EUROPEAN COURT OF HUMAN RIGHTS

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GRAND CHAMBER JUDGMENT
DEMİR AND BAYKARA v. TURKEY

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment[1] in the case of ***Demir and Baykara v. Turkey*** (application no. 34503/97).

The Court held unanimously that:

- there had been a **violation of Article 11** (freedom of assembly and association) of the European Convention on Human Rights on account of interference with the exercise by the applicants, municipal civil servants, of their right to form trade unions; and,
- there had been a further **violation of Article 11** of the Convention on account of the annulment, with retrospective effect, of a collective agreement between the trade union Tüm Bel Sen and the employing authority that had been the result of collective bargaining.

Under Article 41 (just satisfaction), the Court awarded Ms Vicdan Baykara, legal representative of the trade union Tüm Bel Sen, in respect of non-pecuniary damage, 20,000 euros (EUR) to be transferred by her to the union, and Mr Kemal Demir EUR 500 for all heads of damage combined. (The judgment is available in English and French.)

1. Principal facts

Kemal Demir and Vicdan Baykara are Turkish nationals who were born in 1951 and 1958 respectively. Mr Demir lives in Gaziantep and Ms Baykara in Istanbul. At the relevant time, Ms Baykara was the president of the Tüm Bel Sen trade union and Mr Demir one of its members.

The case concerned the failure by the Court of Cassation in 1995 to recognise the applicants' right, as municipal civil servants, to form trade unions, and the annulment of a collective agreement between their union and the employing authority.

The trade union Tüm Bel Sen was founded in 1990 by civil servants from various municipalities, its registered objective being to promote democratic trade unionism and thereby assist its members in their aspirations and claims.

In 1993 the trade union entered into a collective agreement with Gaziantep Municipal Council regulating all aspects of the working conditions of the Council's employees, including salaries, benefits and welfare services. The trade union, considering that the Council had failed to fulfil certain of its obligations – in particular financial – under the agreement, brought proceedings against it in the Turkish civil courts. It won its case in the Gaziantep District Court, which found in particular that although there were no express

[1] Grand Chamber judgments are final (Article 44 of the Convention).

statutory provisions recognising a right for trade unions formed by civil servants to enter into collective agreements, this lacuna had to be filled by reference to international treaties such as the conventions of the International Labour Organisation (ILO) which had already been ratified by Turkey and which, by virtue of the Constitution, were directly applicable in domestic law.

However, on 6 December 1995 the Court of Cassation ruled that in the absence of specific legislation, the freedom to join a trade union and to bargain collectively could not be exercised. It indicated that, at the time the union was founded, the Turkish legislation in force did not permit civil servants to form trade unions. It concluded that Tüm Bel Sen had never enjoyed legal personality, since its foundation, and therefore did not have the capacity to take or defend court proceedings.

Following an audit of the Gaziantep Municipal Council's accounts by the Audit Court, the members of Tüm Bel Sen were obliged to reimburse the additional income they had received as a result of the defunct collective agreement.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 8 October 1996. It was transferred to the Court on 1 November 1998 and declared partly admissible on 23 September 2004. In its Chamber judgment of 21 November 2006, the Court held unanimously that there had been a violation of Article 11 of the Convention.

On 21 February 2007 the Government requested that the case be referred to the Grand Chamber under Article 43[1] of the Convention and on 23 May 2007 the panel of the Grand Chamber accepted that request.

A Grand Chamber public hearing took place in the Human Rights Building, Strasbourg, on 16 January 2008. Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Christos **Rozakis** (Greek), ***President***,
Nicolas **Bratza** (British),
Françoise **Tulkens** (Belgian),
Josep **Casadevall** (Andorran),
Giovanni **Bonello** (Maltese),
Rıza **Türmen** (Turkish),
Kristaq **Traja** (Albanian)
Boštjan M. **Zupančič** (Slovenian),
Vladimiro **Zagrebelsky** (Italian),

[1] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

Stanislav **Pavlovschi** (Moldovan),
Lech **Garlicki** (Polish),
Alvina **Gyulumyan** (Armenian),
Ljiljana **Mijović** (citizen of Bosnia and Herzegovina),
Dean **Spielmann** (Luxemburger),
Ján **Šikuta** (Slovak),
Mark **Villiger** (Swiss)[1],
Päivi **Hirvelä** (Finnish), ***judges***,

and also Michael **O'Boyle**, ***Deputy Registrar***.

3. Summary of the judgment[2]

Complaints

The applicants complained under Articles 11 (freedom of assembly and association) and 14 (prohibition of discrimination) that the Turkish courts had denied them the right to form a trade union and to enter into collective agreements.

Decision of the Court

Article 11

The applicants' right, as municipal civil servants, to form trade unions

The Court considered that the restrictions imposed on the three groups mentioned in Article 11, namely members of the armed forces, of the police or of the administration of the State, were to be construed strictly and therefore confined to the "exercise" of the rights in question. Such restrictions could not impair the very essence of the right to organise. It was moreover incumbent on the State concerned to show the legitimacy of any restrictions. In addition, municipal civil servants, who are not engaged in the administration of the State as such, could not in principle be treated as "members of the administration of the State" and, accordingly, be subjected on that basis to a limitation of their right to organise and to form trade unions.

The Court observed that those considerations found support in the majority of the relevant international instruments and in the practice of European States. The Court concluded that "members of the administration of the State" could not be excluded from the scope of Article 11. At most the national authorities were entitled to impose "lawful restrictions" on them, in accordance with Article 11 § 2. In the present case, however, the Government had failed to show how the nature of the duties performed by the applicants required them to be regarded as "members of the administration of the State" subject to such restrictions. The applicants could therefore legitimately rely on Article 11.

In the Court's view it had not been shown that the absolute prohibition on forming trade unions imposed on civil servants by Turkish law, as it applied at the relevant time, met a pressing social need. At that time, the right of civil servants to form and join trade unions was

[1] Judge elected in respect of Liechtenstein.
[2] This summary by the Registry does not bind the Court.

already recognised by instruments of international law, both universal and regional. Their right of association was also generally recognised in all member States of the Council of Europe. ILO Convention No. 87, the fundamental text securing, internationally, the right of public officials to form trade unions, was already, by virtue of the Turkish Constitution, directly applicable in domestic law, and the State had confirmed by its subsequent practice (amending of Constitution and judicial decisions) its willingness to recognise the right to organise of civil servants. Turkey had also, in 2000, signed the two United Nations instruments recognising this right.

The Court observed, however, that in spite of these developments in international law, the Turkish authorities had not been able, at the relevant time, to secure to the applicants the right to form a trade union, mainly for two reasons. First, the Turkish legislature, after the ratification in 1993 of ILO Convention No. 87 by Turkey, did not enact legislation to govern the practical application of that right until 2001. Secondly, during the transitional period, the Court of Cassation refused to follow the solution proposed by the Gaziantep District Court, which had been guided by developments in international law, and adopted a restrictive and formalistic interpretation of the domestic legislation concerning the forming of legal entities.

The Court thus considered that the combined effect of the restrictive interpretation by the Court of Cassation and the legislature's inactivity between 1993 and 2001 had prevented the Turkish Government from fulfilling its obligation to secure to the applicants the enjoyment of their trade-union rights and that this was not "necessary in a democratic society". Accordingly, there had been a violation of Article 11 on account of the failure to recognise the applicants' right, as municipal civil servants, to form a trade union.

Annulment of a collective agreement which had been applied for the previous two years

The Court pointed out that the development of its case-law as to the substance of the right of association enshrined in Article 11 was marked by two guiding principles: firstly, the Court took into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, allowing for its margin of appreciation; secondly, the Court did not accept restrictions that affected the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles were not contradictory but were correlated. This correlation implied that the Contracting State in question, whilst in principle being free to decide what measures it wished to take in order to ensure compliance with Article 11, was under an obligation to take account of the elements regarded as essential by the Court's case-law.

The Court explained that, from the case-law as it stood, the following essential elements of the right of association could be established: the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it had to say on behalf of its members. This list was not finite. On the contrary, it was subject to evolution depending on particular developments in labour relations. Limitations to rights thus had to be construed restrictively, in a manner which gave practical and effective protection to human rights.

Concerning the right to bargain collectively, the Court, reconsidering its case-law, found, having regard to developments in labour law, both international and national, and to the practice of Contracting States in this area, that the right to bargain collectively with an employer had, in principle, become one of the essential elements of the "right to form and to

join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remained free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State", a category to which the applicants in the present case did not, however, belong.

The Court considered that the trade union Tüm Bel Sen had, already at the relevant time, enjoyed the right to engage in collective bargaining with the employing authority. This right constituted one of the inherent elements in the right to engage in trade-union activities, as secured to that union by Article 11 of the Convention. The collective bargaining and the resulting collective agreement, which for a period of two years had governed all labour relations within Gaziantep Municipal Council except for certain financial matters, had constituted, for the trade union concerned, an essential means to promote and secure the interests of its members. The absence of the legislation necessary to give effect to the provisions of the international labour conventions already ratified by Turkey, and the Court of Cassation's judgment of 6 December 1995 based on that absence, with the resulting *de facto* retroactive annulment of the collective agreement, constituted interference with the applicants' trade-union freedom.

In the Court's view, at the relevant time a number of elements showed that the refusal to accept that the applicants, as municipal civil servants, enjoyed the right to bargain collectively and thus to persuade the authority to enter into a collective agreement, had not corresponded to a "pressing social need".

The right for civil servants to be able, in principle, to bargain collectively, was recognised by international legal instruments, both universal and regional, and by a majority of member States of the Council of Europe. In addition, Turkey had ratified ILO Convention No. 98, the principal instrument protecting, internationally, the right for workers to bargain collectively and enter into collective agreements – a right that was applicable to the applicants' trade union.

The Court concluded that the annulment of the collective agreement was not "necessary in a democratic society" and that there had therefore been a violation of Article 11 on that point also, in respect of both the applicants' trade union and the applicants themselves.

Article 14

In view of its findings under Article 11, the Court did not consider it necessary to examine this complaint separately.

Judge Spielmann expressed a concurring opinion joined by Judges Bratza, Casadevall and Villiger. Judge Zagrebelsky expressed a separate opinion.

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The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

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The European Court of Human Rights *was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.*