



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

SECOND SECTION

CASE OF TURGAY AND OTHERS v. TURKEY

(Applications nos. 8306/08, 8340/08 and 8366/08)

JUDGMENT

STRASBOURG

15 June 2010

FINAL

15/09/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Turgay and Others v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 25 May 2010,

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

PROCEDURE

1. The case originated in three applications (nos. 8306/08, 8340/08 and 8366/08) 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 twelve Turkish nationals (“the applicants”), whose names appear in the appendix.

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

3. On 8 February 2008 the applicants' representative requested that the respondent Government be notified of the introduction of the applications in accordance with Rule 40 of the Rules of Court and that the cases be given priority under Rule 41. On 3 March 2008 the President of the Second Section granted that priority to the cases.

4. On 10 April 2008 the President of the Second Section decided to give notice of the applications to the Government. It was also decided to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The prosecution of the newspapers

5. At the material time the applicants were the owners, executive directors, editors-in-chief, news directors and journalists of two weekly newspapers published in Turkey: *Yedinci Gün* and *Toplumsal Demokrasi*. The publication of these newspapers was suspended pursuant to section 6(5) of Law no. 3713 (the Prevention of Terrorism Act) by the Istanbul Assize Court on 12 and 5 January 2008, respectively, for a period of one month, on account of various news reports and articles. The impugned publications were mainly deemed to be propaganda in favour of a terrorist organisation, the PKK/KONGRA-GEL¹, and constituted an approval of crimes committed by that organisation and its members.

6. Neither the applicants nor their representative participated in these *ex parte* procedures, and their written objections to the suspension orders were dismissed. Consequently, the orders were executed.

2. The prosecution of the applicants

7. The applicants, Ali Turgay and Hüseyin Aykol, the owner and the editor-in-chief, respectively, of *Yedinci Gün*, were prosecuted under sections 6(2) and 7(2) of Law no. 3713, as well as Articles 215 and 218 of the Criminal Code, for disseminating propaganda in favour of and praising crimes committed by the aforementioned organisation and its members, on account of various articles published in the said newspaper (case no. 2008/30).

8. The applicant, Hüseyin Bektaş, the owner of *Toplumsal Demokrasi*, was similarly prosecuted under sections 6(2) and 7(2) of Law no. 3713 and Article 215 of the Criminal Code (case no. 2008/14).

9. According to the information in the case file, these criminal proceedings are still pending at first instance.

II. RELEVANT DOMESTIC LAW

A. The Constitution

10. Article 28 of the Constitution of Turkey reads as follows:

1. Kurdistan Workers' Party, an illegal organisation.

“The press is free and shall not be censored. The establishment of a publishing company shall not be subject to prior permission or the deposit of a financial guarantee.

The State shall take the necessary measures to ensure freedom of the press and freedom of information.

As regards restrictions on freedom of the press, Articles 26 and 27 of the Constitution are applicable.

Anyone who writes or prints any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which are aimed at inciting offences, riot or insurrection, or which refer to classified State secrets, and anyone who prints or transmits such news or articles to others for the above purposes, shall be held responsible under the law governing these offences. Distribution may be suspended as a preventive measure by the decision of a judge or, in the event that delay is deemed prejudicial, by the competent authority designated by law. The authority suspending distribution shall notify a competent judge of its decision within twenty-four hours. The order suspending distribution shall become null and void unless upheld by a competent judge within forty-eight hours.

No ban shall be placed on the reporting of events except by a judge's decision designed to ensure the proper functioning of the judiciary, within the limits specified by law.

Periodical and non-periodical publications may be seized by the decision of a judge in the event of an ongoing investigation into or prosecution of offences prescribed by law and, in situations where a delay could endanger the indivisible integrity of the State with its territory and nation, national security, public order or public morals, and for the prevention of an offence, by order of the competent authority designated by law. The authority issuing the order to confiscate shall notify a competent judge of its decision within twenty-four hours. The order to confiscate shall become null and void unless upheld by the competent court within forty-eight hours.

The general common provisions shall apply to the seizure and confiscation of periodicals and non-periodicals for the purposes of criminal investigation and prosecution.

Publication of periodicals published in Turkey may be temporarily suspended by order of the courts in the event of a criminal conviction on account of their containing material which undermines the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which is clearly a continuation of a suspended periodical shall be prohibited and shall be seized following a decision by a competent judge.”

B. Law no. 3713

11. The relevant provisions of the Prevention of Terrorism Act (Law no. 3713), amended by Law no. 5532, which entered into force on 18 July 2006, read as follows:

Section 6

“1. It shall be an offence, punishable by a term of imprisonment of one to three years, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's ... identity is divulged, provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

2. It shall be an offence, punishable by a term of imprisonment of one to three years, to print or publish declarations or leaflets emanating from terrorist organisations.

...

4. If any of the offences defined in the paragraphs above are committed through the press or the media, the owners and editors-in-chief of the press and media organs concerned who did not participate in the commission of the offence shall also be liable to a judicial fine equivalent to between a thousand and ten thousand days' imprisonment. However, the maximum limit of this punishment shall be the equivalent of five thousand days for editors-in-chief.

5. Periodicals whose content openly encourages the commission of offences within the framework of the activities of a terrorist organisation, approves of the offences committed by a terrorist organisation or its members or constitutes propaganda in favour of the terrorist organisation may be suspended for a period of fifteen days to one month as a preventive measure by a decision of a judge or, if a delay is detrimental, on an instruction from a public prosecutor. The public prosecutor shall notify the judge of such instruction within twenty-four hours. If the judge does not approve the decision within forty-eight hours, the instruction to suspend publication shall become null and void.”

Section 7(2)

“Any person who disseminates propaganda in favour of a terrorist organisation shall be liable to a term of imprisonment of one to five years. Where this offence is committed through the press or the media, the sentence shall be increased by half. Moreover, the owners and editors-in-chief of the press and media organs concerned who did not participate in the commission of the offence shall also be liable to a judicial fine equivalent to between one thousand and ten thousand days' imprisonment. However, the maximum limit of this punishment shall be the equivalent of five thousand days for editors-in-chief.”

C. Criminal Code

12. The relevant provisions of the Criminal Code (Law no. 5237) read as follows:

Article 39

“(1) A person who abets commission of an offence shall be liable to a term of imprisonment of fifteen to twenty years if the offence is punishable by an aggravated life sentence, and ten to fifteen years where the offence is punishable by a life sentence. Punishment is reduced by half in all other circumstances. However, in the latter case the punishment cannot exceed eight years.

(2) A person is deemed to have abetted commission of an offence in the following circumstances:

(a) Encouragement to commit an offence...”

Article 215

“Any person who approves of an offence committed, or praises a person on account of an offence he or she has committed, shall be liable to a term of imprisonment of up to two years.”

Article 218

“Where one of the offences proscribed by Articles 213-217 is committed through the press or the media, the sentence shall be increased by half.”

D. Case-law of the Constitutional Court

13. On 3 March 2006 the former President of Turkey lodged a case with the Constitutional Court (case no. 2006/121), challenging the validity of section 6(5) of Law no. 3713. It had been argued, *inter alia*, that suspension of the future publication and distribution of a periodical pursuant to section 6(5) was a restriction on the freedom of the press which was not permissible under Article 28 of the Constitution and that, therefore, this section had created an unconstitutional penalty.

In its judgment dated 18 June 2009, published in the Official Gazette of 26 November 2009, the Constitutional Court decided that section 6(5) of Law no. 3713 was compatible with the Constitution (decision no. 2009/90). As regards the suspension of the publication of periodicals as a preventive measure pursuant to section 6(5), the Constitutional Court held as follows:

“In the petition (of the former President of Turkey), it has been maintained that the first paragraph of Article 28 of the Constitution provides that the press is free and shall not be censored. It has also been maintained that the fourth, fifth, sixth and eighth paragraphs mention the measures targeting press and media organs. In the fourth paragraph, “prevention of distribution”, in the fifth paragraph “ban on reporting” with a view to the proper functioning of the judiciary, in the sixth paragraph “seizure” of periodical and non-periodical publications and in the eighth paragraph, “temporary suspension” of periodicals are regulated. It has also been noted that the restrictions on the press and media are provided in the Constitution and cannot be extended by

sanctions provided by legislation. It has therefore been argued that section 6(5) of Law no. 3713 is not in conformity with Article 28 of the Constitution.

...

The acts set out in the paragraph in question are acts that are defined as offences in other laws. In order for the preventive measure in question to be applied, it is not sufficient to commit these offences through the press or the media: the acts must be committed within the context of the activities of a terrorist organisation. Therefore, the measure foreseen should be considered as having the aim of preventing the deliberate use of the press and the media in terrorist activities and ensuring that the press and media organs act with responsibility. The legislature, which has the duty to protect the indivisible unity of the State with its territory and nation, is obliged to take all necessary measures against such situations. The paragraph in question has its roots in such a necessity.

The measure of “prevention of distribution” set out in the fourth paragraph of Article 28 of the Constitution and the measure foreseen by section 6(5) of Law no. 3713 have similarities in terms of their nature and consequences. From this point of view, it can be concluded that the legislature has not enacted a law which provides for a different measure from the measure set out in the fourth paragraph of Article 28.

Moreover, taking into consideration the nature of acts that result in the suspension of the publication of periodicals, the magnitude of damage caused by the commission of those offences through the press and the media, as well as the aim, extent and methods of terror in our country and the facility of the press and media organs to communicate with the masses and the former's influence on society, it has been concluded that the provision in question aims at the continuity of democratic society.

For the aforementioned reasons, the provision in question is not incompatible with Article 28 of the Constitution. Therefore, the request for its annulment should be rejected...”

THE LAW

14. Having regard to the similar subject matter of the applications, the Court finds it appropriate to join them.

I. ADMISSIBILITY

15. The Government submitted that the editors-in-chief, news directors and journalists of *Yedinci Gün* and *Toplumsal Demokrasi* did not have victim status as they had not been directly affected by the decisions to suspend the publication of these newspapers. They maintained that only the owners and the executive directors of these newspapers, namely, the applicants Ali Turgay and Hüseyin Bektaş, could claim to be victims of the alleged violations of the Convention. The Government further argued that

the applicants had failed to exhaust domestic remedies because the criminal proceedings against the applicants Ali Turgay and Hüseyin Bektaş were still pending before the first-instance court.

16. As regards the Government's first objection, the Court notes that it has already examined and rejected similar objections in previous cases (see *Tanrıkulu, Çetin, Kaya and Others v. Turkey* (dec.), nos. 40150/98, 40153/98 and 40160/98, 6 November 2001; *Yıldız and Others v. Turkey* (dec.), no. 60608/00, 26 April 2005; and *Ürper and Others v. Turkey* (nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, § 18, 20 October 2009). It finds no particular circumstances in the instant case which would require it to depart from that jurisprudence. Accordingly, the Court rejects the Government's objection under this head.

17. As for the applicants' alleged failure to exhaust domestic remedies, the Court notes that the applicants' complaints under the Convention solely relate to the assize courts' decisions suspending the publication of the two newspapers, and that the applicants had exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention by filing objections to the various decisions (see *Ürper and Others*, cited above, § 21). Accordingly, the Court rejects the Government's objection.

18. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

II. MERITS

A. Alleged violations of Article 10 of the Convention

19. The applicants alleged under Article 10 of the Convention that the suspension of the publication and distribution of *Yedinci Gün* and *Toplumsal Demokrasi*, which had been based on section 6(5) of Law no. 3713, constituted an unjustified interference with their freedom of expression. They claimed in particular that the banning, for such lengthy periods, of the publication of the newspapers as a whole, whose future content was unknown at the time of the national courts' decisions, amounted to censorship.

20. The Government submitted that the national courts' decisions had pursued several legitimate aims, including the protection of national security, territorial integrity and public safety. Moreover, taking into account the content of the articles in question, the measures taken had been proportionate to the legitimate aims pursued and necessary in a democratic society.

21. The Court notes that it has recently examined an identical complaint and found a violation of Article 10 of the Convention in the case of *Ürper and Others* (cited above, §§ 24-45). In that case, the Court observed at the outset that the prior restraints in question, which are identical to those in the present case, were not imposed on particular types of news reports or articles, but on the future publication of entire newspapers, whose content was unknown at the time of the national court's decisions. The Court considered that both the content of section 6(5) of Law no. 3713 and the judges' decisions stemmed from the hypothesis that the applicants, whose "guilt" had been established without trial in proceedings from which they had been excluded, would recommit the same kind of offences in the future. The Court therefore found that the preventive effect of the suspension orders had entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future, and hinder their professional activities. Noting that less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles, the Court concluded that, by suspending the publication and distribution of the newspapers, albeit for short periods, the domestic courts largely overstepped the narrow margin of appreciation afforded to them and unjustifiably restricted the essential role of the press as a public watchdog in a democratic society. Finally, the Court held that the practice of banning the future publication of entire periodicals on the basis of section 6(5) of Law no. 3713 went beyond any notion of "necessary" restraint in a democratic society and, instead, amounted to censorship (see *Ürper and Others*, cited above, §§ 42-45).

22. The Court further notes that the Constitutional Court of Turkey examined the constitutionality of section 6(5) of Law no. 3713 in its judgment published on 26 November 2009 and found that the provision in question was compatible with Article 28 of the Constitution.

23. In this connection, the Court observes that when holding that the measure provided in section 6(5) of Law no. 3713 was necessary and compatible with the Constitution, the Constitutional Court did not address the legal issues examined by the Court in the case of *Ürper and Others v. Turkey*, where a violation of Article 10 was found on account of the application of section 6(5) by the domestic authorities. In these circumstances, the Court finds no particular circumstances in the instant case which would require it to depart from the conclusions previously drawn in the aforementioned case of *Ürper and Others v. Turkey*.

24. Accordingly, there has been a violation of Article 10 of the Convention.

B. Alleged violations of Articles 6, 7 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention

25. The applicants complained under Article 6 §§ 1 and 3 of the Convention that they had been unable to participate in the proceedings before the Istanbul Assize Court and that the latter had decided to suspend the publication and distribution of their newspapers without obtaining their submissions in defence. They further contended under Article 13 of the Convention that they had not had a domestic remedy by which to challenge the lawfulness of the national court decisions, as their objections to the suspension orders had been dismissed without trial. The applicants also complained under Article 6 § 2 of the Convention that these orders had violated their right to be presumed innocent, since the national courts had held that criminal offences had been committed through the publication of news reports and articles in the newspapers for which they had been responsible. The applicants further submitted under Article 7 of the Convention that the decisions to suspend the publication and distribution of the newspapers amounted to a “penalty” without any legal basis. Lastly, they complained under Article 1 of Protocol No. 1 that the decisions to suspend the publication of *Yedinci Gün* and *Toplumsal Demokrasi* had constituted an unjustified interference with their right to property.

26. The Government contested these allegations.

27. Having regard to the circumstances of the cases and to its finding of a violation of Article 10 of the Convention, the Court considers that it has examined the main legal question raised in the present applications. It concludes therefore that there is no need to make separate rulings in respect of these other complaints (see, *mutatis mutandis*, *Demirel and Others v. Turkey*, no. 75512/01, § 27, 24 July 2007; *Demirel and Ateş v. Turkey* (no. 3), no. 11976/03, § 38, 9 December 2008; and *Ürper and Others*, cited above, § 49).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

1. Damage

(a) Pecuniary damage

28. The applicants claimed 240,000 Turkish liras (TRY) (approximately 118,000 euros (EUR)) in pecuniary damage for the commercial loss which the newspapers had suffered as a result of the suspension decisions. Under the same head, the applicants requested EUR 22,000 for the damage which they had suffered individually. However, they did not produce any documentary evidence in support of these claims.

29. The Government contested these requests, arguing that the purported pecuniary damage had not been duly documented.

30. The Court notes the applicants' failure to submit any documents to substantiate their claims. Accordingly, they must be rejected.

(b) Non-pecuniary damage

31. The applicants claimed EUR 30,000 in total in respect of non-pecuniary damage.

32. The Government contended that this sum was excessive and would lead to unjust enrichment.

33. The Court considers that all the applicants may be deemed to have suffered a certain amount of distress and frustration which cannot be sufficiently compensated by the finding of a violation alone. Taking into account the particular circumstances of the case, equitable considerations and the type of violation found, the Court awards the applicants EUR 1,800 each for non-pecuniary damage.

2. Costs and expenses

34. The applicants also claimed EUR 8,640 for the costs and expenses incurred before the domestic courts and before the Court. In this connection they submitted documentation indicating the time spent by their legal representative on the applications, as well as tables of costs and expenditure.

35. The Government contested this claim.

36. 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 and the above criteria, the Court considers it reasonable to award the applicants, jointly, the sum of EUR 1,000 for their costs before the Court.

3. Default interest

37. 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. *Decides* to join the applications;
2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 10 of the Convention;
4. *Holds* that there is no need to examine separately the complaints under Articles 6, 7 and 13 of the Convention or Article 1 of Protocol No. 1;
5. *Holds*
 - (a) that the respondent State is to pay within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into Turkish liras at the rate applicable on the date of settlement:
 - (i) EUR 1,800 (one thousand eight hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to each of the following applicants:
 - Ali Turgay;
 - Hüseyin Aykol;
 - Hüseyin Bektaş;
 - Turabi Kişin;
 - Salih Sezgi;
 - Fuat Bulut;
 - Memet Ali Çelebi;
 - Zeriman Dağdelen;
 - Ramazan Pekgöz;
 - Cengiz Kapmaz;
 - Nurettin Fırat;
 - Bayram Balcı;
 - (ii) EUR 1,000 (one thousand euros) to the applicants, jointly, in respect of costs and expenses, plus any tax that may be chargeable to them;
 - (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;
6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President

Appendix

File No.	Case Name	Date of lodging	Introduced by
8306/08	TURGAY and AYKOL v. Turkey	8.2.2008	Ali Turgay and Hüseyin Aykol
8340/08	BEKTAŞ v. Turkey	8.2.2008	Hüseyin Bektaş
8366/08	KİŞİN and Others v. Turkey	8.2.2008	Turabi Kişin, Salih Sezgi, Fuat Bulut, Memet Ali Çelebi, Zeriman Dağdelen, Ramazan Pekgöz, Cengiz Kapmaz, Nurettin Fırat and Bayram Balcı