement to the use of violence, hostility or hatred" (§ 50) and held that the criminal prosecution of the applicant was a disproportionate interference with the right to freedom of expression. By contrast, the majority in this case, without citing, by way of example, one violent word or any call to aggression, finds that the "*overall message*" was not peaceful and that the newspaper provided "*an outlet to stir up violence and hatred*". The declarations were, undoubtedly, marked by a strong sense of passion, resolve, conviction and determination. They were, indeed, a rallying call for support and resistance but their authors (however well or misguided they may have been) did not advocate violence, injury or harm to any person. As such, there was no clear and pressing danger that required such a radical interference as the criminal prosecution of the applicants.

The majority rely upon what they describe as "*a similar case*" in which the Court has already expressed its concern about the making of such declarations "at a time when serious disturbances had taken place in several prisons". The case cited as authority for their finding in this case is distinguishable on its facts, timing and context and on the proportionality of the interference involved. The Court in *Falakaoglu and Saygılı* (cited in § 25 of the judgment) came to its conclusion that there was no violation of Article 10 because the impugned publication was made in the aftermath of what were then recent and serious disturbances in prisons. By contrast, the publication in the instant case took place two months before any such disturbances had occurred. The majority considers that "*there were indeed reasons to fear for violent reactions and thus to be reticent in view of the events that had taken place in the prisons in less than two months after the publication of the impugned declarations*" (§ 28). How, one wonders, were the publishers to know in October 2000 that there were reasons for them "to

be reticent” in view of events that were to take place the following December?

In this regard, it should also be pointed out that the disturbances in question were not caused when the readership of *Yeni Evrensel* descended *en masse* upon the prisons inspired so to do by the rallying call in the published declarations. Rather, the events occurred when members of the security forces entered, simultaneously, into twenty penitential centres in which the hunger strikers were detained and violent clashes erupted between them and the protesting prisoners.

The threshold of the “necessity” test of state interference with freedom of expression is not equivalent to nor does it have the latitude associated with such notions as “tolerable”, “acceptable” or “reasonable”. Necessity implies the existence of a “*pressing social need*” not a “possible” one.⁵ Thus, the fact that social disturbances occur some two months after an article is published, cannot be used to justify radical state interference in a protected Convention right as exercised two months prior to such events.

The majority, through a process of retrospective reasoning, impute a causal connection between a publication in a daily newspaper in October 2000 and subsequent events in prisons the following December. The logic of their position would require the press not just to look over its shoulder to ensure that its publications do not add fuel to flaming fires. They must, in addition, look into the future to try to ascertain whether a fire might some day occur and, if so, whether their publication could be identified as one of a number of matches that may be accused of having caused it! Such a burden places an unworkable restriction upon the freedom of the press and jeopardises the protection of a fundamental value in a democratic society. There is nothing in the case law of this Court to justify the imposition of such a restriction.

Finally, the majority’s conclusion, in our view, is difficult to reconcile with this Court’s finding in *Thoma v Luxembourg*⁶ in which the Court reiterated that punishing a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there were particularly strong reasons for doing so. We find no such reasons in this case.

5. *Lingens v. Austria*, 8 July 1986, §§ 39-40, Series A no. 103; *Sunday Times v. the United Kingdom* (no. 2), 26 November 1991, § 50, Series A no. 217.

6. No. 38432/97, § 62, ECHR 2001-III.