CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 27528/95
by Zeynel Abidin KIZILYAPRAK
against Turkey

The European Court of Human Rights, sitting on 4 September 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA, *judges*
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mrs. S. Dollé, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 19 October 1994 and registered on 7 June 1995,

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 Commission's decision of 24 June 1996,

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, Zeynel Abidin Kızılyaprak, is a Turkish national of Kurdish origin, born in 1960 and living in Istanbul. He is represented before the Court by Ms Tülay Geyik, a lawyer practising in Istanbul.

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

A. The circumstances of the case

In 1991, the Pele Sor Publishing House of which the applicant is the owner, published a book entitled "How did we fight against the Kurdish People? - Memories of a Soldier" (*Kürt Halkına Karşı Nasıl Savaştık - Bir Askerin Anıları*).

1. The charges against the applicant

In an indictment dated 20 December 1991, the public prosecutor at the Istanbul State Security Court charged the applicant and the editor of the book under section 8 of the Prevention of Terrorism Act 1991 (hereinafter "the 1991 Act") with disseminating propaganda against the indivisible integrity of the State. The applicant was also charged under Article 312 of the Turkish Criminal Code with provoking enmity and hatred among the people. The public prosecutor requested that confiscation of the book be ordered.

In support of his submissions the public prosecutor referred to the following passages from the book:

> "DERLEYENİN ÖNSÖZÜ
>
> ...
>
> Bu broşür, (Yavuz Erkal müstehar ismini kullanan ve/fakat gerçek ismi bizde saklı olan) bir devrimci Türk gencinin 1986'larda ilettiği yazılardan özetlenerek derlenmiştir. Ve 12 Eylül'lü yıllar boyunca Türk Kürdistanı'nda olup bitenleri, en derin yönleriyle gözler önüne sermektedir.
>
> ...
>
> Bu broşürde anlatılanlar da gösteriyor: 12 Eylül faşist diktatörlüğü, 'Atatürk milliyetçiliği' adı verilen şovenizmi 60 küsur senedir temel ilke edinmiş TC devletinin Kürt halkına layık gördüğü terör, baskı ve aşağlama politikasını, tam bir vahşet düzeyine çıkarmıştır. Kürt halkı, devlet güçleri tarafından, Nazi yöntemleriyle kırılmaya, tarihten silinmeye çalışılmaktadır. Kürt halkı ise buna karşı koymak azmindedir ve başaracaktır.

...

A.K

GİRİŞ

...

Türk burjuvazisinin ‘bölücü’, ‘eşkiya’ diye adlandırdığı bir siyasi haraketin (PKK’nın) mensuplarına karşıymış gibi gösterip, aslında Kürt ulusal hareketine karşı sürdürdüğü savaş nedeniyle Kürdistan’a gönderdiği askeri güçlerin içindeydim.

...

Yavuz Erkal

SAVAŞA HAZIRLIK

...

Kürdistan’a operasyona gönderilen erat özel olarak seçiliyor. ... Kafası çalışan, açıkgöz, kültürlü insanlar götürülmüyor. Tersine cahil, kültürsüz, kafası pek çalışmayan, körü körüne devletine ve vatanına bağlı olan insanlar seçiliyor. ... Bu seçim sonucunda oluşturulan erat kitlesi Kürdistan sorununu bilecek durumda değil. Kürt halkının eninde sonunda kendi devletini kuracağını anlayabilecek bilinçten yoksun.

...

KATİL ÜSTEĞEMEN H. S.

Görevi başlı başına işkence yapmak olan sorgulama timi Ağaçyurdu köylülerine üç gün işkence yaptıktan sonra köyden ayrıldı. İşkencecilerin köyden ayrılışının ikinci ya da üçüncu günüydü, köylüleri köy meydanında toplamış güya yoklama yapiyor ve ifadelerini aliyorduk. Tabi en kaba yöntemlerle, döverek ve hakaret ederek...

....

Meydana topladığımız o köylüler içerisinde, o aranan kişinin aile fertleri de var. Bu aileden 12-13 yaşlarında, ömrünün baharında bir genç adayı çocuk var ki, ne bir suçu, ne bir günahı söz konusu değil.

...

H.S çocuğu kalabalığın içinden alıp, köyün dışına, kayaların arasına götürdü.

...

Bir zaman sonra bir silah sesi duyduk. ... Çocuk kanlar içinde ve cansız yerde yatıyor. ... Cani, katil, şoven, faşist köpekler cezasız kalmamalı.

...

YİNE MAL VE CAN GÜVENLİĞİ

...

Dönerdöverliler ile birlikte Tönekpınar, Dadaklı, Körüklükaya köylülerini de aynı köye toplamışlar. Okulun bahçesine dizmişler. Okul işkencehane yapılmış.

...

Bizim timin yaptığı ya da şahit olduğu işkencelerde insanlar, o anda işkence anında ölmedi. Sakat kalanlar oldukça çoktu.

...

SAVAŞ KÜRT HALKINA KARŞI AÇILMIŞTIR

...

Resmi politikalarında Türkiye'de "Kürt yok" diyenler, Kürtlerin bırakın ulusal haklarını, varlıklarını bile kabul etmeyenler, açıkça "Kürtlere savaş açtık diyemezler ya...

...

SULAR ZEHİRLENDİ

...

Savunmasız halkın ekmeğine, canına, namusuna ve hatta SUYUNA bile saldırıldı. ... bir jandarma eri bir yerde su içiyor, ... Jandarma eri su içişinden iki saat sonra ölüyor. Doktor muayenesinde zehirlenmeden öldüğü anlaşılıyor. İçtiği sudan zehirlenmiş.

...

EMİR EVREN'DEN ÜRUĞ'DAN GELİYOR

Olayın tüm boyutlarını bundan sonra gördük ve anladık. Anladık ki, yöredeki tüm kuyular ve sarnıçlar, o alana giren askeri birliğin komutanınca gizlice zehirleniyor. Emir ise Genelkurmay'dan geliyor.

...

BAZI OLAYLARIN İÇ YÜZÜ

...

Kürdistan'da süren savaşın asıl gerekçesi ve özü PKK'lılar değildir. PKK'lıların değerlendirilmesinde yoğunlaşıp olayın özünün arka plana itilmesi doğru değildir. PKK'lılar üzerinde durmamamın asıl nedeni budur. Anlattıklarımdan, PKK'lılar

doğrudur, yapmaları gereken bugün yaptıklarıdır ya da tersidir, demek istediğim gibi bir sonuç da çıkartılmamalıdır.

<Translation>

"THE EDITOR'S NOTE

This book is a collection of summarised writings of a revolutionary young man (whose name appears as Yavuz Erkal in this book but whose real name is not disclosed) from 1986. The book is an in-depth exposure of what has happened in Turkish Kurdistan during the years of '12th September'[1].

...

This book also reveals that the fascist dictators of the '12th September' have instigated the terrorising, pressurising, intimidating policies of the State of the Republic of Turkey. These policies promoted chauvinism, i.e. 'the Kemalist nationalism', bringing it to the level of a massacre of Kurds for over 60 years. The aim of the State was to break the Kurdish people and wipe it out from history through the use of Nazi methods. The Kurdish people, however, is determined to resist and it will succeed.

...

A.K

FOREWORD

...

I was among the military forces that were sent to Kurdistan by the Turkish bourgeoisie in order to carry out a purported war against the members of a political movement (the PKK) which was named as 'the separator' and 'the brigand'. This war was actually carried out against the Kurdish national movement.

...

Yavuz Erkal

WAR PREPARATION

...

The privates who are sent to Kurdistan for operations are specially selected. ... Clever, sharp, cultivated people are not sent there. On the contrary, uneducated, uncivilised, stupid people who blindly obey their State and country are chosen. ... Therefore, the privates who are mobilised according to these criteria are not in a position to understand the Kurdistan problem. They cannot realise that the Kurds are going to establish their own State in any case.

[1] On 12 September 1980 the Turkish army staged a *coup d'état*.

...

FIRST LIEUTENANT H.S., THE MURDERER

The team left the Ağaçyurdu village after having tortured the villagers for three days. That team was responsible for interrogating the villagers by way of torturing them. When two or three days later the torturers left the village we gathered the villagers in the village square. It was supposedly a roll call and inspection. Of course, by rude means, beating and insulting.

...

The family members of that wanted man were among the villagers gathered in the village square. There was a 12 or 13-year-old boy from that family. He was in the spring of his youth. He could have committed neither a fault nor a sin. ... H.S took him out of the crowd and brought him to the rocky area outside the village.

...

After a while we heard a gunshot. ... The child was lying lifeless in the middle of a pool of blood. ... Slayer, murderer, chauvinist, fascist dogs should not be left unpunished.

SECURITY OF PERSON AND POSSESSION, AGAIN

... They brought the villagers from Tönekpınar, Dadaklı, Körüklükaya together with the Dönerdöverliler villagers to the same village. They gathered them in the school's garden. The school is a torture house!

...

Not everyone died during the torture that was conducted or witnessed by our team. Some of them were crippled.

THIS IS A WAR AGAINST THE KURDISH PEOPLE

...

In their official policies they say there are 'no Kurds' in Turkey. They do not even accept their existence, how can they accept their political rights? How can they say openly 'we declared a war against the Kurds?'

THEY POISONED WATER

...

They 'attacked' the defenceless people's bread, life, honour and even their WATER. ... A private had drunk water, ... After having drunk it, he died within two hours. It was understood in the medical examination that he had died of poisoning. He had drunk poisoned water.

...

IT IS EVREN'S AND ÜRUĞ'S ORDER

We saw and understood the realities in every aspect. We understood that the commander of the military forces who goes to the region poisons all the wells and cisterns in that region. It is an order of the General Staff.

...

THE REALITIES

...

The main purpose of and the reason for the war in Kurdistan are not the PKK. It would not be right to concentrate on the PKK and to overlook the core issue. This is the main reason why I did not comment on the PKK. It should not be concluded from what I have told that the PKK is right or that what they have done is what they should or should not have done.

..."

2. The applicant's conviction

In the proceedings before the Istanbul State Security Court, the applicant denied the charges. He pleaded that the incriminated book was a collection of memories of a soldier who was doing his military service in south-east Turkey. Its aim was not to disseminate separatist propaganda. The applicant stated that the book had been edited by A.K. and for that reason could not engage his responsibility. A.K. did not appear before the Istanbul State Security Court.

In a judgment dated 14 October 1993, the Istanbul State Security Court found the applicant guilty of an offence under section 8 of the 1991 Act as the publisher of the book. The applicant was sentenced to six months' imprisonment and a fine of TRL 50,000,000.

In its reasoning, the court relied on an extract from the book and held that the following phrases amounted to propaganda against the indivisibility of the State:

"...the fascist dictators of the '12th September'" have instigated the terrorising, pressurising, intimidating policies of the State of the Republic of Turkey. These policies promoted chauvinism, i.e. "the Kemalist nationalism", bringing it to the level of a massacre of Kurds for over 60 years. The aim of the State was to break the Kurdish people and wipe it out from history through the use of Nazi methods. The Kurdish people, however, is determined to resist and it will succeed...".

The court further held that the book disseminated separatist propaganda because it alleged that the Kurdish people had been ill-treated, oppressed and tortured by Turkish soldiers. The book introduced the members of the PKK as the saviours of this region who were carrying out a liberation war

and presented this so-called struggle as an imminent success. The book concluded that the Kurdish people would found its own State in south-east Turkey.

The court finally held that the impugned book had referred to a certain part of Turkish territory as "Kurdistan", had asserted that people living there were Kurdish citizens and that the activities of the PKK had been in the cause of the liberation of the Kurdish nation.

3. The applicant's appeal

The applicant appealed against his conviction. On 2 March 1994 the Court of Cassation dismissed the appeal, upholding the cogency of the State Security Court's assessment of evidence.

On 26 April 1994 the public prosecutor at the Istanbul State Security Court notified the prison sentence and fine to the applicant.

4. Further developments

Following the amendments made by Law No. 4126 of 27 October 1995 to the Prevention of Terrorism Act, the Istanbul State Security Court *ex officio* re-examined the applicant's case.

On 16 February 1996 the court sentenced the applicant to six months' imprisonment and a fine of TRL 100,000,000.

The applicant appealed against this sentence. On 15 January 1998 the Court of Cassation, having regard to the provisions of Law no. 4304 which had entered into force on 14 August 1997, quashed the State Security Court's judgment of 16 February 1996.

On 28 April 1998 the Istanbul State Security Court decided to defer the imposition of a final sentence upon the applicant, pursuant to section 1 of Law no. 4304. The court held, under section 2 of the same law, that the criminal proceedings against the applicant would be suspended and a final sentence would be imposed should the applicant be convicted of a further intentional offence in his capacity as publisher within three years of this decision.

B. Relevant domestic law and practice

A full description of the relevant domestic law may be found in *Sürek v. Turkey (no. 1)* ([GC], no. 26682/95, §§ 23-36, ECHR 1999-IV).

1. Prevention of terrorism legislation

Section 8 of the Prevention of Terrorism Act 1991 (Law no. 3713 of 12 April 1991) creates the offence of undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation through written and spoken propaganda, meetings, assemblies and demonstrations,

irrespective of the methods used and the intention. Any person who engages in such an activity may be sentenced to imprisonment or a fine, which for a press editor nowadays may be up to 2 years' imprisonment and a fine of up to three hundred million Turkish lira.

Law no. 4126 of 27 October 1995 amended the Prevention of Terrorism Act 1991 to require the re-examination of the cases of persons convicted under the aforementioned Section 8 with a view to imposing substitute penalties or measures to imprisonment. Editors who had been convicted before 12 July 1997 of a Section 8 offence were later entitled to a suspended sentence for up to three years, provided that no further offences were committed, pursuant to Law no. 4304 of 14 August 1997.

2. The State Security Courts

Article 138 of the Constitution requires all judges to perform their duties independently. State Security Courts were established by Article 143 of the Constitution to try offences "against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security."

According to Sections 5 and 6 of Law no. 2845 on the creation and rules of procedure of the State Security Court, such courts shall be composed of a president, two other regular members and two substitute members, appointed for four-year renewable periods. At the material time, one regular member and one substitute were military judges of the first rank.

Appeals lie to the Court of Cassation against State Security Court decisions.

The careers of military judges, according to Section 7 of the Military Legal Service Act (Law no. 357), depend on assessments by the Minister of State in the Ministry of Defence, or the Minister of Defence. Section 8 of that Act provides that military judges are to be appointed "by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence... ." It is an offence under Article 112 of the Military Code for a public official to attempt to influence the performance by a military judge in the exercise of his judicial functions. Military judges are subject to officer salary scales and discipline by the Minister of Defence (Sections 18 and 29). Career disputes concerning military judges are ultimately determined by the Supreme Military Administrative Court (Section 22 of Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court).

Amendments made by Law no. 4388 of 18 June 1999 and Law no. 4390 of 22 June 1999 removed military judges from the bench of the State Security Courts.

COMPLAINTS

The applicant complains under Articles 9 and 10 of the Convention that his conviction and sentence for publishing a book constituted an unjustified interference with his right to freedom of thought and freedom of expression, and, in particular, with his right to impart ideas.

The applicant also complains under Article 6 § 1 of the Convention that his case was not heard by an independent and impartial tribunal. He alleges that the Istanbul State Security Court is an extraordinary jurisdiction dealing with political offences and its military judges are answerable to their military superiors.

THE LAW

The applicant complains that his conviction and sentence for publishing a book constituted an unjustified interference with his right to freedom of thought and freedom of expression, and, in particular, with his right to impart ideas. He invokes Articles 9 and 10 of the Convention.

The applicant further complains that his case was not heard by an independent and impartial tribunal. He invokes Article 6 § 1 of the Convention.

A. The Government's preliminary objection

The Government observe that the application to the Commission was lodged on 19 October 1994 while the applicant's case was still pending before the Court of Cassation. The Government infer from this that domestic remedies had not been exhausted when the application was made and that, consequently, the Court should declare the application inadmissible pursuant to Article 35 of the Convention.

The applicant makes no submissions on this point.

The Court reiterates that under Article 35 of the Convention it may only deal with an application after all domestic remedies have been exhausted.

The Court notes that the Court of Cassation upheld the applicant's conviction on 2 March 1994. The public prosecutor at the Istanbul State Security Court notified the prison sentence and fine to the applicant on 26 April 1994. Following the amendments made by Law no. 4126 to the Prevention of Terrorism Act, the Istanbul State Security Court *ex officio* re-examined the applicant's case and convicted him on 16 February 1996. Upon the applicant's appeal, the Court of Cassation quashed this judgment on 15 January 1998. The Istanbul State Security Court decided to defer the imposition of a final sentence on the applicant on 28 April 1998.

In these circumstances, the Court observes that the Istanbul State Security Court's *ex officio* examination pursuant to provisions of Law no. 4126, in principle, concerns the deferral of the imposition of a final sentence on the applicant. The Court points out that the proceedings before the Istanbul State Security Court were concluded on 28 April 1998 before the Court has adopted its decision on admissibility. The Government's objection cannot, therefore, be sustained (see, *mutatis mutandis*, the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 38, § 91).

B. Merits

1. Alleged violation of Articles 9 and 10 of the Convention

The applicant maintains that his conviction and sentence for publishing a book constituted an unjustified interference with his right to freedom of thought and freedom of expression. He submits that the deferral of the imposition of his sentence does not remove this interference. He invokes Articles 9 and 10 of the Convention. The Court has examined this complaint under Article 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. 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 make no submissions on this point.

As regards the substance of the applicant's complaints under Article 10 of the Convention, the Court considers, in the light of the applicant's submissions, that this complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the complaint 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.

2. Alleged violation of Article 6 of the Convention

The applicant complains that his case was not heard by an independent and impartial tribunal. He invokes Article 6 § 1 of the Convention, which provides to the extent relevant as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

The Government make no submissions on the applicant's complaints under this head.

As regards the substance of the applicant's complaints under Article 6 § 1 of the Convention, the Court considers, in the light of the applicant's submissions, that this complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the complaint 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 the application admissible, without prejudging the merits of the case.

S. DOLLÉ
Registrar

J.P. COSTA
President