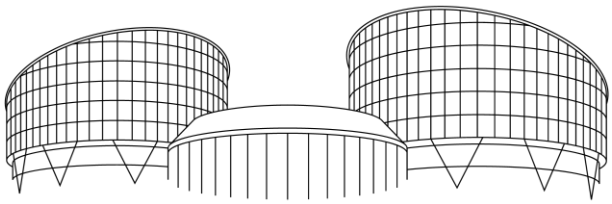

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ÇAMYAR AND BERKTAŞ v. TURKEY

(Application no. 41959/02)

JUDGMENT

STRASBOURG

15 February 2011

FINAL

15/05/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Çamyar and Berktaş v. Turkey**,**

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Dragoljub Popović,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos,
Guido Raimondi, *judges,*

and Françoise Elens-Passos, *Deputy Section Registrar,*

Having deliberated in private on 25 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 41959/02) 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 two Turkish nationals, Ms Elif Çamyar and Ms Nevin Berktaş ("the applicants"), on 7 October 2002.

2. The applicants, who had been granted legal aid, were represented by Ms V.D. Behrens, a lawyer practising in Berlin, as well as Mr M. Filorinali and Ms Y. Başara, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged that they had been denied a fair hearing by an independent and impartial tribunal and that their conviction for publishing a book had constituted a violation of their right to freedom of expression within the meaning of Articles 6 and 10 of the Convention, respectively.

4. On 8 February 2008 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1968 and 1958 respectively and live in Istanbul. The first applicant is the owner of a publishing house in Istanbul

which published a book giving rise to the present application. The second applicant is the editor and author of the book in question.

A. The criminal proceedings before the Istanbul State Security Court

6. On 25 April 2000 the public prosecutor at the Istanbul State Security Court commenced an investigation in connection with a book, entitled *Hücreler*[1], published and written by the first and second applicants respectively as a critique of the Turkish penitentiary system. The book contains nine articles, five of which are written by the second applicant, in which the authors criticise the cell system in Turkish prisons. By way of examples from other countries and personal anecdotes, the second applicant claims in her articles that the cell system facilitates ill-treatment and leads to deaths in prison. The introductory part of the book states the following:

> "This book is a salute to the new generations who fascism is trying to separate from our history of resistance and tradition of unity. It is a white page handed over by those who made courage and sacrifice the norm and created future revolutionary fighters. It is a message from those who, like a magnet, carried new powers from generation to generation to our ranks. We did not and will not allow [future generations] to forget the traditions and norms that were created during humanity's, revolutionists' and communists' struggle and revolt against slavery, genocide, fascism and national and class exploitation ... In this book, we transmit our conscience and hearts to those who are fighting for a better future."

7. The book also contains four other articles written by persons serving prison sentences, following their conviction for having been involved in an illegal armed organisation called the *TIKB* (*Bolşevik*).[2] In their articles, entitled "Isolation cells are death cells", "She was in [prison], I was out", "Empty the dungeons, free the prisoners" and "Prisons and health", the authors criticise the isolation of prisoners, ill-treatment of detainees and poor prison conditions and recount their personal experiences of imprisonment. Furthermore, the book comprises newspaper clippings concerning the real events on which the articles are based.

8. On 23 October 2000 the public prosecutor filed a bill of indictment against the applicants, accusing them of disseminating propaganda that undermined the territorial integrity and the indivisible unity of the Republic of Turkey through publishing, and of aiding and abetting an illegal armed organisation, namely, *TIKB (Bolşevik)*, in certain parts of the book. The charges were brought under sections 5 and 8 subsections 1, 2 and 4 of Law no. 3713[3] and Articles 36 and 169 of the now defunct Criminal Code. The Government noted that *TIKB (Bolşevik)* had been involved in a number of terrorist acts with a view to detaching part of the territory of Turkey and

1. *Cells*
2. Turkish Union of Revolutionary Communists (Bolshevik)
3. The Prevention of Terrorism Act

forming a political regime based on Marxist-Leninist ideology. The organisation, which was qualified as a terrorist organisation under the domestic law of Turkey, disseminated separatist propaganda within the Kurdish community and incited hatred and hostility by making distinctions on the basis of race and region.

9. At the first hearing, held on 24 January 2001, the Istanbul State Security Court invited the applicants to present their defence arguments against the bill of indictment filed by the public prosecutor. Both applicants requested an extension of the time-limit for the preparation of their defence, which was granted. The applicants were informed that they were expected to present their defence arguments at the next hearing and that otherwise they would be deemed to have waived their defence rights in so far as the bill of indictment was concerned.

10. At the second hearing, on 11 April 2001 the applicants requested a further extension. The first applicant, Elif Çamyar, claimed that she had appointed a new lawyer who had prior engagements, and the second applicant argued that she had encountered problems in meeting with her lawyer due to the searches conducted on lawyers visiting the prison. The State Security Court dismissed the applicants' request for a further extension and indicated that that interim decision could be appealed against along with the decision on the merits.

11. At the third and fourth hearings, on 11 July 2001 and 24 October 2001 Nevin Berktaş requested extensions of the time-limit for submission of her defence arguments, whereas Elif Çamyar or her representative did not attend. The court granted the extensions requested and ruled that at the next hearing the applicants were required to be present and make their final submissions.

12. On 7 November 2001 the Istanbul State Security Court heard the applicants' defence submissions. The applicants pleaded not guilty and argued that in the book they had merely criticised fascist policies in Turkey and, particularly, had expressed their opinion about the prison system. They claimed further that their trial by a State security court for publication of a book had constituted a violation of Articles 6 and 10 of the European Convention on Human Rights. Following this hearing, the State Security Court rendered its judgment and convicted the applicants under Article 169 of the now defunct Criminal Code of aiding and abetting the illegal armed organisation *TIKB (Bolşevik)*. The court sentenced the first applicant to three years and nine months' imprisonment, convertible to a fine of 4,152,330,000 Turkish liras[1] (TRL), and the second applicant to four years, four months and fifteen days' imprisonment in view of her previous conviction of membership of the *TIKB (Bolşevik)*. The State Security Court did not make reference to any specific passages or pages of the book, but rather based its conviction on a review of the book as a whole.

1. Approximately EUR 2,680 at the date of the judgment.

B. The appeal proceedings

13. By petitions dated 8 and 12 November 2001 the applicants appealed against the above-mentioned judgment and requested the Court of Cassation to hold a hearing. The Court of Cassation decided to hold a hearing in respect of Nevin Berktaş but dismissed the request of Elif Çamyar on the grounds that the conditions required under Article 318 of the Code of Criminal Procedure had not been met.

14. On 4 April 2002 the Court of Cassation upheld the judgment of the State Security Court without holding a hearing. It noted that Nevin Berktaş and her representative had not attended the hearing and had not informed the court of the reason for their absence. The opinion of the Chief Public Prosecutor submitted to the Court of Cassation was not communicated to the applicants.

15. On 26 April 2002 the decision of the Court of Cassation was returned to the registry of the Istanbul State Security Court.

C. The re-examination of the final judgment by the Istanbul Assize Court in view of the entry into force of the new criminal code

16. On 10 January 2004 the applicants requested a re-examination of their case by the 14th Chamber of the Istanbul Assize Court in view of the future entry into force of the new criminal code on 13 January 2005 (Law no. 5237). They further asked the court to suspend the execution of their sentences.

17. In a judgment dated 29 June 2007 the Istanbul Assize Court first determined which law was the most favourable in respect of the applicants. It held that the former criminal law was more favourable to the first applicant because she had been convicted of an offence under Article 169 of the now defunct Criminal Code and her sentence had been converted to a fine, whereas if the new amendments had applied she would have been sentenced to at least one year of imprisonment, which could not be converted into a fine.

18. As regards the second applicant, Nevin Berktaş, the court held that the provisions of the new criminal code were more favourable to her. Thus, it convicted her of the offence under section 7(2) of Law no. 3713. The court, after reducing the penalty to be imposed by 1/6 under Article 62 of the new Criminal Code, sentenced the second applicant to ten months' imprisonment and to a fine of TRY 416. The applicants appealed.

19. On an unspecified date, the Court of Cassation quashed the above judgment in respect of the first applicant, Elif Çamyar, on the ground that a pre-payment notice (*ön ödeme ihtaratı*) had not been served on her. It noted that the offence committed by the applicant fell within the scope of section 7(2) of Law no. 3713, as amended by Law no. 5532, and that the said provision provided for a fine and required pre-payment.

20. In a judgment dated 18 December 2009 the Istanbul Assize Court convicted the first applicant, Elif Çamyar, of the offence under Article 169 of the former Criminal Code and sentenced her to three years and nine months' imprisonment. The Assize Court reiterated that the former criminal code was more favourable to the first applicant since it provided for a lighter sentence that could be converted to a fine. Thus, in the light of the new amendments, the court converted the first applicant's prison sentence to a fine in the amount of TRY 4,095 (approximately EUR 2,000). The court noted that the first applicant and her representative had failed to attend the hearing and had also failed to make the pre-payment.

21. On 26 January 2010 the first applicant appealed against that judgment. The proceedings are still pending before the Court of Cassation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. At the time of the applicants' conviction, Article 169 of the Criminal Code provided as follows:

> "Any person who, knowing that an armed gang or organisation is illegal, assists it, harbours its members, provides it with food, weapons and ammunition or clothes or facilitates its operations in any manner whatsoever shall be sentenced to no less than three and no more than five years' imprisonment ..."

On 30 July 2003 this Article was amended and the part "... or facilitates its operations in any manner whatsoever ..." was deleted.

23. Under section 7(2) of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), any person who disseminates propaganda in favour of a terrorist organisation shall be liable to a term of imprisonment of one to five years.

24. Further information on the relevant domestic law and practice in force at the material time can be found 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.

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicants complained that their conviction for publication of a book constituted a violation of their right to freedom of expression under Article 10 of the Convention, which reads 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 ..."

27. The Government contested that argument.

A. Admissibility

28. The Government contended that the applicants had failed to exhaust domestic remedies, within the meaning of Article 35 § 1 of the Convention, since they had not raised an objection in respect of their right to freedom of expression. Nor could they claim to be victims under Article 34 of the Convention.

29. The applicants disputed the Government's submissions.

30. The Court notes that the applicants pleaded not guilty to the charges brought against them throughout the proceedings and, particularly, at the hearing on 7 November 2001 they alleged that their trial had violated their rights protected by Articles 6 and 10 of the Convention (see paragraph 12 above). The Court thus considers that the applicants, who pursued the proceedings up until the last instance and raised their complaints before the Court of Cassation, can be considered to have exhausted domestic remedies. They can also claim to be victims of a violation of their rights guaranteed by Article 10 in view of their conviction by the national courts. The Court dismisses the Governments' objection concerning the exhaustion of domestic remedies and the applicants' victim status.

31. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

32. The applicants alleged that their conviction for publishing the book in question was not justified since their aim had been merely to criticise the penitentiary system in question. In their view, the prosecuting authorities had punished them for their use of the phrase, "The freedom fight of the Kurdish people" on page 39 of the book. The interference was therefore a new obstacle to freedom of press and the freedom to impart opinions.

33. The Government maintained that the interference with the applicants' right to freedom of expression was justified under the provisions of the second paragraph of Article 10. They argued that the content of the book incited hatred and hostility and praised terrorist crime. In their opinion, the measures taken against the applicants fell within the margin of appreciation of the authorities and were justified under the second paragraph of Article 10.

2. The Court's assessment

34. The Court notes that it is not in dispute between the parties that the applicants' conviction and sentence constituted an interference with their 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, namely, the prevention of crime, for the purposes of Article 10 § 2. In the present case what is at issue is whether the interference was "necessary in a democratic society".

(a) General principles

35. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (see, in particular, the following judgments: *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24; *Şener v. Turkey*, no. 26680/95, §§ 39-43, 18 July 2000; *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, §§ 51-53, 10 October 2000; *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, §§ 41-42; *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999; and *Kuliś v. Poland*, no. 15601/02, §§ 36-41, 18 March 2008).

36. The Court considers that the principles contained in the above-mentioned judgments also apply to the publication of books in general or written texts other than the periodical press (see *Association Ekin v. France*, no. 39288/98, §§ 56-57, ECHR 2001-VIII). It will examine the present case in the light of the above principles.

(b) Application of the above principles to the facts of the present case

37. The Court notes that the applicants were convicted of aiding and abetting a terrorist organisation and disseminating propaganda in favour of it through the publication and distribution of a book. Since they were, respectively, the owner of the publishing house which printed the book and editor-in-chief and author of the book in question, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy (see *Lingens*, cited above, § 41, and *Fressoz and Roire*, cited above, § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State, such as national security or territorial integrity, against the threat of violence or for the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only does the press have the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV).

38. Turning to the facts of the case, the Court notes that the impugned book is a compilation of articles inspired by real events, namely, the personal experience of the second applicant and certain other persons who had been convicted of affiliation with the *TIKB* (*Bolşevik*). When examined in its entirety, it appears that the book is a severe criticism of the Turkish penitentiary system. The personal anecdotes told in the book concentrate on the ill-treatment inflicted on the detainees or pressure exerted on them by security officials, which no doubt may create in the mind of the reader a powerful hostility towards the injustice to which the detainees were subjected in the prisons. Furthermore, in one of the articles, entitled "Prisons and health", the author, who is a medical doctor, criticizes the general conditions of detention in prisons, which he considers inhuman and degrading for the detainees. However, he makes constructive recommendations to the authorities for the improvement of the conditions in prisons.

39. Nonetheless, it is also possible that certain ideas conveyed in the book may be regarded as highly controversial and be correlated to the *TIKB* (*Bolşevik*) by some readers. In particular, the book glorifies the struggle of "revolutionaries" against slavery, genocide, fascism and national and class exploitation (see paragraph 6 above). On that account, the Court takes note of the Turkish authorities' concern about the dissemination of views which they considered might exacerbate serious disturbances in the prisons or in the country generally.

40. However, even though some of the passages from the book seem hostile in tone, the Court considers them to be an expression of deep distress

in the face of tragic events that occurred in prisons, rather than a call to violence.

41. Moreover, while the Government argued that the book incited hatred and hostility and praised terrorist crime, the domestic courts did not rely on the arguments that are now adduced by the Government to justify the interference in question. In other words, the national courts did not make reference to any specific passages or pages of the book which could be regarded as incitement to hatred or violence, but rather based the applicants' conviction on a review of the book as a whole.

42. Finally, the Court takes into account the fact that the impugned articles in the book, written by private individuals, would necessarily reach a relatively narrow readership compared to views expressed by well known figures in the mass media. Accordingly, this limits the potential impact of the book on "public order" to a substantial degree.

43. Against this background, the Court considers that the reasons given by the domestic courts for convicting and sentencing the applicants cannot be considered sufficient to justify the interference with their right to freedom of expression.

44. In the light of the foregoing considerations, the Court concludes that the applicants' 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 OF THE CONVENTION

45. The applicants complained that the written opinion of the principal public prosecutor at the Court of Cassation had never been served on them, thus depriving them of the opportunity to put forward their counter-arguments. The applicants relied on Article 6 of the Convention which, in so far as relevant, provides:

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

A. Admissibility

46. The Government contended that the second applicant had no victim status within the meaning of Article 34 of the Convention since she had failed to attend the hearing at the Court of Cassation where the written opinion of the Principal Public Prosecutor had been read out.

47. The second applicant disputed this allegation.

48. The Court reiterates that it has already examined and rejected similar arguments advanced by the Government in similar cases (see, in particular, *Kabasakal and Atar v. Turkey*, nos. 70084/01 and 70085/01, § 37, 19 September 2006). It finds no particular circumstances in the instant case

which would require it to depart from its findings in the above-mentioned case. It therefore rejects the Government's preliminary objection.

49. 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.

B. Merits

50. The Government submitted that the written opinion of the Principal Public Prosecutor was not binding on the Court of Cassation, as it was free to decide on appeals regardless of the Prosecutor's opinion. They further maintained that the applicants or their representatives had had the right to consult the case file and examine the documents. Finally, the Government pointed out that, on account of the recent amendment of 27 March 2003, Article 316 of the Code of Criminal Procedure now provided that the written opinion of the Principal Public Prosecutor of the Court of Cassation must be sent to the parties.

51. The applicants maintained their allegations.

52. The Court notes that it has already examined the same grievance in the case of *Göç v. Turkey* and found a violation of Article 6 § 1 of the Convention ([GC], no. 36590/97, § 58, ECHR 2002-V). In that judgment the Court held that, having regard to the nature of the Principal Public Prosecutor's submissions and to the fact that the applicant had not been given an opportunity to make written observations in reply, there had been an infringement of the applicant's right to adversarial proceedings (*loc. cit*. § 55).

53. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned case.

54. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

55. The applicants complained under Article 6 § 1 of the Convention that they had not been tried by an independent and impartial tribunal and that they had been denied an oral hearing before the Court of Cassation. They further alleged that they had not had adequate time and facilities for the preparation of their defence as safeguarded under 6 § 3 (b) of the Convention, because the State Security Court refused to grant them an extension of the time-limit for the preparation of their initial defence against the indictment by the public prosecutor.

56. In the light of all the material in its possession, the Court finds that the applicants' submissions do not disclose any appearance of a violation of

the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicants each claimed 50,000 euros (EUR) in respect of non-pecuniary damage. As to the pecuniary damage, the applicants claimed EUR 27,300 and EUR 60,500, respectively.

59. The Government invited the Court not to make any awards in respect of pecuniary damage on account of the applicants' failure to submit any evidence in support of their claims. The Government also considered that the claim for non-pecuniary damage was excessive and therefore unacceptable.

60. The Court observes that the applicants have not submitted any evidence to enable the Court to assess and calculate the damage caused by their conviction; it therefore rejects this claim. However, having regard to the nature of the violations found in the present case and ruling on an equitable basis, the Court awards each applicant the sum of EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

61. The applicants also claimed EUR 5,000 for the costs and expenses incurred before the Court.

62. The Government objected to the claim as being unsubstantiated.

63. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicants have not substantiated that they have actually incurred the costs claimed. In particular they failed to submit documentary evidence, such as bills, receipts, a contract, a fee agreement or a breakdown of the hours spent by their lawyer on the case. Accordingly, the Court makes no award under this head.

C. Default interest

64. 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 complaints concerning the alleged breach of the applicants' rights to freedom of expression and non-communication of the Principal Public Prosecutor's written opinion admissible and the remainder of the application inadmissible;

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

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as a result of the non-communication to the applicants of the Principal Public Prosecutor's written opinion;

4. *Holds*
   (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President