AS TO THE ADMISSIBILITY OF

Application No. 24246/94
by Ahmet Zeki OKÇUOGLU
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 15 March 1994 by Ahmet Zeki Okçuoglu against Turkey and registered on 1 June 1994 under file No. 24246/94;

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 21 February 1996 and the observations in reply submitted by the applicant on 8 April 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen born in 1950, is a lawyer and author. Before the Commission he is represented by Mr. Selim Okçuoglu, a lawyer practising in istanbul.

A. Particular circumstances of the case

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

The applicant participated in a discussion on "the present and the past of the Kurdish problem" organised by a review entitled "Demokrat". The speech he had made during the discussion was published in Demokrat's May 1991 issue.

On 10 June 1991 the Public Prosecutor at the istanbul State Security Court issued an indictment charging the applicant with disseminating propaganda against the indivisibility of the State in his speech. The charges were brought under Article 8 paragraph 1 of the Anti-Terror Law.

In the proceedings before the State Security Court, the applicant denied the charges. He appears to have submitted that he had not acted with the aim of making separatist propaganda.

In a judgment dated 11 March 1993, the Court found the applicant guilty of an offence under Article 8 of the Anti-Terror Law. It first sentenced the applicant to two years' imprisonment and a fine of 50,000,000 Turkish lira. Then, considering the good conduct of the applicant during the trial, it reduced his sentence to one year and eight months' imprisonment and a fine of 41,666,666 Turkish lira. The Court held that to the extent that the applicant, in his speech, had alleged that "the citizens of Kurdish race were denied their national rights; their land was divided among the States in the region; the Kurds were fighting for their national rights", his speech as a whole contained elements of propaganda against the indivisibility of the State.

The applicant appealed against this judgment. On 24 September 1993 the Court of Cassation upheld the decision of the trial court.

The applicant served his sentence in prison and paid the fine. Therefore, the amendments made by Law No. 4126 of 27 October 1995 to the Anti-Terror Law, were not applied to the applicant's case as his sentence had already been executed.

B. Relevant domestic law:

Article 8 of the Anti-Terror Law No. 3713 of 12 April 1991

<Translation>

"No one shall, by any means or with any intention or idea, make written and oral propaganda or hold assemblies, demonstrations 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 two and five years and a fine between 50 and 100 million Turkish lira."

C. Extracts from the relevant speech

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

rulings:

> " The Kurds were fighting for their national rights...the Kurdish question is ... the problem .. of a nation of approximately 40 million people, who, under the aegis of the regional and international powers, have been deprived of their national sovereignty and rights by other countries of the region which have divided and shared their land between them."

COMPLAINTS

The applicant complains of violations of Articles 9, 10, 14 (in conjunction with 10) and 6 of the Convention.

As to Articles 9 and 10 of the Convention, the applicant complains that his conviction for making a speech following publication of the speech in a review constituted an unjustified interference with his freedom of thought and freedom of expression.

As to Article 14 of the Convention, the applicant complains that his conviction for expressing his opinion on the "Kurdish problem", on the ground that this was contrary to State policy, constituted discrimination on the ground of political opinion.

As to Article 6 para. 1 of the Convention, the applicant complains that his case was not heard by an independent and impartial tribunal. He asserts in this regard that one of the three members of the State Security Court is a military judge answerable to his military superiors whose presence prejudices the independence of the Court.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 March 1994 and registered on 1 June 1994.

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

The Government's observations were submitted on 21 February 1996, after an extension of the time-limit fixed for that purpose. The applicant replied on 8 April 1996.

THE LAW

1. The applicant first complains that his conviction for making a speech constitutes an unjustified interference with his freedom of thought and freedom of expression.

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 under Article 14 of the Convention in conjunction with Article 10 (Art. 14+10) that his conviction for expressing his opinion on the "Kurdish problem", on the ground that this was contrary to State policy, constituted discrimination on the ground of political opinion. Article 14 (Art. 14) reads as follows:

"The enjoyment of the rights and freedoms set forth in this 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 first argue that at no stage in the proceedings did the applicant invoke the relevant provisions of the Convention.

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

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 in the present case that the applicant asserted before the domestic courts that his conviction for making a speech in which he expressed his opinions on the Kurdish problem constitutes an unjustified interference with his freedom of expression.

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.

Secondly, as to the substance of the case, the Government maintain that the interference with the applicant's rights under Article 10 (Art. 10) of the Convention was prescribed by the Anti-Terror Law. They state that the comments made by the applicant in his speech constitute a provocation of enmity and hatred between the Kurdish and Turkish societies which serves to mobilise people to revolt. They assert that according to the Anti-Terror Law these forms of expression constitute propaganda against the indivisible integrity of the State. The Government consider that the domestic courts therefore interpreted the law reasonably.

The Government also maintain that the purpose of the applicant's conviction was linked to the prevention of terrorism carried out by illegal organisations and consequently served to protect territorial integrity and national security.

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 offending speech was based on the glorification of the activities of the PKK which is an illegal terrorist organisation for the establishment of an independent Kurdish State against the Turkish State. 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.

In this respect the Government assert 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.

The applicant observes that he was convicted of an offence for expressing his views on the Kurdish problem in Turkey. He asserts that he had commented on the facts concerning the Kurdish people living in Turkey.

The applicant also maintains that his conviction cannot be justified for any of the reasons permitted under the Convention. He considers that the speech in question was within the limits of permissible criticism.

With regard to the amendments made by Law No. 4126 of 27 October 1995 to Article 8 of the Anti-Terror Law, the applicant observes that they were made after he had served his sentence and did not therefore apply to his case.

The Commission has conducted a preliminary examination of the parties' arguments. It considers that this part of 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 above complaints cannot be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring them inadmissible have been established.

2. The applicant further complains that his case was not heard by an independent and impartial tribunal as required by Article 6 para. 1 (Art. 6-1) of the Convention. In so far as relevant, this provision reads as follows:

> "1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal..."

The Government maintain that this part of the application is ill-founded and abstract. In this context they state that the applicant did not raise any complaint related to the fairness of his trial.

The applicant claims that the State Security Courts are extraordinary courts dealing with political offences and that they are not sufficiently independent. He contends that:

- the members of the State Security Court are appointed by the High Council of Judges and Prosecutors,

- the president of this Council is the Minister of Justice and one other member also holds office in the Ministry of Justice,

- one of the three members of the State Security Court is a military judge answerable to his military superiors.

The Commission has conducted a preliminary examination of the parties' arguments. It considers that this part of the application also 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, this complaint cannot be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the

merits of the case.

H.C. KRÜGER Secretary to the Commission	S. TRECHSEL President of the Commission