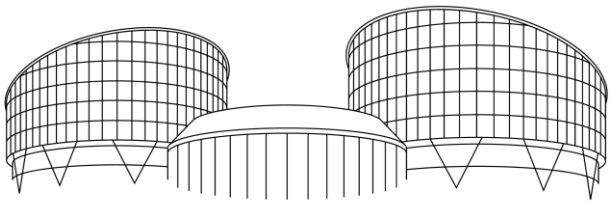

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF SORGUÇ v. TURKEY

(Application no. 17089/03)

JUDGMENT

This version was rectified on 21 January 2010
under Rule 81 of the Rules of Court

STRASBOURG

23 June 2009

FINAL

23/09/2009

This judgment may be subject to editorial revision.

In the case of Sorguç 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,
Dragoljub Popović,
Nona Tsotsoria,
Işıl Karakaş, *judges*,

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

Having deliberated in private on 2 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 17089/03) 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 a Turkish national, Mr Vehbi Doğan Sorguç[1] ("the applicant"), on 6 May 2003.

2. The applicant was represented by Mr M.S. Gemalmaz, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that his right to freedom of expression under Article 10 of the Convention had been breached since the domestic courts had qualified his criticism of the academic system as defamation. He maintained also that the domestic courts' decision had violated his rights under Article 6 of the Convention and Article 1 of Protocol No. 1.

4. On 11 January 2007 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).

1. Rectified on 21 January 2010. The former version read "Doğan Sorguç".

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1930 and lives in Istanbul.

6. The applicant is a professor of construction management at Istanbul Technical University. In his speech, delivered during the "First National Construction Conference", which took place in 1997, the applicant analysed the progress of the work in his field of discipline. He also distributed a paper in which he criticised the way the examinations for assistant professors were being administered.

7. On 17 September 1997, an assistant professor, N.C.A., brought a civil action for compensation against the applicant, before the Şişli Civil Court of First Instance. He claimed that certain remarks used by the applicant in the paper constituted an attack on his reputation, although his name was not mentioned. The statements in question were as follows:

> "The panel for the assistant professorship examination in the discipline of construction management was formed by academics of the construction faculty. This led to the election of very inadequate assistant professors. (...) During this period, before a panel on which [the applicant] was the only professor of construction management, a candidate was notified that his one-page-long report and his examination were not satisfactory. Blaming [the applicant] for the unsatisfactory result, the same candidate filed an action for damages, alleging that he had been beaten by [the applicant]. Before the action for compensation was finalised, he managed to pass the assistant professorship examination before another panel, whose members were not from the construction management department, and without publishing a single article ..."

8. On 10 June 1999 the first instance court rejected N.C.A's claim, holding that these statements were merely a criticism of the academic system and the institutions. N.C.A appealed.

9. On 13 September 1999 the Court of Cassation quashed the decision holding that the following sentence could be taken as an attack on the plaintiff's reputation:

> "...he managed to pass the assistant professorship examination before another panel, whose members were not from the construction management department, and without publishing a single article ..."

10. It held that the above sentence implied that, if there had been a different panel, the plaintiff would have failed the examination.

11. On 22 May 2000 the applicant's request for rectification of the latter decision was dismissed.

12. On 7 November 2000 the Şişli Civil Court of First instance, after having considered the Court of Cassation's views on the case, confirmed its earlier decision. It held that the defendant, who was an academic, should be

granted the flexibility enjoyed by members of the press or lawyers. The reasoning of the court was as follows:

> "If these statements were uttered by a press member or a lawyer, it would have been regarded as freedom of the press or the rights of the defence. If we hold that these remarks made by an academic were against the law, then this would be a breach of his constitutional rights, such as freedom of expression, dissemination of ideas (article 26) and freedom of science and the arts (Article 27)."

13. N.A.C. appealed once again. On 14 March 2001 the Joint Civil Chambers of the Court quashed the decision by 26 votes to 24, holding that the first instance court should have followed the opinion of the Court of Cassation.

14. On 30 May 2001 the applicant's request for the rectification of the latter decision was dismissed.

15. The case was resumed before the Şişli Civil Court of First Instance. The applicant informed the court that, at the beginning of the 1999-2000 academic year, the Discipline Council of the Yıldız Technical University had dismissed N.A.C. from his post on account of his inadequate scientific competence and personal values. In view of this information, the applicant asserted that he had been right to criticise the system of promotion and thus asked the court to dismiss the plaintiff's request.

16. On 12 December 2001 the first instance court followed the decision of the Joint Civil Chambers of the Court of Cassation, and awarded N.A.C. compensation in the sum of 1,000,000,000 Turkish liras (TRL) for non-pecuniary damage. The court did not address the applicant's argument concerning the dismissal of the plaintiff from the university. Both parties appealed against this decision.

17. On 10 June 2002 Court of Cassation upheld the decision of the first instance court.

18. On 13 November 2002 the applicant's request for rectification of the decision of 10 June 2002 was rejected by the Court of Cassation.

19. The applicant was ordered to pay TRL 3,455,215,000, the sum obtained by adding together the principal compensation, interest and court fees.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL MATERIAL

20. Article 49 of the Code of Obligations provides as follows:

> "Any person who alleges that his personality rights have been illegally violated can claim compensation for non-pecuniary damage.
>
> The judge shall take into account the parties' socio-economic situation, their occupation and social status when determining the amount of compensation..."

21. In its Recommendation 1762 (2006), the Parliamentary Assembly of the Council of Europe adopted the following declaration for the protection of academic freedom of expression:

> "...
>
> 4. In accordance with the Magna Charta Universitatum, the Assembly reaffirms the right to academic freedom and university autonomy which comprises the following principles:
>
> 4.1. academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction;...
>
> 4.3. history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation;..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicant complained that his right to freedom of expression had been interfered with in breach of 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 ... for the protection of the reputation or rights of others..."

23. The Government contested that argument.

A. Admissibility

24. 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

25. The applicant claimed that, as an academic, he had fulfilled his duty to inform scientific circles and the public at large about the weaknesses of the discipline in which he taught. In his statements, he had not mentioned the name of the plaintiff, but even if he had done so, this was not a valid reason to restrict his right to freedom of expression. In any event, the opinions expressed by him had had a factual basis given that the plaintiff had been dismissed from his post on account of inadequate scientific competence and personal values. The applicant concluded therefore that there was no pressing social need capable of justifying the interference in question and that it was not proportionate to the aim pursued.

26. The Government submitted that the applicant had sought to create a polemic about an incident which had occurred between him and N.A.C. several years before and that his words had exceeded the limits of a scientific discussion, although they had been uttered in a scientific environment. When striking a balance between the conflicting interests, namely the applicant's right to freedom of expression against the plaintiff's right to reputation, the domestic courts had ruled in favour of the latter. The interference in question was proportionate to the aim pursued and should be considered to fall within the margin of appreciation of the national authorities.

2. The Court's assessment

27. The Court notes that it was not in dispute between the parties that the final judgment given in the defamation case constituted an “interference” with the applicant's right to freedom of expression, protected by Article 10 § 1 of the Convention. Nor was it contested that the interference was “prescribed by law” and “pursued a legitimate aim”, that of protecting the reputation or rights of others, for the purposes of Article 10 § 2. It thus remains to be determined whether the interference in question was “necessary in a democratic society”.

(a) Relevant principles

28 The Court reiterates that the test of “necessity in a democratic society” requires the Court to determine whether the interference complained of corresponded to a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as

protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V; *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII). In this context, the Court reiterates that paragraph 2 of Article 10 recognises that freedom of speech may be restricted in order to protect reputation. In other words, the Convention itself announces that restrictions on freedom of expression are to be determined within the framework of Article 10 enshrining freedom of speech.

29. One factor of particular importance for the Court's determination in the present case is the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, for example, *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103; *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 63, Series A no. 204). However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment may be excessive if it has no factual basis to support it (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II).

30. Finally, the amount of compensation awarded must "bear a reasonable relationship of proportionality to the ... [moral] ... injury ... suffered" by the respondent in question (see *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 49, Series A no. 316-B; see also *Steel and Morris v. the United Kingdom*, no. 68416/01, § 96, ECHR 2005-II, where the Court held that the damages awarded "although relatively moderate by contemporary standards ... [were] ... very substantial when compared to the modest incomes and resources of the ... applicants ..." and, as such, in breach of the Convention).

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

31. The Court notes that the impugned statements were made by the applicant through distribution of a paper at a scientific conference. In this paper, the applicant criticised in essence the system of appointment and promotion of academics in the university. Relying on his personal experience, he maintained that the presence on promotion panels of persons who were not experts in the field of construction management led to the selection of academically inadequate persons for the posts of assistant professors. He asserted in that context that a candidate, who did not have adequate qualifications, had been promoted to an assistant professorship (see paragraph 7 above).

32. In the Court's opinion, these assertions should be qualified as value judgments on an issue of public importance as they concerned the

applicant's assessment of the appointment and promotion system in the universities. In this connection, the Court reiterates that the truthfulness of a value judgment is not susceptible of proof. The necessity of a link between a value judgment and its supporting facts may vary from case to case according to the specific circumstances (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII). This being so, in the circumstances of the present case, the Court finds that the value judgment made by the applicant was based on his personal experience in promotion panels and information which was already known in academic circles. Accordingly, the applicant's statements were, at least in part, susceptible of proof (see, *Boldea v. Romania*, no. 19997/02, § 56, ECHR 2007-... (extracts)).

33. However, the Turkish courts did not provide the applicant with an opportunity to substantiate his statements. Although, in the course of the proceedings against him, the applicant endeavoured to demonstrate that his statements were well-founded or that at least he voiced them in good faith since the plaintiff had later been dismissed from his post as a result of his inadequate scientific competence and personal values, the domestic courts did not address his arguments (see paragraphs 15 and 16 above). They rather concluded that the following statements, "...*he managed to pass the assistant professorship examination before another panel, whose members were not from the construction management department, and without publishing a single article* ..." had constituted an attack on N.A.C.'s reputation, taking the view that the applicant had implied that N.A.C. would have failed the exam had he been examined by a different panel (see paragraphs 9, 10 and 13 above).

34. The Court notes that the Court of Cassation attached greater importance to the reputation of an unnamed person than to the freedom of expression that should normally be enjoyed by an academic in a public debate. Nor did it explain why the reputation of the plaintiff, whose name was not even mentioned in the paper, outweighed the applicant's freedom of expression that was recognised by the first instance court as being his constitutional right (see paragraph 12 above).

35. In this connection, the Court underlines the importance of academic freedom, which comprises the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction (see paragraph 21 above).

36. In view of the above, the Court considers that the Court of Cassation did not convincingly establish that there was pressing social need for putting the protection of the personality rights of an unnamed individual above the applicant's right to freedom of expression and the general interest in promoting this freedom where issues of public interest are concerned. In particular, it does not appear from the domestic courts' decisions that the applicant's statement affected N.A.C.'s career or private life.

37. Finally, although the applicant did not specify his monthly income at the relevant time, the Court considers that the damages he was ordered to pay to the plaintiff were very substantial (see paragraphs 16 and 19 above) when compared to the incomes and resources of academics in general.

38. In conclusion, the Court finds that the reasons adduced by the domestic courts cannot be regarded as a sufficient and relevant justification for the interference with the applicant's right to freedom of expression. The national authorities therefore failed to strike a fair balance between the relevant interests.

39. It thus follows that the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

40. There has therefore been a violation of Article 10 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

41. The applicant further complained of violations of Article 6 of the Convention and Article 1 of Protocol No. 1. In this connection, he alleged that he had been denied a fair hearing since the domestic court decisions were arbitrary and without reasoning. He also submitted that the compensation he had been ordered to pay to the plaintiff had amounted to a violation of his right to the peaceful enjoyment of his possessions.

42. The Government contested these arguments.

43. The Court notes that these complaints are linked to that examined above and must therefore likewise be declared admissible.

44. Having regard to the facts of the case, the parties' submissions and its finding of a violation of Article 10, the Court considers that it has examined the main legal question raised in the present application. It concludes therefore that there is no need to make a separate ruling under this head (see, for example, *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 43, 17 July 2007, and *K.Ö. v. Turkey*, no. 71795/01, § 50, 11 December 2007).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 5,300 euros (EUR) in respect of pecuniary damage and EUR 10,000 for non-pecuniary damage. As regards the pecuniary damage, he explained that the principal compensation, interest and court fees had amounted to EUR 2,000 and that the interest on this amount since 2002 would come to EUR 3,300.

47. The Government asserted that no award should be made under this head. They submitted, in the alternative, that should the Court decide to award damages, this should not lead to unjust enrichment.

48. The Court notes that the applicant suffered pecuniary damage in that he had been ordered to pay the plaintiff TRL 3,455,215,000. Furthermore, as regards the 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. It therefore awards him a total sum of EUR 3,500 in respect of the damage under this head and dismisses the applicant's request for the payment of interest on that sum.

B. Costs and expenses

49. The applicant also claimed EUR 1,180 for the costs and expenses incurred before the domestic courts and EUR 8,050 for those incurred before the Court (lawyer's fees in the amount of EUR 8,000 and postage expenses in the amount of EUR 50).

50. The Government submitted that the amounts claimed were baseless and excessive.

51. According to the Court's case-law, an applicant is entitled to reimbursement of his 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, the Court notes that the applicant did no more than refer to the Istanbul Bar Association's scale of fees in respect of his legal representative's claims and failed to submit any supporting documents. The Court therefore only makes an award in respect of the postage costs under this head, namely EUR 50 (see *Balçık and Others v. Turkey*, no. 25/02, § 65, 29 November 2007).

C. Default interest

52. 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 application admissible;

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

3. *Holds* that there is no need to examine separately the complaints under Articles 6 of the Convention and Article 1 of Protocol No. 1;

4. *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 following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;
      (ii) EUR 50 (fifty euros), plus any tax that may be chargeable to the applicant, for costs and expenses;
   (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;

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

Done in English, and notified in writing on 23 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Deputy Registrar	Françoise Tulkens President