AS TO THE ADMISSIBILITY OF

Application No. 26682/95
by Kamil Tekin SÜREK
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 February 1995 by Kamil Tekin Sürek against Turkey and registered on 9 March 1995 under file No. 26682/95;

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 14 February 1996 and the observations in reply submitted by the applicant on 7 June 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen, born in 1957 and resident in istanbul, is a lawyer.

A. Particular circumstances of the case

Applications Nos. 23927/94, 24122/94, 24735/94, 24762/94 have been brought by the same applicant, who was the owner of a periodical.

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

At the material time, the applicant was the major shareholder in the Deniz Basin Yayin Sanayi ve Ticaret Organizasyon A.S., a Turkish company which owns a weekly review entitled "Haberde Yorumda Gerçek" (The Truth of News and Comments) and published in istanbul.

In the twenty-third issue of the review dated 30 August 1992, two readers' articles, entitled "Silahlar özgürlügü engelleyemez" (Weapons cannot win against freedom) and "Suç bizim" (We are guilty) were published.

In an indictment dated 21 September 1992, the Public Prosecutor at the istanbul State Security Court, on account of the published articles, charged the applicant, being the owner of the review, with disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people. The charges were brought under Article 8 of the Anti-Terror Law and Article 312 of the Turkish Criminal Code.

In the proceedings before the istanbul State Security Court, the applicant denied the charges. He asserted that expression of an opinion cannot constitute an offence. He stated that the said articles had been written by the readers of the review.

In a judgment dated 12 April 1993, the Court found the applicant guilty of an offence under Article 8 of the Anti-Terror Law. It found no grounds for conviction under Article 312 of the Turkish Criminal Code. The Court first sentenced the applicant to a fine of 200,000,000 Turkish lira. Then, considering the good conduct of the applicant during the trial, it reduced the fine to 166,666,666 Turkish lira. The Court held that the articles at issue contravened Article 8 of the Anti-Terror Law to the extent that they referred to a certain part of the Turkish territory as an independent state, "Kurdistan", alleged the existence of a "national independence war" against the Turkish State, discriminated on the grounds of race, and contained statements which aimed at provoking enmity against the Turkish State.

The applicant appealed. He stated that his trial and conviction contravened Articles 6 and 10 of the Convention. He asserted that Article 8 of the Anti-Terror Law was contrary to the Constitution. He denied that the articles at issue disseminated separatist propaganda. He also asserted that he had not been able to be present at the hearing during which the decision on his conviction was given. He pleaded that the decision given in his absence and without taking his final statement was contrary to law.

On 26 November 1993 the Court of Cassation found the amount of the fine adjudicated by the State Security Court excessive. It set aside the applicant's conviction and sentence in this respect.

In a judgment dated 12 April 1994, the istanbul State Security Court first sentenced the applicant to a fine of 100,000,000 Turkish lira. Then, it reduced the fine to 83,333,333 Turkish lira. As regards the grounds for conviction, the Court, inter alia, reiterated its reasoning dated 12 April 1993.

The applicant appealed. He, inter alia, reiterated the defence which he had made earlier. He also stated that the State Security Court had convicted him without duly hearing his defence.

On 30 September 1994 the Court of Cassation dismissed the appeal. It upheld the cogency of the State Security Court's reasoning and its assessment of evidence.

After the amendments made by Law No. 4126 of 27 October 1995 to the Anti-Terror Law, the istanbul State Security Court re-examined the applicant's case. On 8 March 1996 the Court sentenced the applicant to the previous sentence.

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.

If the offence of propaganda referred to in the preceding paragraph is committed by means of periodicals, as defined in Article 3 of the Press Law No. 5680, the owners of such periodicals shall also be punished by a fine, to be determined in accordance with the following provisions:

- For periodicals published at less than monthly intervals, the fine shall be ninety per cent of the average real sales of the previous month;

- [for printed works that are not periodicals or for periodicals which have recently started business, the fine shall be ninety per cent of the average monthly sales of the highest circulating daily periodical.]

In any case, the fine may not be less than 100 million Turkish lira.

Responsible editors of these periodicals shall be sentenced to imprisonment from six months to two years and to half of the fine determined in accordance with the foregoing provisions."

In a judgment dated 31 March 1992, the Constitutional Court found the clauses enclosed in brackets in the text of Articles 6 and 8 of the Anti-Terror Law above to be contrary to the Constitution and annulled them. The Constitutional Court held that the annulled text would cease to have effect six months after the date of publication of the annulment decision in the Official Gazette. The decision was published on 27 January 1993 and therefore these clauses ceased to have effect as of 27 July 1993.

The Press Law (Law No. 5680)

Under Article 7 of the Press Law, in cases where a periodical is owned by a company, the major shareholder in that company is considered to be the owner of the periodical.

COMPLAINTS

The applicant complains of violations of Articles 10 and 6 of the Convention.

As to Article 10 of the Convention, the applicant complains that his conviction and sentence, as the owner of a periodical which published articles by its readers, constituted an unjustified interference with his freedom of expression.

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.

The applicant also complains that the length of the criminal proceedings against him exceeded the reasonable time requirement of Article 6 para. 1.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 February 1995 and registered on 9 March 1995.

On 20 February 1995 the Commission decided to communicate the application, under Articles 10 (freedom of expression) and 6 para. 1 (lack of impartiality and independence) 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 14 February 1996, after an extension of the time-limit fixed for that purpose. The applicant replied on 7 June 1996.

THE LAW

1. The applicant first complains that his conviction as the owner of a periodical constitutes an unjustified interference with his freedom of expression 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 Government maintain that the interference with the applicant's rights under Article 10 (Art. 10) of the Convention was prescribed by law in this case, i.e. by Article 8 of the Anti-Terror Law. They state that the applicant, in his review, published articles by its readers in which a certain part of Turkish territory had been referred to as "Kurdistan" and a certain section of the population as "Kurds". They also state that the articles at issue alleged the existence of a "national independence war" against the Turkish State

and contained statements which aimed at provoking enmity against the Turkish State. They assert that according to Article 8 of 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 conviction of the applicant was linked to the control 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 the threat posed to Turkey by the PKK and its affiliations is internationally recognised, as is the need to react firmly to it. 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 is based on the glorification of the activities of the PKK being 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 contests all these arguments. He maintains that expression of an opinion cannot constitute an offence. He states that the articles at issue had been written by readers of the review.

The applicant also maintains that his conviction cannot be justified for any of the reasons permitted 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.

The applicant claims that the amendments made to the Anti-Terror Law and the developments in the re-examined cases of persons who had been convicted and sentenced under Article 8 of the said Law are simply repetitions of the previous sentences.

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 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.

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 and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

The Government maintain that State Security Courts, which are special courts set up to deal with offences against the existence and continuity of the State, are ordinary courts, given that they have been established in accordance with the provisions of Article 143 of the Constitution. As they are independent judicial organs, no public

authority or agent could give instructions to such courts. State Security Courts are composed of three members, one of whom is a military judge. A civil judge acts as president and all the judges have attained the first grade in the career scale. The presence of a military judge in the court does not prejudice its independence, this judge being a judge by career and not belonging to the military. The judges of State Security Courts evaluate the evidence and take their decisions in accordance with the law and their own conscientious conviction as required by Article 138 of the Turkish Constitution. The verdicts of such courts are subject to review by the Court of Cassation.

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 claims that the State Security Courts are extraordinary courts dealing with political offences. 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 two other members also hold 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 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.

3. The applicant lastly complains that the criminal proceedings brought against him were not dealt with within a "reasonable time" as required by Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission notes that the total period to be considered began on 21 September 1992 when the public prosecutor charged the applicant and ended on 30 September 1994 when the Court of Cassation delivered its judgment. It therefore amounted to 24 months and 9 days.

The Commission recalls that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the established case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (Eur. Court HR, Yagci and Sargin v. Turkey judgment of 8 June 1995, Series A no. 319, p. 20, para. 59).

In the instant case, the Commission observes that the total period at issue was not unreasonably long. Moreover, the applicant has not shown any substantial periods of inactivity attributable to the judicial authorities.

It follows that this part of this application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the

applicant's complaints relating to the alleged interference with his freedom of expression and the alleged lack of impartiality and independence of the tribunal which convicted him.

DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.

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