AS TO THE ADMISSIBILITY OF

Application No. 25068/94
by Selami INCE
against Turkey

The European Commission of Human Rights sitting in private on 14 October 1996, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 20 August 1994 by Selami ince against Turkey and registered on 2 September 1994 under file No. 25068/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 20 February 1995 to communicate the application ;

- the observations submitted by the respondent Government on 11 August 1995 and the observations in reply submitted by the applicant on 21 March 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen born in 1966 and resident in Ankara, is a journalist. He is represented before the Commission by Mr. Senal Sarihan, a lawyer practising in Ankara.

A. Particular circumstances of the case

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

In its January 1992 edition "Demokratik Muhalefet" (Democratic Opposition), a review published in istanbul, published an interview which the applicant had made with the Turkish sociologist, ismail Besikçi.

In an indictment dated 23 March 1992, the Public Prosecutor at the istanbul State Security Court charged the applicant, on the basis of this interview, with disseminating propaganda against the indivisibility of the State. The charges were brought under Article 8 of the Anti-Terror Law.

In the proceedings before the State Security Court, the applicant denied the charges. He pleaded that the published interview was a transcript of ismail Besikçi's remarks. He argued that the publication of an interview could not constitute an offence. He maintained that similar remarks were also being made by the highest authorities in Turkey.

In its judgment dated 12 August 1993, the court found the applicant guilty under Article 8 of the Anti-Terror Law. The applicant was first sentenced to two years'imprisonment and a fine of 50,000,000 Turkish lira. The court, taking into consideration the applicant's good conduct during the trial, reduced his sentence to one year and eight months' imprisonment and a fine of 41,666,666 Turkish lira.

The Court relied on certain extracts from the published declarations of ismail Besikçi. It held, inter alia, that such sentences as the following amounted to propaganda against the indivisibility of the State: "... Now that there is an armed resistance in Kurdistan, the State authorities recognise Kurdish reality...no armed resistance by the Turkish forces could stop the spread and progress of the PKK... the ideology and activities of the PKK could change the persistent official policy of the State... the progress explained above has been due to the armed struggle of the PKK for nearly 8 years... what is illegal in Kurdistan, the guerilla force or the special squad of the Turkish armed forces?... Kurds are dying for their nation, what are the Turks dying for? What are they doing in Kurdistan... the Turkish State has evacuated certain areas called Botan (the south-eastern part of Turkey), here the Kurds are completely in control... this means the beginning of the formation of an independent state... the Kurds, especially the PKK, will become more active on both Turkish and Kurdish societies ...consciousness of nationalism and independence will develop among the Kurdish people...".

The applicant appealed against this judgment.

In a decision of 1 February 1994, pronounced on 9 February 1994 in the applicant's absence, the Court of Cassation dismissed the appeal. It upheld the cogency of the State Security Court's assessment of the evidence and its reasoning in rejecting the applicant's defence. The applicant received this judgment on 21 February 1994.

After the amendments made to the Anti-Terror Law by Law No. 4126 of 27 October 1995, the istanbul State Security Court re-examined the applicant's case. On 15 December 1995 the Court sentenced the applicant to the same sentence as before.

B. Relevant domestic law

Article 8 of the Anti-Terror Law No. 3713 of 12 April 1991 (before the amendments of 27 October 1995)

<Translation>

"No one shall, by any means or with any intention or idea, make written and oral propaganda or hold assemblies, demonstrations or manifestations against the indivisible integrity of the State of the Turkish Republic with its land and nation. Those carrying out such an activity shall be sentenced to imprisonment between two and five years and a fine between 50 and 100 million Turkish lira."

Article 8 paragraph 1 of the Anti-Terror Law as amended by Law No. 4126 of 27 October 1995

<Translation>

"No one shall make written and oral propaganda or hold assemblies, demonstratitons and manifestations against the indivisible integrity of the State of the Turkish Republic with its land and nation. Those carrying out such an activity shall be sentenced to imprisonment between one and three years and a fine between 100 and 300 million Turkish lira. In case of re-occurrence of this offence, sentences shall not be commuted to fines."

C. Extracts from the relevant interview

The following is an English translation of extracts from the relevant interview constituting the grounds for the domestic court rulings:

"To what extent shall Demirel accept the "Kurdish Reality"?

... Now that there is an armed resistance in Kurdistan, the State authorities recognise Kurdish reality...no armed resistance by the Turkish forces could stop the spread and progress of the PKK... the ideology and activities of the PKK could change the persistent official policy of the State...

How will the State shape its new official policy on Kurdistan? Which aspects of the official ideology will be changed, and how will they be changed? What effects may this have on the daily lives of the Kurdish people?

In Turkey, the Government and the State are two very different things. The State works with appointed institutions and bodies which are not elected bodies. It is those institutions and bodies which represent the power of the State. The Government, that is to say, political power, carries very little weight against the power of the State. From that point of view, the power of the State can very often cause Governments to deviate from their function. Official ideology can be changed only in the long term. And the forces which can change it are non-governmental political and societal forces. Changing it is the challenge of those forces. The essence of the ideas and action of the PKK, for example, is capable of changing the official ideology, diminish the weight carried by the bodies which have been established on the political scene in Turkey, and increase the weight carried by the parliaments elected by the people. In my opinion, the influence of the Kurds and in particular of the PKK, will become more effective. The influence of the PKK in both Kurdish and Turkish society will spread and will deepen. And, as that influence grows, more serious steps will be taken in Government

policy towards recognising the "Kurdish reality". The power of the State will obviously obstruct the Government in that process and will try to distort certain ideas and policies. And it is manifest that the Government will be able to survive as long as it can resist the power of the State and control the appointed institutions and bodies, i.e. as long as it has real power.

These changes will be reflected in the daily lives of the Kurds. Investigations and research will develop in fields such as the Kurdish language, Kurdish history and Kurdish folklore. Kurdish culture will be revived. The specificity of being a Kurdish society will be emphasised more amongst the Kurdish masses. National awareness and desire for autonomy will become stronger and will spread further. The idea and feeling of acquiring independence will develop.

It is now observed that Kurds who until now would never have said "I am Kurdish, and I am engaging in politics for my present life and for my future" are now clearly beginning to "get into politics for their own interests" throughout Kurdistan and Turkey. What sort of developments have brought about this situation? Do Kurds need a political subject in the legal sphere? If so, what form should it take?

Without any doubt the most important cause of these developments has been the armed combat which the PKK has been waging for almost eight years. The guerilla warfare has brought about major societal and political changes in traditional Kurdish society. Traditional values are in turmoil. There has been very widespread support amongst the people for Kurdish guerilla fighters ever since 15 August 1984. National awareness is now growing in Kurdish society, and this process is spreading rapidly. And we see that within this process the political establishment has been used for Kurdish interests, for the move towards autonomy and independence. Kurds who until now have always engaged in politics for others and in order to serve other nations have now begun to engage in politics in order to serve the Kurdish people. Healthy national awareness is now developing in response to Turkish racism and colonialism. It would no doubt be oversimplifying to say that all of this began after the outbreak of Kurdish guerilla warfare on 15 August. This process has roots that go further back into the past. But what has been decisive is the new process launched by the PKK. What is illegal in Kurdistan, the guerilla force or the special squad of the Turkish armed forces? Kurds are dying for their nation, what are the Turks dying for? What are they doing in Kurdistan? The Turkish State have evacuated certain areas called Botan (the south-eastern part of Turkey), here the Kurds are completely in control. This means the beginning of the formation of an independent State."

COMPLAINTS

The applicant complains of violations of Articles 9, 10 and 7 of the Convention.

As to Articles 9 and 10 of the Convention the applicant complains that his conviction for publishing his interview with the Turkish sociologist ismail Besikçi in a review constituted an unjustified interference with his freedom of thought and freedom of expression, in particular his right to receive and impart information and ideas.

As to Article 7 of the Convention the applicant complains that he was convicted on the basis of an act which did not constitute a criminal offence under national or international law at the time it was committed. He states that offences under the Anti-Terror Law should have a direct link with the fight against terrorism. He asserts that propaganda cannot therefore constitute an offence under Article 8 of

the Anti-Terror Law unless it incites people to terrorism. He points out that the publication of the interview for which he was convicted did not incite people to terrorism and, therefore, could not foreseeably have been against the law. The applicant also complains that the provisions of the Article in question were unclear and could not have enabled him to distinguish between permissible and prohibited behaviour. Thus, he asserts that his conviction had no legal basis.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 August 1994 and registered on 2 September 1994.

On 20 February 1995 the Commission decided to communicate the application, under Articles 10 and 7 of the Convention, to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's observations were submitted on 11 August 1995, after an extension of the time-limit fixed for that purpose.

On 4 December 1995 the Government submitted information concerning the amendments made to the Anti-Terror Law (Law No. 3713) and the developments in the cases of persons convicted and sentenced under Article 8 of the said Law. The applicant replied on 21 March 1996.

THE LAW

The applicant alleges that his conviction for publishing an interview with the Turkish sociologist in a review constitutes an unjustified interference with his freedom of thought and freedom of expression, in particular his right to receive and impart ideas and information. He also complains that his conviction was based on legal principles which had not existed, or at least had not been defined with sufficient clarity at the time of the commission of the offence. In this context he invokes Articles 7, 9 and 10 (Art. 7, 9, 10) of the Convention.

Exhaustion of domestic remedies

The Government first argue that at no stage in the domestic proceedings did the applicant invoke the relevant provisions of the Convention and that therefore he has failed to duly exhaust domestic remedies.

The applicant contests this argument and claims that he has raised in the domestic proceedings the substance of all complaints made before the Commission.

The Commission refers to its established case-law to the effect that the person who has raised in substance before the highest competent national authority the complaint he makes before the Commission has exhausted domestic remedies. Even where the Convention is directly applicable in a State's domestic law (as is the case in Turkey), the person concerned may also rely before the domestic courts on "other arguments to the same effect"(No. 7367/76, Dec. 10.3.77, D.R. 8 pp. 185, No. 11425/85 Dec. 5.3.85, D.R. 53 pp. 76). In this respect the Commission notes that in the present case the applicant asserted before the Court of Cassation that his conviction for criticising the oppression of the Kurdish people constituted a serious threat to his freedom of expression and that the imposition of a prison sentence was unlawful.

Consequently, the Commission finds that the requirement as to the exhaustion of domestic remedies has been satisfied and that the application cannot be rejected on the basis of Articles 26 and 27 para.

3 (Art. 26, 27-3) of the Convention.

Six-month time-limit

Secondly the respondent Government object that the applicant failed to observe the six-month rule under Article 26 (Art. 26) of the Convention. They state that the period in question expired on 9 August 1994 as the Court of Casation pronounced its decision on 9 February 1994. The Government submit that the application was received by the Commission on 20 August 1994, which is not within the six-month period.

The applicant contests this argument. He states that the Court of Cassation pronounced its decision on 9 February 1994 and the decision was served upon him on 21 February 1994. He maintains that he has therefore observed the six-month rule.

The Commission recalls that the six-month time-limit is respected when an application is introduced not more than six months after the applicant has become aware of the final decision within the meaning of Article 26 (Art. 26) of the Convention (No. 10107/82, Dec. 12.7.84, D.R. 38 p. 90).

In the present case, the Commission notes that the Court of Cassation's decision was served upon the applicant on 21 February 1994. The first communication to the Commission indicating all the details with regard to the facts and the complaints of the present application was made by the applicant in his first letter of 20 August 1994, that is, less than six months later.

It follows that the applicant's complaints must be considered as having been introduced within the six-month time-limit imposed by Article 26 (Art. 26) of the Convention.

As to the substance of the applicant's complaints

The applicant alleges that his conviction for publishing an interview with the Turkish sociologist in a review constitutes an unjustified interference with his freedom of thought and freedom of expression, in particular his right to receive and impart ideas and information.

Thus formulated, the applicant's complaint is in fact directed against an alleged infringement of his freedom of expression. The Commission has examined this complaint under Article 10 (Art. 10) of the Convention which 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. ...
>
> 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 applicant also complains on the basis of the same facts of a breach of Article 7 (Art. 7) of the Convention.

The Commission recalls that in the particular case of restrictions on the freedom of expression taking the form of criminal

sanctions, Article 7 (Art. 7) must be taken into account in addition to the more general requirement of lawfulness laid down in Article 10 para. 2 (Art. 10-2) (No. 8710/79, Dec. 7.05.1982, D.R 28 p. 77).

Therefore it has examined the complaint together with Article 7 (Art. 7) of the Convention which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Government maintain that the interference with the applicant's rights under Article 10 (Art. 10) of the Convention was prescribed by law, namely by Article 8 of the Anti-Terror Law. They state that the applicant published an interview in which such sentences as "...the Kurds, especially the PKK, will become more active on both Turkish and Kurdish societies ... consciousness of nationalism and independence will develop among the Kurdish people ..." amounted to propaganda against the indivisibility of the State. They consider that therefore the domestic courts interpreted the law reasonably.

The Government also maintain that the applicant's conviction was part of the campaign to prevent terrorism carried out by illegal organisations, and consequently served to protect territorial integrity and national security. They submit that it is generally accepted, in comparative and international law on terrorism, that restrictions on Convention rights will be deemed necessary in a democratic society threatened by terrorist violence, as being proportionate to the aim of protecting public order.

As to the necessity of the measure in a democratic society, the respondent Government state that terrorism strikes at the heart of democracy, the fundamental rights which that concept enshrines and the judicial and political systems. They assert that the interview in question was based on the glorification of the activities of the PKK, an illegal terrorist organisation for the establishment of an independent Kurdish State against the Turkish State. They state that the freedom of expression constitutes one of the essential foundations of a democratic society. However, in a situation where politically-motivated violence poses a constant threat to the lives and security of the population and where advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspirators seeking to overthrow the democratic order which guarantees this freedom and other human rights.

In this respect the Government claim that the decisions of the Istanbul State Security Court and the Court of Cassation did not exceed the margin of appreciation conferred on States by the Convention.

Lastly, the Government maintain that the allegation that the applicant has been convicted on the basis of an act which did not constitute a criminal offence at the time it was committed is ill-founded. In this context they state that the content of the impugned review was manifestly contrary to the Anti-Terror Law.

Accordingly, the Government submit that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

The applicant contests all these arguments. He alleges that the text of Article 8 of the Anti-Terror Law was so unclear, and the concept of "dissemination of propaganda" against the indivisible

integrity of the State with its land and nation was so vague that his conviction thereunder was not foreseeable. He emphasises that the text of the provisions did not therefore enable him to distinguish between permissible and prohibited behaviour.

The applicant also alleges that his conviction was not for any legitimate purpose under the Convention. He considers that it was completely out of proportion to rely on such reasons, particularly in view of the limited circulation of the review.

Furthermore, the applicant maintains that the penal sanctions inflicted upon him were not necessary in a democratic society. He explains in this connection that he had published only the transcript of ismail Besikçi's remarks and observed that similar remarks had also been made by certain official institutions in Turkey.

With regard to the amendments made by Law No. 4126 of 27 October 1995 to Article 8 of the Anti-Terror Law, the applicant states that his case was re-examined in the light of these amendments and the new judgment delivered on 15 December 1995 was the same as the previous one.

The Commission has conducted a preliminary examination of the parties' arguments. It considers that the application raises complex factual and legal issues which cannot be resolved at this stage of the examination of the application, but require an examination of the merits. Consequently, the application cannot be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. The Commission further notes that it is not inadmissible on any other grounds.

For these reasons, the Commission, by a majority

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

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| H.C. KRÜGER<br>Secretary<br>to the Commission | S. TRECHSEL<br>President<br>of the Commission |