CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF DEMİREL AND ATEŞ (NO. 3) v. TURKEY

(Application no. 11976/03)

JUDGMENT

STRASBOURG

9 December 2008

FINAL

09/03/2009

This judgment may be subject to editorial revision.

In the case of Demirel and Ateş (no. 3) v. Turkey**,**

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

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 18 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 11976/03) 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 Hünkar Demirel and Mr Hıdır Ateş ("the applicants"), on 4 March 2003.

2. The applicants were represented by Mr Ö. Kılıç, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 18 January 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

4. The applicants were born in 1979 and 1951 respectively and currently reside in Neu Isenburg and Berlin respectively.

5. The second applicant, Mr Ateş, and the first applicant, Ms Demirel, were, respectively, the owner and the editor of *Yedinci Gündem*, a weekly newspaper.

6. In its 31st edition, in January 2002, *Yedinci Gündem* published an article entitled 'Öcalan[1]'s reply to Akçam[2]'. It concerned Abdullah Öcalan's response to Taner Akçam's accusations on issues concerning the establishment of the PKK and its development which was published in another newspaper. It also featured Öcalan's thoughts on various issues such as education and cultural activities in Kurdish. Various parts of the article read as follows:

" Response to Taner Akçam

....Öcalan replied to one of the ex-leaders of DEV-YOL, Taner Akçam...It is not a coincidence that they are making him talk. It is important...Those that Taner Akçam claimed to have saved from the hands of the PKK, he had them murdered...he caused great damage...they had them murdered. This person's identity and personality is dubious. He also caused great damage to the PKK...We were at ADYÖD together in 1975...In 1982 he provoked the anti-fascist front. You can ask Teslim Töre this, he knows this period. He said that, at that time, Apo wanted to kill him. No, I never had any intention of killing him. On the contrary, we have suspicions that it was that front who attempted to kill or assassinate us. He very openly dissolved DEV-YOL. He is swearing to his past...he has one foot in America, the other in Yerevan. It is not known to whom and what he adheres...He is dangerous...

Identity notice

Abdullah Öcalan also referred to the desires for a Kurdish education and the State's response to these requests and said: It would be better to establish special learning houses in villages and streets to learn Kurdish on a scientific basis rather than the State giving permission for it. I am saying do literary and cultural work and activities...If Turkey prohibits it then it cannot make progress...

"May it be a democratic year"

If there are no developments in the democratic expansion then there will be deadlock. If State keeps the doors open for democratic expansion and, a democratic response develops then Turkey will grow big both inside and outside...If pressure, denial and destruction develops a new in that case the state of legitimate defence will be realised".

7. On 28 January 2002 the prosecutor at the Istanbul State Security Court filed a bill of indictment with that court and charged the applicants with offences defined in Section 6 § 2 of the Anti-Terrorism Act (Law no. 3713), namely publishing declarations of an illegal organisation. In addition, he called for the application of Additional section 2 of the Press Act (Law no. 5680) and section 36 of the Criminal Code.

[1] Abdullah Öcalan, the former leader of PKK (the Workers' Party of Kurdistan), an illegal armed organisation.
[2] Dr Taner Akçam is a sociologist, historian and writer.

8. On 4 February 2002 criminal proceedings against the applicants commenced before the Istanbul State Security Court.

9. In their written submissions to the court the applicants denied that the publication of the article had been in contravention of the applicable legislation. They maintained, *inter alia*, that by publishing the article they had been doing their jobs and informing the public. There had been nothing in the article which could be interpreted as an insult to other individuals or as an incitement to commit offences and that there was no justification for a restriction on their right to freedom to impart information.

10. On 3 June 2002 the Istanbul State Security Court convicted the applicants as charged. It found that the article in question had described the establishment, development and activities of the PKK and had further referred to Öcalan's statements about a Kurdish education campaign. As such, the article as a whole had constituted a statement on behalf of the illegal organisation and the applicants had committed an offence by publishing that statement in their newspaper. The second applicant was ordered to pay a "heavy fine" of 4,000,500,000 Turkish liras (TRL) (approximately 3,000 euros (EUR)) and the first applicant was ordered to pay a heavy fine of TRL 2,000,250,000 (approximately EUR 1,500). The first-instance court further ordered, in accordance with Additional section 2 § 1 of Law no. 5680, the temporary closure of the newspaper for a period of seven days.

11. The applicants appealed. On an unspecified date the principal public prosecutor at the Court of Cassation submitted his written opinion on the merits of the applicants' appeal. The opinion was not notified to the applicants.

12. On 19 December 2002 the Court of Cassation upheld the judgment of the first-instance court.

13. On 20 January 2003 the president of the Istanbul State Security Court sent the final judgment to the prosecutor's office at the Istanbul State Security Court and requested that the order for the newspaper's closure be executed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. A description of the relevant domestic law at the material time can be found in *Demirel and Ateş v. Turkey (no. 2)*, (no. 31080/02, § 12, 29 November 2007).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

15. The applicants complained that their criminal conviction had infringed their right to freedom of expression. They relied in that connection on Article 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."

A. Admissibility

16. 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

1. The parties' submissions

17. 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. In particular, they considered that the content of the article incited violence and hostility among various groups in Turkish society, thus endangering human rights and democracy. Therefore, the interference with the applicants' right was proportionate to the legitimate aims pursued and the reasons adduced by the authorities were relevant and sufficient.

18. The applicants maintained their allegations and asked the Court, in line with its case-law, to find a violation.

2. The Court's assessment

19. The Court notes that it is not in dispute between the parties that the applicants' conviction 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 or aims, namely national security and territorial integrity for the purposes of Article 10 § 2. The Court, therefore, will confine its examination of the case to the question whether the interference was "necessary in a democratic society".

20. 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; *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-I; *Lingens v. Austria*, 8 July 1986, §§ 41-42, Series A no. 103; and *Erdoğdu v. Turkey*, no. 25723/94, §§ 51-53, ECHR 2000-VI). It will examine the present case in the light of these principles.

21. 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 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". In addition, the nature and severity of the penalties imposed are also factors to be considered when assessing the proportionality of the interference (see *Skałka v. Poland*, no. 43425/98, § 42, 27 May 2003). Moreover, the Court also takes into account the background to the case submitted to it, particularly problems linked to the prevention of terrorism (see *Karataş v. Turkey* [GC], no. 23168/94, § 51, ECHR 1999-IV).

22. The Court has on many occasions stressed the essential role the press plays in a democratic society. It has, *inter alia*, stated that although the press must not overstep certain bounds set, for example, for the protection of vital interests of the State such as national security or territorial integrity, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including divisive ones (see, for example, *Şener v. Turkey*, cited above, § 41; and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 59, ECHR 1999-IV). Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III).

23. In addition, the Court reiterates that news reporting based on interviews or declarations by others, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog". The punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to the discussion of matters of public

interest, and should not be envisaged unless there are particularly strong reasons for doing so (see, for example, *Kuliś v. Poland*, no. 15601/02, § 38, 18 March 2008). The Court reiterates that, in cases concerning the press, the national margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press (see *Dąbrowski v. Poland*, no. 18235/02, § 31, 19 December 2006).

24. The Court observes that it has examined a number of cases, two of which were brought by the same applicants, raising similar issues to those in the present case and found a violation of Article 10 of the Convention (see, in particular, *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, 8 July 1999; *Özgür Gündem v. Turkey*, no. 23144/93, §§ 63-64, ECHR 2000-III; *Korkmaz v. Turkey (no. 1)*, no. 40987/98, 20 December 2005; *Korkmaz v. Turkey (no. 3)*, no. 42590/98, 20 December 2005; *Halis Doğan v. Turkey (no. 2)*, no. 71984/01, 25 July 2006; *Karakoyun and Turan v. Turkey*, no. 18482/03, 11 December 2007; *Demirel and Ateş v. Turkey*, nos. 10037/03 and 14813/03, 12 April 2007; and *Demirel and Ateş v. Turkey (no. 2)*, cited above). The Court has examined the present case in the light of its case-law and considers that the Government have not submitted any facts or arguments capable of leading to different conclusions in this instance for the following reasons.

25. In the instant case, the Court notes that the article in question concerned statements by Abdullah Öcalan, partly in response to Mr Akçam's statements published in another newspaper and which concerned an historical account of the establishment and development of the PKK. It also included his views on the use of Kurdish in education and cultural activities as well as his general message as regards the year 2002. The Court observes that the domestic courts assessed that the article in question constituted a statement on behalf of an illegal organisation and that the applicants had committed an offence by publishing that statement in their newspaper. The applicants were subject to heavy fines and, in addition, the newspaper was closed for a period of seven days; that is for one single issue.

26. The Court has examined the article in question. It considers that the article in question had a newsworthy content since it provided, however one-sided, historical information about an organisation which has since 1985 waged armed opposition against the State, its background, place in the leftist movements and persons involved and an insight into the psychology of the person who was the driving force behind it. While it also contained serious allegations about Mr Akçam, the Court notes that this was not in issue in the instant proceedings, where the applicants were charged under the Anti-Terrorism Act and not with defamation. The Court further considers that, despite particularly libellous and acerbic passages, the article as a whole cannot be construed, on any reading, as encouraging violence**,** armed resistance or an uprising (see, *Gerger v. Turkey* [GC], no. 24919/94,

§ 50, 8 July 1999, *a contrario*, *Halis Doğan v. Turkey*, no. 75946/01, §§ 35-38, 7 February 2006, and *Gülcan Kaya v. Turkey* (dec.), no. 6250/02, 22 March 2007). In the instant case, the article in question was not capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons (see, *a contrario*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, cited above, § 62).

27. For the Court it appears that the domestic courts have not given consideration to any of the above but have concentrated instead on the mere fact that the article contained statements on the PKK from Abdullah Öcalan. As such the wording of Article 6 § 2 of Law no. 3713 and its application in the instant case falls short of the Convention requirements, since the fact that interviews or statements were given by a member of a proscribed organisation cannot in itself justify a blanket ban on the exercise of freedom of expression. Regard must be had instead to the words used and the context in which they were published, with a view to determining whether the impugned text, taken as a whole, can be considered an incitement to violence (see *Özgür Gündem, cited* above, § 63). When a publication cannot be categorised as such, Contracting States cannot with reference to national security or territorial integrity restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media (see, *mutatis mutantis, Sürek and Özdemir,* cited above, §§ 51 and 61).

28. Moreover, the Court notes that, apart from the substantial fines imposed on the applicants, the first-instance court also ordered the temporary closure of the newspaper for a period of seven days, which amounted to veiled censorship, likely to discourage the applicants and others from publishing similar articles in the future and hinder their professional activities.

29. Having regard to the circumstances of the case as a whole and notwithstanding the national authorities' margin of appreciation, the Court finds that the interference with the applicants' freedom of expression was not based on sufficient reasons to show that the interference complained of was "necessary in a democratic society" and their conviction under criminal law and sentence was disproportionate to the aim pursued.

30. It follows that there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

31. The applicants complained that the non-communication of the principal public prosecutor's written opinion to them infringed their right to a fair trial, resulting from the failure to respect the principle of equality of arms. They relied on Article 6 § 3 (b) of the Convention.

32. The Court considers that this complaint should be examined from the standpoint of Article 6 § 1, 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

33. 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

34. The Court notes that it has already examined the same grievance in the past and has found a violation of Article 6 § 1 of the Convention (see, in particular, *Demirel and Ateş v. Turkey (no. 2)*, cited above, § 17; *Karakoyun and Turan v. Turkey*, cited above, § 40; and *Abdullah Aydın v. Turkey (no. 2)*, no. 63739/00, § 30, 10 November 2005).

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

36. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROCOTOL No.1

37. The applicants complained under Article 1 of Protocol No. 1 that the temporary closure of the newspaper had constituted an unjustified interference with their right to peaceful enjoyment of their property.

38. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible. It further observes that the temporary closure of the newspaper was an incidental effect of the applicants' conviction. Having already determined that their conviction constituted a breach of Article 10 of the Convention (see paragraph 31 above), the Court finds it unnecessary to examine this complaint separately (see, for example, *mutatis mutandis, Ünsal Öztürk v. Turkey*, no. 29365/95, § 70, 4 October 2005, and, *mutatis mutandis, Öztürk v. Turkey* [GC], no. 22479/93, § 76, ECHR 1999-VI).

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

39. In their application form the applicants also raised complaints under Articles 1, 6 § 1 (in respect of the independence and impartiality of the Istanbul State Security Court), 7, 13, 14, 17 and 18 of the Convention.

40. The Court observes that it has previously examined and rejected the applicants' grievances of this kind (see *Demirel and Ateş v. Turkey* (dec.), no. 10037/03 and 14813/03, 9 February 2006). The Court finds no particular circumstances in the instance case which would require it to depart from its earlier findings. Consequently, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicants claimed 5,000 euros (EUR) and EUR 3,000 respectively for pecuniary damage and EUR 3,000 each in respect of non-pecuniary damage. The applicants maintained that their numerous convictions under the Anti-terrorism legislation had had a negative impact on their professional and private life, as a result of which they had to leave Turkey to avoid imprisonment.

43. The Government contested the amounts.

44. In the absence of any supporting evidence, the Court considers the applicants' claim for pecuniary damage unsubstantiated (see *Demirel and Ateş v. Turkey (no. 2)*, cited above, § 32). It accordingly dismisses them.

45. On the other hand, the Court considers that the applicants may be taken to have suffered a certain amount of distress and frustration, which cannot be sufficiently compensated by the finding of a violation alone. Taking into account the particular circumstances of the case, the type of violations found and having regard to its case law, the Court awards the applicants jointly EUR 4,000 for non-pecuniary damage.

B. Costs and expenses

46. The applicants also claimed EUR 3,250 for the costs and expenses incurred before the domestic courts and the Court. In support of their claims, they submitted a time sheet indicating 25 hours' legal work carried out by their legal representative.

47. The Government contested the amount.

48. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,000 for the proceedings before the Court.

C. Default interest

49. 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 applicants' right to freedom of expression, the non-communication of the written opinion of the principal public prosecutor at the Court of Cassation to them and the interference with their right to peaceful enjoyment of their property 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;

4. *Holds* that it is not necessary to examine separately the applicants' complaint under Article 1 of Protocol No.1;

5. *Holds*
   (a) that the respondent State is to pay the applicants, jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following sums, to be converted into new Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 4,000 (four thousand euros) for 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;

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

Done in English, and notified in writing on 9 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President