[TRANSLATION-EXTRACTS]

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THE FACTS

The applicant, Mr Müslüm Gündüz, is a Turkish national who was born in 1941 and lives in Elazığ. He was represented before the Court by Mr A. Çiftçi, a lawyer practising in Ankara.

A. The circumstances of the case

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

A report about the applicant, the leader of Tarikat Aczmendi (a community describing itself as an Islamic sect), entitled "They came with bombs, they will leave with bombs" ("*Bombayla geldiler, bombayla gidecekler*") was published in the 17 and 24 June 1994 issues of *Haftalık Taraf* ("Weekly Viewpoint"), a weekly newspaper with radical Islamic leanings.

On 9 November 1994 the public prosecutor at the Fatih Criminal Court charged the applicant with incitement to commit an offence, within the meaning of Article 311 § 2 of the Criminal Code, and with insulting the memory of Atatürk, under Law no. 5816, which protects the memory of Atatürk.

In a judgment of 19 January 1998, the Criminal Court acquitted the applicant of insulting the memory of Atatürk, holding that his comments on Kemalism in the report in question amounted to criticism that could not be treated as an insult to the memory of Atatürk.

However, it sentenced him to four years' imprisonment for incitement to commit an offence. In support of that decision, it cited the following comments by the applicant that had appeared in the report:

> "These people [moderate Islamic intellectuals] have no strength left ... Now they have come up with I.N. [an Islamic intellectual known for his moderate views]... Allah has blocked their water supply ... Only a fraction of Muslims, among those not engaged in the struggle, regard I.N. as someone important ... Now their teeth and nails have been ripped out, their hair has fallen out, they have been dethroned. They are still trying, but in vain, to preserve their greatness and, in doing so, provide a rather comic image of a monster ... like a hollow statue ... which, as soon as it is touched or set in motion (in the event of an attack), will show that it no longer has the strength to do anything ... Indeed, this has already been seen ... All that is needed now is for one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet to show just how empty they are. They no longer have anything else to sustain them. There is nothing else left ..."

The court held that the applicant's statement "All that is needed now is for one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet to show just how empty they are ... There is nothing else left ..." in the account of his opinions about I.N. amounted to public incitement to commit an offence. It considered that in the instant case the right to impart information and to engage in criticism could not be relied on and that publication of the statements in question had not served any public interest. In conclusion, it held that the legal rules governing the exercise of the right to impart information had not been complied with.

The applicant, submitting that his conviction had infringed his freedom of thought and expression, appealed on points of law on 24 April 1998.

On 29 December 1998 the Court of Cassation dismissed his appeal and upheld the judgment at first instance.

In the meantime, on 20 May 1997, the Istanbul National Security Court had sentenced the applicant to two years' imprisonment and a fine of 520,000 Turkish liras, holding that the comments made by him in the report in question (reference was made to other passages in the report, in which he had asserted that secularists and Kemalists were infidels and enemies of Islam and should do penance to save their lives) amounted to incitement to religious hatred. That decision was upheld by the Court of Cassation on 4 February 1998.

B. Relevant domestic law

Article 311 § 2 of the Criminal Code provides:

> "Public incitement to commit an offence
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> Anyone who publicly incites another to commit an offence shall be liable:
>
> (1) ...
>
> (2) to a penalty of between three months and three years' imprisonment, depending on the nature of the offence and the sentence it carries, whether long-term imprisonment or a shorter custodial sentence ...
>
> Where incitement to commit an offence is done by means of mass communication, of whatever type – tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled ..."

Under the criminal law, while the ordinary criminal courts have jurisdiction in cases concerning public incitement to commit an offence, within the meaning of Article 311 of the Criminal Code, only the national

security courts have jurisdiction to try the offences referred to in Article 312 of the Criminal Code, which prohibits incitement to religious hatred.

The relevant part of section 19(1) of the Execution of Sentences Act (Law no. 647 of 13 July 1965) provides:

> "... persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct ..."

COMPLAINTS

1. The applicant considered that his conviction on 19 January 1998 by the Fatih Criminal Court on account of statements made during an interview reported in the press had infringed his right to freedom of religion and freedom of expression under Articles 9 and 10 of the Convention, taken separately or in conjunction with Article 14.

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THE LAW

1. The applicant submitted, firstly, that his conviction on 19 January 1998 by the Fatih Criminal Court on account of statements made during an interview reported in the press had infringed his right to freedom of religion and to freedom of expression under Articles 9 and 10 of the Convention, taken separately or in conjunction with Article 14.

The Court, which cannot see any grounds for a separate examination of the complaints under Articles 9 and 14 of the Convention, will examine the complaint under Article 10, the relevant parts of which provide:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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 Court considers that the applicant's conviction amounted to "interference" with his freedom of expression. Such interference will constitute a breach of Article 10 unless it was "prescribed by law", pursued

one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" in order to achieve the aim or aims in question.

The Court observes that the impugned measure was "prescribed by law", having been based on Article 311 § 2 of the Criminal Code. In addition, the interference pursued at least one of the legitimate aims referred to in Article 10 § 2, namely the prevention of crime.

It remains to be determined whether the measure was "necessary in a democratic society". In this connection, the Court reiterates the essential role played by the press in such a society (see *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 500, § 39, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Although its duty is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, it must not overstep certain bounds, in particular in respect of the reputation and rights of others (see *Thoma v. Luxembourg*, no. 38432/97, § 45, ECHR 2001-III; *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31; and *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 37). Although journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38), it is subject to the proviso that the journalists in question are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see Bladet Tromsø *and Stensaas*, cited above, § 65, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I). However, where the remarks in question incite others to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for interference with freedom of expression (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV).

In the instant case, the Court emphasises the content and tone of the applicant's comments, which were intended to stigmatise "moderate Islamic intellectuals", particularly in the following passage: "their ... nails have been ripped out, their hair has fallen out, they have been dethroned." The applicant also stated: "All that is needed now is for one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet to show just how empty they are."

Admittedly, such comments could have been construed as metaphor, but they could also have had another meaning. It should be noted here that in the report in issue the applicant gave the name of one of the persons he was alluding to, I.N. As this person was a writer enjoying a certain amount of fame, he was easily recognisable by the general public and, following publication of the article, was therefore indisputably exposed to a significant

risk of physical violence. In this context, the Court considers that the reasons given by the authorities for the applicant's conviction, with their emphasis on the danger that I.N. faced, are both relevant and sufficient to justify the impugned interference with the applicant's right to freedom of expression. The Court reiterates that the mere fact that "information" or "ideas" may offend, shock or disturb does not suffice to justify such interference, since what is in issue in the instant case is hate speech glorifying violence (see *Sürek (no. 1)*, cited above, § 62).

The Court must also stress that statements which may be held to amount to hate speech or to glorification of or incitement to violence, such as those made in the instant case, cannot be regarded as compatible with the notion of tolerance and run counter to the fundamental values of justice and peace set forth in the Preamble to the Convention. Admittedly, the Court acknowledges the severity of the applicant's sentence, which was increased because the offence had been committed by means of mass communication. It considers, however, that provision for deterrent penalties in domestic law may be necessary where conduct reaches the level observed in the instant case and becomes intolerable in that it negates the founding principles of a pluralist democracy. Furthermore, having regard, in particular, to the fact that, pursuant to section 19(1) of the Execution of Sentences Act (Law no. 647), the applicant will automatically be entitled to parole after serving half of his sentence, the Court considers that the severity of the penalty imposed in the instant case cannot be regarded as disproportionate to the legitimate aim pursued, namely the prevention of public incitement to commit offences.

The interference in question was therefore compatible with Article 10 § 2 of the Convention. It follows that this complaint must be dismissed as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

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For these reasons, the Court unanimously

Declares the application inadmissible.