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

SECOND SECTION

CASE OF ÜSTÜN v. TURKEY

(Application no. 37685/02)

JUDGMENT

STRASBOURG

10 May 2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Üstün v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr A.B. BAKA, *President,*
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr M. UGREKHELIDZE,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mr D. POPOVIĆ, *judges,*
Ms D. JOČIENĖ, *substitute judge,*

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 April 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37685/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Saim Üstün ("the applicant"), on 4 August 2002.

2. The applicant was represented by Mr B. Utku and Mr A. Atalay, lawyers practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purpose of the proceedings before the Court.

3. The applicant alleged, in particular, under Articles 6 and 10 of the Convention, that his conviction and sentence for disseminating separatist propaganda by publishing a book amounted to a violation of his rights to a fair trial and freedom of expression. He further alleged under Article 1 of Protocol No. 1 that the confiscation of copies of the book at issue infringed his property rights.

4. On 5 May 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963 and lives in İstanbul.

6. At the time of the events giving rise to this application, the applicant was the owner of "Dönüşüm Publishing", a small independent publication firm.

7. In 1992 this firm published a book, written by Mr H.Y., entitled "The people's artist and fighter: Yılmaz Güney" (*Halkın Sanatçısı, Halkın Savaşçısı: Yılmaz Güney*). The book was about the life and political views of the left-wing revolutionary cinema artist Yılmaz Güney. It was reprinted in 2000.

8. On 19 October 2000 the public prosecutor at the İstanbul State Security Court filed a bill of indictment accusing the applicant of disseminating separatist propaganda, contrary to section 8 (3) of Law no. 3713 (the Prevention of Terrorism Act).

9. The prosecution relied on the following passages of the book:

> "...Sürü (Herd)[1] depicts Kürdistan. In Yol (Road)[2] there was even a street sign showing that the film is about Kürdistan. This scene in particular was sufficient to make the Turkish fascists go mad..."
>
> "...in the meantime the revolutionary movement evolved in the country and national conscience awakened in Northern Kürdistan..."
>
> "...Yılmaz Güney is without a doubt a cornerstone in Turkey-Northern Kürdistan cinema..."
>
> "...According to them it is separatism and degeneracy to defend Kurdish peoples' national and democratic rights and their independence...those who don't want to be degenerate and bloodless must lick the boots of fascism, endure pressures, turn a blind eye to human rights violations [and] applaud the oppression of the Kurdish Nation. According to us they are the real degenerates and bloodless. We shall fight and defend all national and democratic rights, including the right of the Kurdish nation to establish an independent political state..."
>
> "...Those who introduced those prohibitions in Turkey and in Northern Kürdistan will be held accountable".

10. In his written submissions, dated 29 June 2001, to the State Security Court, the applicant pleaded that the book concerned the life and, in particular, the political views of a famous cinema star and that it was written by Mr H.Y. He maintained that, while he did not share the views of the

---

[1] Film title, 1978, screenplay written by Yılmaz Güney.

[2] Film title, 1981, screenplay written by Yılmaz Güney.

author, he did not think that publishing the book would constitute an offence. He also argued that the book had been previously published without any charges being brought against him. Finally, he also pointed out, relying on the note of the Istanbul Security Directorate dated 15 November 2000, that no confiscation decision had been given against the book by the authorities.

11. On 29 June 2001 the Istanbul State Security Court found the applicant guilty of the offence, as publisher of the book. He was sentenced to six months' imprisonment, a sentence which was then commuted to a fine of 1,764,360,000 Turkish liras[1]. In its decision, the court, relying on the passages indicated by the prosecution, noted that the book referred to a certain part of the Turkish territory as Kurdistan, and thus had disseminated propaganda against the indivisible integrity of the State.

12. On 4 February 2002 the Court of Cassation upheld the judgment of the first-instance court.

13. The applicant paid the fine on 11 July 2003.

14. By an additional judgment (*ek karar*) dated 7 October 2003, the Istanbul State Security Court, taking into account that Article 8 of Law no. 3713 was abolished pursuant to Law no. 4928, acquitted the applicant and nullified his conviction together with all its consequences. This judgment became final on 15 October 2003.

15. In their observations the Government submitted that the applicant had not yet applied to the court in order to be reimbursed.

II. THE RELEVANT DOMESTIC LAW

16. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Erdoğdu v. Turkey* (no. 25723/94, §§ 21-26, ECHR 2000-VI), and *Başkaya and Okçuoğlu v. Turkey* ([GC], nos. 23536/94 and 24408/94, §§ 25-27, ECHR 1999-IV).

17. By Law no. 4928, published in the Official journal on 15 July 2003, Article 8 of the Prevention of Terrorism Act (Law no. 3713) was abolished.

THE LAW

I. ADMISSIBILITY

18. The applicant complained under Article 6 of the Convention that his right to a fair hearing was breached since he was tried and convicted by a

[1] Approximately 1,705 euros at the material time.

State Security Court. He further submitted that the written opinion of the principal public prosecutor at the Court of Cassation was never served on him, thus depriving him of the opportunity to put forward his counter-arguments. He submitted under Article 10 that his conviction and sentence for disseminating separatist propaganda by publishing a book amounted to a violation of his right to freedom of expression. Finally, the applicant alleged under Article 1 of Protocol No. 1 that the confiscation of copies of the book at issue infringed his property rights.

19. The Government suggested that, since the applicant had been acquitted in 2003, he was no longer a victim. They invited the Court to declare the application inadmissible pursuant to Articles 35 §§ 3 and 4 of the Convention.

20. The applicant disputed the Government's argument.

21. As regards the applicant's complaint under Article 10, the Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Güneş v. Turkey* (dec.), no. 53916/00, 13 May 2004). The Court finds no particular circumstances in the instant case which would require it to depart from its previous findings.

22. In view of the above, the Court rejects the Government's preliminary objection under this head.

23. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

24. As to the applicant's complaint under Article 6 of the Convention, the Court further reiterates that it has already held that, following annulment of a conviction, an applicant can no longer be considered a victim, within the meaning of Article 34 of the Convention, of the alleged violation of Article 6 (see, in particular, *Güneş,* cited above, and *Koç and Tambaş v. Turkey* (dec.), no. 46947/99, 24 February 2005). The Court finds that the applicant's situation is comparable. In these circumstances, the Court accepts the Government's objection under this head. It follows that this part of the application should be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

25. Finally, the Court notes that no documents were submitted to substantiate the applicant's complaint under Article 1 of Protocol No. 1 pertaining to the confiscation of copies of the impugned book. Therefore this part of the application is also inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained that his conviction and sentence for publishing a book constituted an unjustified interference with his freedom of expression. He relied on Article 10 of the Convention, which provides insofar as relevant 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 ... territorial integrity or public safety, [or] for the prevention of disorder or crime..."

27. The Government maintained that the interference with the applicant's right to freedom of expression was justified under the provisions of the second paragraph of Article 10. In this respect, they maintained that the applicant had published a book which disseminated propaganda against the indivisible integrity of the State. The Government noted that at the time of the events this act was sanctioned by Article 8 of Law no. 3713. Finally, they submitted that, following the abrogation of the aforementioned law, the applicant was acquitted of all charges.

28. The applicant maintained his allegations.

29. The Court notes that it is not in dispute between the parties that the applicant's original conviction constituted an interference with his right to freedom of expression, protected by Article 10 § 1. Nor is it contested that this interference was prescribed by law and pursued a legitimate aim or aims, namely the protection of territorial integrity and public order for the purposes of Article 10 § 2. The Court agrees. In the present case what is in issue is whether the interference was "necessary in a democratic society".

30. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, the following judgments, *Şener v. Turkey*, no. 26680/95, §§ 39-43, 18 July 2000, *İbrahim Aksoy*, cited above, §§ 51-53, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, §§ 41-42, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999). It will examine the present case in the light of these principles.

31. The Court must look at the impugned interference in the light of the case as a whole, including the content of the book and the context in which it was published. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". The Court takes into account, furthermore, the background to cases submitted to it, particularly problems linked to the prevention of

terrorism (see *Karakaş v. Turkey* [GC], no. 23168/94, § 54, ECHR 1999-IV).

32. The Court observes that the applicant reprinted a book which had been written by Mr H.Y. It notes that the book in issue took the form of a biography of Yılmaz Güney, a famous left-wing revolutionary cinema artist. The Court, taking into account the information contained in the case file, finds that the book does not give a neutral account of Mr Güney's life but a politicised version, and that the author seeks to convey to the public, through this book, his own opinions on certain matters such as the rights of the Kurdish people and the authorities' stance against the achievement of such rights. Reiterating that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or the debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV), the Court finds that, although the passages highlighted by the prosecution do give the narrative a hostile tone, they do not encourage violence, armed resistance or insurrection, and do not constitute hate speech. In the Court's view, this is an essential consideration (contrast *Sürek v. Turkey (no. 1),* cited above, § 62, and *Gerger v. Turkey* [GC], no. 24919/94, § 50, 8 July 1999) in the assessment of the necessity of the measure.

33. Moreover, the Court observes that the first edition of the book had sold out without occasioning criminal proceedings. The Government failed to explain how the second edition of the same book could have caused more concern to the judicial authorities than the first, published in 1992.

34. Furthermore, the Court notes that, notwithstanding the eventual acquittal and the annulment of the sentence imposed on the applicant, he nevertheless remained convicted for over a year and had to pay the fine which had been imposed in order to avoid a prison sentence.

35. Against this background, the Court considers that the reasons given by the State Security Court for convicting and sentencing the applicant, although relevant, cannot be considered sufficient to justify the interference with his right to freedom of expression.

36. Having regard to the above considerations, the Court concludes that the applicant's original conviction and sentence was disproportionate to the aims pursued and therefore not “necessary in a democratic society”. Accordingly, there has been a violation of Article 10 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage, costs and expenses

38. The applicant claimed, in total, 214,764,400,000 Turkish Liras (approximately 116,880 euros (EUR)) in respect of pecuniary and non-pecuniary damage. This sum included the loss of profit on the selling of the books, the fine which he had paid and representation fees, costs and expenses incurred both before the Court and in the domestic proceedings.

39. The Government suggested that the applicant had failed to comply with Rule 60 of the Rules of the Court.

1. Pecuniary damage

40. The Court dismisses the applicant's claims concerning a loss of profits as being speculative. Moreover, the Court finds that the reimbursement by the Government of the fine paid by the applicant, plus the statutory interest applicable under domestic law, running from the date when the applicant had paid it, would satisfy his claim for pecuniary damage.

2. Non-pecuniary damage

41. The Court considers that the applicant may be taken to have suffered a certain amount of distress in the circumstances of the case. Making its assessment on an equitable basis, it awards him EUR 2,000 for non-pecuniary damage.

3. Costs and expenses

42. The Court dismisses the applicant's request for the reimbursement of his costs and expenses incurred before the domestic courts, since the applicant has failed to submit any receipt or invoices demonstrating that they were necessarily and reasonably incurred. However, the Court, making its own estimate based on the information available, considers it equitable to award the applicant EUR 1,000 for the costs and expenses incurred before the Court.

B. Default interest

43. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the interference with the applicant's right to freedom of expression admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the reimbursement of the fine paid by the applicant, plus the statutory interest applicable under domestic law, running from the date of payment, as well as the following sums, to be converted into new Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	A.B. BAKA
Registrar	President