



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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37059/97  
by Ayşenur ZARAKOLU  
against Turkey

The European Court of Human Rights (Third Section), sitting on 5 December 2002 as a Chamber composed of

Mr G. RESS, *President*,  
Mr I. CABRAL BARRETO,  
Mr L. CAFLISCH,  
Mr R. TÜRMEŒ,  
Mr B. ZUPANČIČ,  
Mrs H.S. GREVE,  
Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 20 May 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

## THE FACTS

The applicant, Mrs Ayşenur Zarakolu, who died on 28 January 2002 was a Turkish national and lived in Istanbul. She was represented before the Court by Mr Özcan Kılıç, a lawyer practising in Istanbul.

On 25 April 2002 the Court was informed of Mrs Zarakolu's death and that Mr Ragıp Zarakolu, her widower, wanted the proceedings to continue and wished to participate in them, retaining the applicant's lawyer as his representative.

For practical reasons, Mrs Zarakolu will continue to be called "the applicant", although Mr Zarakolu is now to be regarded as such (see *Dalban v. Romania* [GC], no. 28114/95, § 1, ECHR 1999-VI and see also *Ahmet Sadık v. Greece*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1641, § 3).

### A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant was the owner of a publishing company, *Belge Uluslararası Yayıncılık*, in Istanbul.

In November 1996 the applicant's company published a book entitled *Dersim Tertelesi* (Dersim Uprising), written by Haydar Işık. The book is a novel of 240 pages, telling the story of the public upheavals at the end of the 1930s in Dersim (the Kurdish name for Tunceli).

On 22 January 1997 the principal public prosecutor at the Istanbul State Security Court lodged an application with the court requesting an order for the seizure of the novel.

On 23 January 1997 the 6<sup>th</sup> Chamber of the Istanbul State Security Court, sitting with a single civilian judge, ordered the seizure of the novel in accordance with Article 28 of the Constitution, Article 86 of the Code of Criminal Procedure and Article 2 § 1 of the Press Act no. 5680. The court considered that the novel, at certain pages and taken as a whole, contained separatist propaganda against the integrity of the State.

On 29 January 1997 the applicant filed an objection with the Istanbul State Security Court against its order of 23 January 1997. She pleaded that the novel as a whole, including the pages impugned by the public prosecutor, did not contain any element of separatist propaganda. She further stated that the court's order lacked reasons and merely repeated the request of the public prosecutor. She maintained that in publishing the novel she aimed at enjoying her right to express ideas and impart information to the public. She also contended that the court's order for the seizure of the novel contravened Articles 6, 9 and 10 of the Convention. She finally asked the court to set aside the seizure order of 23 January 1997.

On 6 February 1997 the 1<sup>st</sup> Chamber of the Istanbul State Security Court, sitting with three full members including a military member, dismissed the applicant's objection and upheld the order for the seizure of the novel.

In the meantime, on 25 April 1997 the principal public prosecutor at the Istanbul State Security Court filed an indictment with the court charging the applicant and the author of the novel with disseminating separatist propaganda. The public prosecutor alleged that in the book the Tunceli province was defined as "Kurdistan" and that a distinction was made between Turks and Kurds. He requested the court to punish the applicant in accordance with Article 8 § 3 of Law no. 3713 (Prevention of Terrorism Act) and to order the confiscation of the incriminated novel.

In the proceedings before the 5<sup>th</sup> Chamber of the Istanbul State Security Court the applicant denied the charges against her. She pleaded that the incriminated novel did not contain any separatist propaganda against the integrity of the State.

On 25 September 1997 the Istanbul State Security Court postponed the criminal proceedings against the applicant pursuant to Article 1 § 3 of Law no. 4304 of 14 July 1997. The court also decided, under Article 2 of the same Law, that the criminal proceedings would be set aside provided that the applicant did not intentionally commit any offence in her capacity as an editor within three years of this decision.

On 27 November 1997 the applicant appealed against the Istanbul State Security Court's decision of 25 September 1997.

On 22 March 1999 the 9<sup>th</sup> Chamber of the Court of Cassation dismissed the appeal.

## **B. Relevant domestic law**

### *1. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)*

This Law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code that it describes as acts "of terrorism" or acts "perpetrated for the purposes of terrorism" and to which it applies.

Article 8 provides as follows:

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a re-offender may not be commuted to a fine.

Where the act of propaganda, deemed to be an offence for the purposes of the first paragraph, is committed through the medium of periodicals within the meaning of Article 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine

equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the act of propaganda, deemed to be an offence for the purposes of the first paragraph, is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras ...

..."

*2. Law no. 4304 of 14 August 1997 on the deferment of judgment and of execution of sentences in respect of offences committed by editors before 12 July 1997*

The following provisions are applicable to sentences in respect of offences under the Press Act:

**Article 1**

"The execution of sentences passed on those who were convicted under Article 16 of the Press Act (Law no. 5680) or other laws as editors for offences committed before 12 July 1997 shall be deferred.

The provision in the first paragraph shall also apply to editors who are already serving their sentences.

The institution of criminal proceedings or delivery of final judgments shall be deferred where no proceedings against the editor have yet been brought, or where a preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final."

**Article 2**

"If an editor who has benefited under the provisions of the first paragraph of Article 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence.

...

Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment.

Any conviction as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued.”

### 3. *The Constitution (as in force in 1997)*

Article 28 provides as follows:

“The press is free, and shall not be censored .

...

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

...

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

...”

### 4. *The Code of Criminal Procedure*

Article 86 provides as follows:

“Materials likely to be used as evidence in an investigation, or which are subject to seizure, are kept separately from other materials or secured in another way.

If these materials are in the possession of a person who refuses to relinquish them upon proper demand, they may be forcibly taken.

### 5. *The Code of Criminal Procedure*

Article 343 § 1, concerning references to the Court of Cassation by written order of the Minister of Justice (*Yazılı emir ile bozma* – “reference by written order”), provides as follows:

“Where the Minister of Justice has been informed that a judge or court has delivered a judgment that has become final without coming under the scrutiny of the Court of Cassation, he may issue a formal order to the Principal State Counsel requiring him to ask the Court of Cassation to set aside the judgment concerned

...”

6. *Press Act no. 5680*

Article 2 § 1 provides as follows:

“In cases of conviction for the commission of acts by means of the press against national security or morals...the court may order the closure of the periodical in which the incriminated article was published for a period of three days to one month ...”

## COMPLAINTS

Invoking Article 6 § 1 of the Convention, the applicant alleges that in the proceedings concerning the seizure of the book she did not receive a fair hearing on account of the presence of a military judge on the bench of the Istanbul State Security Court.

Under Article 6 § 2 of the Convention the applicant maintains that the Istanbul State Security Court’s order for the seizure of the book, which was not based on a finding of guilt following fair proceedings, violated her right to be presumed innocent until proved guilty.

She complains under Articles 9 and 10 of the Convention that there has been an interference with her right to freedom of expression by a public authority in that her right to impart information and ideas has been undermined by the Istanbul State Security Court which ordered the seizure of the book and before which subsequent criminal proceedings were instituted against her.

Under Article 13 of the Convention, the applicant complains of a lack of effective remedies in domestic law in respect of the above complaints. She claims, in particular, that she has no remedies at her disposal to challenge the deferment of the criminal proceedings.

The applicant finally invokes Article 14 of the Convention in conjunction with Articles 9 and 10 of the Convention and alleges that the seizure of the novel on account of the use of certain words such as “Kurdish”, “Kurdish Nation” and “Kurdistan” constitutes discrimination on the ground of political opinion.

## THE LAW

The applicant complains of violations of Articles 6, 9, 10, 13 and 14 of the Convention in connection with the seizure of the book and the subsequent criminal proceedings introduced against her for having published the book.

## A. Exhaustion of domestic remedies

The Government submit that the application is inadmissible as the applicant has failed to exhaust domestic remedies within the meaning of Article 35 § 1 the Convention. In this regard, they submit that according to Article 343 of the Code of Criminal Procedure the applicant could have requested the Ministry of Justice to issue a written order to the principal public prosecutor requiring him to ask the Court of Cassation to set aside the judgment concerned.

The applicant maintains that this particular appeal referred to by the Government is an extraordinary remedy which she did not have to exhaust.

The Court notes that the reference by written order (*yazılı emir ile bozma*) provided for in Turkish law is an extraordinary remedy available against judgments given at last instance against which no appeal lies to the Court of Cassation. According to Article 343 of the Code of Criminal Procedure (see above), only principal public prosecutors at the Court of Cassation are empowered to refer a case, but they may do so only on the formal instructions of the Minister of Justice. The remedy in question is therefore not directly accessible to people whose cases have been tried. Consequently, regard being had to the generally recognised rules of international law, it is not necessary for this remedy to have been used for the requirements of Article 35 of the Convention to be held to have been satisfied.

In this context, the Court observes that in another case, the respondent Government themselves have referred to this particular remedy as an extraordinary remedy (*Öztürk v. Turkey* [GC], no. 22479/93, § 42, ECHR 1999-VI).

In the light of the foregoing, the Court concludes that the application cannot be rejected for non-exhaustion of domestic remedies under Article 35 §§ 1 and 4 of the Convention.

## B. Merits

### *1. Complaints under Article 6 of the Convention*

The applicant maintains that her right to a fair hearing guaranteed by Article 6 § 1 of the Convention was breached on account of the presence of a military judge on the bench of the Istanbul State Security Court which ordered the seizure of the book. She further submits that the handing down of the seizure order in the absence of a prior conviction violated her right to be presumed innocent until proved guilty. Relevant parts of Article 6 provide as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.

...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

The Court notes that the parties, despite having been invited by the Court, did not make any comments on the applicability of Article 6 to the seizure proceedings.

The Court observes that the decision to seize copies of the book was a prelude to the laying of criminal charges against the applicant and her prosecution before the State Security Court. The guarantees of Article 6 of the Convention only attach to the determination of her guilt or innocence at her trial and on appeal, and not to the stage when evidence of the alleged offence was seized (see *Gerger v. Turkey* (dec.), no.42436/98,25.6.2000, unreported).

The Court further observes that the purpose of the seizure order was not the conviction or acquittal of the applicant and that the making of the seizure order had no implications for her criminal record. For the Court, these are also relevant considerations for concluding that Article 6 does not apply to the seizure proceedings in the instant case see also (see *Butler v. The United Kingdom* (dec.), no. 41661/98, 27.6.2002, unreported).

The Court finds, therefore, that the decision of the single judge to order the seizure of copies of the book entitled *Dersim Terteleşi* did not involve the determination of a “criminal charge” within the meaning of Article 6 of the Convention.

The Court concludes accordingly that the complaints under Article 6 of the Convention must be considered as being incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 34 § 4 thereof.

## 2. Complaints under Article 9 and 10 of the Convention

The Court observes that in her application to the Commission the applicant complained that her rights under Articles 9 and 10 of the Convention were breached. In her observations in reply, however, she did not submit argument in support of the complaint under Article 9 of the Convention other than making a passing reference to it. The Court considers, in any event, that the essence of the applicant’s complaints concerns the alleged interference with her right to express views and opinions, and therefore it should be considered from the standpoint of Article 10 of the Convention that provides as follows:

“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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.



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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The Government maintain that although the seizure order might have had an adverse effect on the applicant’s economical rights, it cannot be regarded as an interference with the applicant’s rights under Article 9 and 10 of the Convention.

They further submit that the seizure of the book and the criminal proceedings brought against the applicant in her capacity as the publisher of the book could not be regarded as an infringement of her freedom of expression. The applicant is not the author of the book but is a mediator between the author and the public.

The applicant maintains her allegations. She submits in particular that the views expressed in the book cannot be regarded as incitement to violence. In this connection, the applicant points out that this was not contested by the Government. She finally submits that criminal proceedings were brought against her regardless of the fact that she is not the author of the book. These, according to the applicant, constituted an interference with her right to impart or express opinions.

The Court considers, in the light of the parties’ submissions, that this complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

### *3. Complaint under Article 13 of the Convention*

Under Article 13 of the Convention the applicant complains of a lack of effective remedies in domestic law in respect of the above complaints. She claims, in particular, that she has no remedies at her disposal to challenge the deferment of the criminal proceedings. Article 13 provides as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

The Government submit that a remedy within the meaning of Article 13 does not mean that the applicant’s claim must be vindicated and that the applicant must win her case. It merely requires that the applicant must have an opportunity for her claim to be examined by a national authority.

The Court notes at the outset that, to the extent that the applicant complains of a lack of a national remedy in order to challenge the seizure

order, it has already found that the seizure proceedings did not involve the determination of a “criminal charge” within the meaning of Article 6 of the Convention.

In so far as the applicant complains that she had no effective remedy to challenge the Istanbul State Security Court’s decision of 25 September 1997 postponing the criminal proceedings against her, the Court observes that the applicant was in fact able to appeal, albeit unsuccessfully, against this decision. In this connection, the Court observes that the word “remedy” within the meaning of Article 13 does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint (see, *mutadis mutandis*, *Bensaid v. the United Kingdom*, no. 44599/98 § 56, ECHR 2001-I; see also *Said v. The Netherlands* (dec.), no. 2345/02, 17.9.2002).

In the light of the foregoing, the Court finds that no issues arise under Article 13 of the Convention. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

#### *4. Complaint under Article 14 of the Convention*

The applicant alleges that the seizure of the novel on account of the use of certain words such as “Kurdish”, “Kurdish Nation” and “Kurdistan” constitutes discrimination on the ground of political opinion within the meaning of Article 14 of the Convention which provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The Government reject the allegation and submit that the circumstances in which books can be seized are set out in relevant domestic legislation.

They further submit, referring to the Court’s finding in the case of *Observer and Guardian v. The United Kingdom* (judgment of 26 November 1991, Series A no.216, p. 35, § 73), that Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations.

The applicant maintains her allegation and submits that she was punished on account of having published a book in which opinions incompatible with the State’s official ideology were expressed.

The Court considers, in the light of the parties’ submissions, that this complaint also raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

*Declares* admissible, without prejudging the merits, the applicant's complaints concerning the alleged interference with her freedom of expression and the alleged discrimination in the enjoyment of that right on account of her political opinion;

*Declares* the remainder of the application inadmissible.

Vincent BERGER  
Registrar

Georg RESS  
President