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

FOURTH SECTION

CASE OF HALİS v. TURKEY

(Application no. 30007/96)

JUDGMENT

STRASBOURG

11 January 2005

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 Halis v. Turkey,

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

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr R. TÜRMEN,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 23 May 2002 and on 7 December 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 30007/96) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Atilla Halis ("the applicant"), on 19 December 1995.

2. The applicant, who had been granted legal aid, was represented by Mr Özcan Kılıç, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 23 May 2002 the Court declared the application partly admissible. It retained the applicant's complaints concerning the independence and impartiality of the Istanbul State Security Court and the alleged interference with his rights to freedom of expression.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). The case was assigned to the newly composed Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1969 and lives in Istanbul.

8. The applicant worked as a journalist for the Turkish daily newspaper "*Özgür Gündem*".

9. On 2 January 1994 "*Özgür Gündem*" published an article with the title "Four New Books by Zagros Publications", written by the applicant. On the same day, the copies of the newspaper were confiscated by an order of the Istanbul State Security Court.

10. In the impugned article, the applicant reviewed four books written by four different authors who discussed problems related to Turkey's south-eastern region. The first book reviewed in the article, "*Tasfiyeciliğin Tasfiyesi*" ("Liquidation of Liquidators"), was written by Abdullah Öcalan, the leader of the PKK.

11. Under this heading the author expressed his views in the following terms:

> "Combating 'liquidation' (*tasfiye*) is of paramount importance for every revolutionary movement. There is hardly any great movement in which 'liquidation' (*tasfiye*) does not exist. Abdullah Öcalan, the General Secretary of the PKK, examined the characteristics of the liquidators and the destructive damage they caused in the struggle. He reveals his determination on this issue by declaring: 'I will not hesitate even if I have to sacrifice the whole party in order to liquidate one of them'.
>
> In this connection, a further success of the PKK is its never ceasing firm struggle against 'liquidation' (*tasfiye*). The PKK has revealed facts that almost no other revolutionary movement managed to do. This discipline and determination of the PKK may give an idea about its prospective system and the characteristics of its creators.
>
> The PKK has, in this sense, diagnosed at the right time the 'liquidation' (*tasfiye*) tendencies which would lead the revolution to defeat, took measures against possible damage, organised the struggle to save the revolution's origins and thus has carried the revolution further to victory. These issues are explicitly taken up and evaluated in the book. 'Liquidation of Liquidators' (*Tasfiyeciliğin Tasfiyesi*) is not a theoretical work, nor a book written after examination of the relevant literature. On the contrary, it is a book that collects in chronological order the evaluations on the problem of 'liquidation' (*tasfiye*), encountered in practice during a long and hard struggle. The book is in this respect a documentary, including information and instructive lessons not only for The National Liberation Struggle for Kurdistan but also for all class or national liberation movements in the world."

12. The titles of the other books reviewed in the same article are "*History of Colonisation*" and "*From the nineteenth century to this day*, *the national problem and Kürdistan*" and "*The Cease-fire declared by the PKK and its Effects*". Under the last article, the applicant stated:

> "... [the] Cease fire, which was declared on 20 March 1993 by the PKK did not reach its goal, on the contrary, [it] continued the dirty war in Kürdistan. In fact, the guerrillas blocked the Elazığ-Bitlis highway on 25 May 1993 killed twenty-nine soldiers and the cease fire, which had not been responded to, ended."

13. On 1 June 1994, the public prosecutor at the Istanbul State Security Court charged the applicant with disseminating propaganda about an illegal separatist terrorist organisation. The charges in the indictment were brought under Article 7 § 2 of Prevention of Terrorism Act (Law no. 3713).

14. The public prosecutor based his indictment on the following sentences from the applicant's article:

> "...In this connection, a further success of the PKK is its never ceasing firm struggle against liquidation. The PKK has revealed facts that almost no other revolutionary movement managed to do. This discipline and determination of the PKK may give an idea about its prospective system and the characteristics of its creators.
>
> The PKK has, in this sense, diagnosed at the right time the liquidation tendencies which would lead the revolution to defeat, took measures against possible damage, organised the struggle to save the revolution's origins and thus has carried the revolution further to victory..."

15. On 20 March 1995 the Istanbul State Security Court found the applicant guilty of the offence under Section 7 § 2 of Prevention of Terrorism Act and sentenced him to one year imprisonment and to a fine of four hundred million Turkish liras (TRL).

16. In its reasoning the court pointed out the following passage in the article:

> "...In this connection, a further success of the PKK is its never ceasing firm struggle against liquidation... The PKK has, in this sense, diagnosed at the right time the liquidation tendencies which would lead the revolution to defeat, took measures against possible damage, organised the struggle to save the revolution's origins and thus has carried the revolution further to victory..."

17. The court, taking into consideration the above-mentioned remarks of the author and the impugned article as a whole, held that the applicant had disseminated propaganda about the PKK while reviewing books written by the leader and leading members of the PKK.

18. On 10 October 1995, the Court of Cassation upheld the judgment of the Istanbul State Security Court.

19. Following the judgment of the Court of Cassation the applicant disappeared in order to avoid imprisonment. He was apprehended on 2 March 2002 and taken into custody. On 4 March 2002 the applicant was released from custody. On 25 July 2002 Istanbul State Security Court suspended the execution of his sentence pursuant to Law no. 4454.

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. The relevant domestic law and practice in force at the material time are outlined in the following judgments and decision: *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, §§ 41-42, 10 October 2000, *Özel v. Turkey* no. 42739/98, §§ 20-21, 7 November 2002, *Gençel v. Turkey*, no. 53431/99, §§ 11-12, 23 October 2003, and *Halis v. Turkey* (dec.), no. 30007/96, 23 May 2002.

21. By Law no. 5190 of 16 June 2004, published in the official journal on 30 June 2004, the State Security Courts have been abolished.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicant complained that his criminal conviction had infringed his right to freedom of expression. He relied on Article 10 of the Convention, which provides:

> "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..."

23. 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.

A. Existence of an interference

24. The Court notes that it is clear and undisputed between the parties that there has been an interference with the applicant's right to freedom of expression on account of his conviction and sentence under section 7 § 2 of the Prevention of Terrorism Act.

B. Justification of the interference

25. This interference would contravene Article 10 of the Convention unless it was "prescribed by law", pursued one or more of the legitimate

aims referred to in paragraph 2 of Article 10, and was "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

26. The Court finds that since the applicant's conviction was based on section 7 § 2 of the Prevention of Terrorism Act the resultant interference with his freedom of expression could be regarded as "prescribed by law".

2. Legitimate aim

27. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey at the time of the events (see, among many others, *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2539, § 10, and *Ceylan v. Turkey* [GC], no. 23556/94, § 28, ECHR 1999-IV) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and public safety. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which relied on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of the parties

(i) The applicant

28. The applicant submitted that the word *"tasfiye"* was not used in the impugned article to mean *"to destroy, to exterminate, to remove"* as it was alleged by the Government but was used in its political terminology meaning *"to refine, to perfect"*. He further pointed out that he had been convicted on account of reviewing books written by the leader and the alleged leading members of the PKK and not because he had used the word "*tasfiye"* in his article. He maintained that the State Security Court did not convict him for incitement to hatred or violence but for separatist propaganda.

29. The applicant submitted that in any event the impugned article could not have had the effect of inciting people to hatred or violence since the journal in which it was published had been confiscated by the order of Istanbul State Security Court on 2 January 1994 before it could be distributed and sold to the public. The applicant affirmed that with the

confiscation order any alleged threat to the prevention of disorder or crime had already been averted.

(ii) The Government

30. The Government contested that the meaning of the word *"tasfiye"* was used by the applicant as meaning *"to refine, to perfect"*. In this connection they have submitted the meaning of the word as defined in various dictionaries. They pointed out that the word "*tasfiye*" in Turkish is closer in meaning to "*elimination by killing*" in English than to "*liquidation*". In this connection, they submitted a quotation of leader of the PKK in its Third National Conference held in March 1994 in support of how the word *"tasfiye"* was understood by them.

31. The Government maintained that in the impugned article the applicant upheld the ideas and words of Abdullah Öcalan. They contended that the applicant was praising the PKK and it's so called "national liberation struggle for Kürdistan". The Government stated that at the time of the events this meant killing innocent people. The Government submitted that the applicant has acknowledged this, in his article, while reviewing the book called "*The Cease-fire declared by the PKK and its Effects*". They pointed out that the PKK was recently included among the European Union's list of terrorist organisations. In this respect, they maintained that the applicant disseminated propaganda for a terrorist organisation which killed many people. The Government emphasised that PKK related terrorism was at its peak at the time of the publishing of the article and that, therefore, the applicant's article would have constituted an indirect incitement to further violence.

(b) The Court's assessment

32. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, the following judgments, *Ceylan,* cited above, § 32, *Öztürk v. Turkey* [GC], no. 22479/93, § 64, ECHR 1999-VI, *İbrahim Aksoy*, cited above, § 51-53, 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.

33. The Court must look at the impugned interference in the light of the case as a whole, including the content of the article and the context in which it was diffused. 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).

34. The article in issue consists of a review of four books written by four different authors. One of the books that was reviewed by the applicant "*Tasfiyeciliğin Tasfiyesi*" was written by the leader of the PKK. The Court notes that the arguments of the parties in their observations centred on the proper meaning of the term "*tasfiye*", contained in both the applicant's article and in the title of the book. In this respect, the Court would emphasise that the applicant was not the author of the book in which the theme of "*tasfiye*" was developed but a mere journalistic commentator. As such, freedom of expression requires that care be taken to dissociate the personal views of the writer of the commentary from the ideas that are being discussed or reviewed even though these ideas may be considered offensive to many or even to amount to an apologia for violence.

35. Furthermore, the Court notes that the applicant was convicted by the Istanbul State Security Court not for the offence of incitement to violence, but for disseminating propaganda about the PKK. In its judgment, the State Security Court did not, however, rely on the arguments that are now adduced by the Government to justify the interference in question. In particular, the Court observes that the national judges did not seek to interpret or to give any special weight to the term "*tasfiye*" in their reasoning leading to the conviction of the applicant (see *Müslüm Gündüz v. Turkey*, no. 35071/97, § 48, 4 December 2003).

36. Moreover, the Court attaches particular significance to the fact that the applicant was convicted and sentenced to imprisonment for disseminating such propaganda even though the impugned article was never actually disseminated since the edition of 2 January 1994 of *Özgür Gündem* which contained the article in issue, was seized by an order of the Istanbul State Security Court before it was distributed.

37. The Court further observes that, notwithstanding the fact that the execution of the sentence imposed on the applicant was in any event suspended, he nevertheless faced the threat of a heavy penalty. The Court reiterates in this connection that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference.

38. Against this background, the Court considers that the reasons given by the Istanbul 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 (see *Şener v. Turkey*, no. 26680/95, § 45, 18 July 2000).

39. Having regard to the above considerations, the applicant's conviction was disproportionate to the aims pursued and, accordingly, not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

40. The applicant submitted that the Istanbul State Security Court that tried and convicted him was not an "independent and impartial tribunal" capable of guaranteeing him a fair trial, because one of its members was a military judge. In his submission, that amounted to a breach of Article 6 §1 of the Convention, the relevant part of which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

41. The Court has examined a large number of cases raising similar issues to those in the present case and found a violation of Article 6 § 1 of the Convention (see *Özel*, cited above, §§ 33-34, and *Özdemir v. Turkey,* no. 59659/00, §§ 35-36, 6 February 2003).

42. The Court has examined the present case and considers that the Government have not submitted any facts or arguments capable of leading to a different conclusion in this instance. It considers it understandable that the applicant – prosecuted in a State Security Court for offences under the Criminal Code – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service. On that account he could legitimately fear that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. Consequently, the applicant's doubts about that court's independence and impartiality may be regarded as objectively justified (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1573, § 72, *in fine*).

43. In conclusion, the Court considers that the State Security Court which tried and convicted the applicant was not an independent and impartial tribunal within the meaning of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed compensation for pecuniary and non-pecuniary damage which he assessed 10,000 euros (EUR).

46. The Government considered that the amount requested by the applicant was excessive.

47. As regards the alleged pecuniary damage sustained by the applicant, the Court notes that the applicant has not produced any documents in support of his claim. The Court accordingly dismisses this claim.

48. With regard to non-pecuniary damage, 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, as required by Article 41 of the Convention, the Court awards him EUR 2,000 for non-pecuniary damage.

49. Where the Court finds that an applicant was convicted by a tribunal which was not independent and impartial within the meaning of Article 6 § 1, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted, if the latter requests, a prompt retrial by an independent and impartial tribunal (*Gençel*, cited above, § 27).

B. Costs and expenses

50. The applicant, who received 4,100 French francs (EUR 625) in legal aid from the Council of Europe in connection with the presentation of his case, claimed EUR 2,000 in respect of costs and expenses incurred before the Court. He did not provide the Court with any receipts in respect of his claim under this head.

51. The Government contested the amount requested by the applicant.

52. Having regard to the evidence before it and its case-law in this field, the Court considers the sum of EUR 2,000 reasonable in respect of the proceedings before the Court and awards the applicant EUR 2,000 less EUR 625 received by way of legal aid from the Council of Europe.

C. Default interest

53. 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

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

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 1,375 (one thousand three hundred and seventy-five 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 amount[s] at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 11 January 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr S. Pavlovschi is annexed to this judgment.

N.B.
M.O'B.

DISSENTING OPINION OF JUDGE PAVLOVSCHI

Unfortunately, and to my great regret, I am unable to subscribe to certain of the conclusions reached by the majority in the present case.

I have no difficulty whatsoever with regard to the merits of the case. I share the majority's view that there has been a violation of both Article 6 § 1 and Article 10 of the Convention.

My difficulties begin when analysing the application of Article 41 of the Convention.

In particular, I refer to the award made to the applicant in respect of non-pecuniary damage, namely EUR 2,000. I consider this amount far too small and inadequate to the circumstances of the case. It does not correspond to the degree of suffering experienced by the applicant.

In my opinion, it is impossible to justify this amount of compensation either from the point of view of formal logic or from the perspective of the Court's case-law. These render this level of compensation unfair and unjust.

I am firmly convinced that, when examining “freedom of expression”-type violations, it is vitally necessary - if not imperative - to make a clear distinction between different forms of interference by a state, which may in turn result in different forms of suffering.

In practical terms, the severity of suffering entitles applicants to differing (higher or lower) amounts of compensation. To some extent, and in so far as possible, such compensation should be proportionate to the various degrees of suffering.

In my opinion, it is clear that the suffering of persons who, as a result of exercising their right to freedom of expression, were subject to criminal prosecution, conviction and punishment is higher than that of persons who, in the same conditions, were not subject to criminal sanctions. It is quite clear that the suffering of persons detained by the authorities - be it for a couple of hours, a couple of days or a couple of months - is higher than that of a person who was not so detained.

Equally, the suffering of a person who, as a result of exercising his or her rights to freedom of expression, is obliged by the judicial authorities merely to compensate other persons for the non-pecuniary damage caused by his or her professional activity is much lower than that of a person who is prosecuted and convicted of a criminal offence.

In my opinion, the suffering of persons who are criminally convicted for their opinions is even greater in situations where such convictions are based on judicial decisions arising from a violation of the right to a fair trial. It has for years been this Court's general practice that the award made to a person who suffered as a result of two or more different violations should be higher than the award made to a person who suffered from only one violation.

For those reasons, I am unable to agree when, in a "freedom of expression" case which did not arise from the applicant's prosecution, conviction of a criminal offence and punishment, or from his or her detention, the compensation awarded was EUR 4,000, yet, in the present case, where the applicant was prosecuted, convicted of a criminal offence and punished, he was awarded only EUR 2,000. This difference is especially striking if one takes into account the fact that, in the first case, the Chamber found only a violation of Article 10 while, in the present case, violations have been found of both Article 10 and Article 6 § 1.

There is no logical explanation as to why, in a case where the Chamber finds a violation of Article 10 alone, the compensation awarded is EUR 4,000, but, where the same Chamber finds a violation of both Article 10 and Article 6 § 1, the award is merely EUR 2,000.

Nor is it possible to explain how a person who was not prosecuted, convicted or punished on a criminal charge is awarded EUR 4,000, while a person who was prosecuted, convicted and punished on a criminal charge is awarded only EUR 2,000. I find this approach absolutely unjust, i.e. contrary to the provisions of Article 41 of the Convention, which enshrined the principle of "just satisfaction".

In my opinion, the award in respect of the applicant's non-pecuniary damage in this particular case should be no less than EUR 4,000, a sum which should be taken as a starting point. Taking into consideration the criminal character of the sanctions applied to the applicant, I would add a further EUR 2,000. Last but not least, taking into consideration the fact that a violation of Article 6 § 1 of the Convention was found in the present case, I would add EUR 3,000 to the previous two figures in respect of the violation of Article 6 § 1.

All these calculations lead me to the conclusion that, in order to be just, the award in the present case should have been EUR 9,000 or thereabouts, but certainly not EUR 2,000. This is where I disagree with the majority.