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

SECOND SECTION

**CASE OF İRFAN TEMEL AND OTHERS v. TURKEY**

*(Application no. 36458/02)*

JUDGMENT

STRASBOURG

3 March 2009

**FINAL**

*03/06/2009*

*This judgment may be subject to editorial revision.*

**In the case of İrfan Temel and Others 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 Françoise Elens-Passos, *Section Deputy Registrar*,

Having deliberated in private on 16 December 2008 and on 10 February 2009,

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

# PROCEDURE

1. The case originated in an application (no. 36458/02) 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 eighteen Turkish nationals ("the applicants")[1] on 13 August 2002.

2. The applicants were represented by Mr M. Rollas, a lawyer practising in İzmir. The Turkish Government ("the Government") were represented by their Agent for the purposes of the proceedings before the Court.

3. On 15 September 2006 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).

4. By a letter dated 16 December 2008 the applicants' representative informed the Court that one of the applicants, Mr Hamit Çiftçi had died.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were students at various faculties attached to Afyon Kocatepe University in Afyon, Turkey, at the time of the events.

[1] Listed in the appendix to this document.

6. On various dates between 27 December 2001 and 4 January 2002 the applicants petitioned the University Rector's Office and requested that Kurdish language classes be introduced as an optional module.

7. Around the same time similar petitions were submitted by students studying at various Universities in Turkey.

8. The following are extracts from the petition submitted by the applicants:

> "... When Article 42 of the Constitution concerning the right to instruction and education is considered together with the recent amendment to the Constitution, it must be held to provide a constitutional right to education in the language one knows the best: one's mother tongue...
>
> ... Unfortunately, for years, starting with the Kurds, peoples in Turkey were treated as if they did not exist and, owing to fears of secession, they were prevented from developing their languages and cultures...
>
> As a student who believes that I am taking a step to assist the democratisation in Turkey, I request from the Chancellor of our University that Kurdish be taught in our University, under optional courses."

9. On 18 January 2002, relying on Regulation 9 (d) of the Disciplinary Regulations of Higher Education Institutions, the Administrative Board of Afyon Kocatepe University, after having heard the defence submissions of the applicants, suspended them from the university for a period of two terms starting from spring term, except for Mr Pulat, who was suspended for one term after having shown remorse, on the ground that although they appeared to be lodging individual petitions, the petitions were the same as regards style and content, and the applicants had acknowledged that their acts had constituted an offence for which they showed no remorse.

10. The applicants, upon notification of the disciplinary sanctions in question, lodged separate actions with the Denizli Administrative Court, requesting a stay of execution of the disciplinary decisions, to be followed by their annulment.

11. On various dates, the applicants' requests for a stay of execution were rejected by the Denizli Administrative Court, without any further elaboration, on the ground that the conditions required under domestic law were not met.

12. These decisions were upheld by the Denizli Regional Administrative Court on the ground that none of the arguments advanced by the applicants provided sufficient reasons to set aside the first-instance court's decision.

13. In the course of the proceedings the applicants claimed to have unsuccessfully sought another stay of execution of disciplinary decisions given in respect of them.

14. In the meantime, however, it appears that in a similar case brought before the Istanbul Administrative Court, that court, on 9 May 2002, had suspended the execution of the disciplinary sanction. In its decision the

court examined the content of the petition and the manner in which the disciplinary procedure was handled. It found that the disciplinary sanction in question was unlawful and that, therefore, its application would cause irreparable damage to the plaintiff.

15. On 24 October 2002 the Denizli Administrative Court examined the merits of the cases and dismissed them. In its decisions, the court noted, *inter alia*, that the University Rector's Office had received information from the Afyon Governor's Office about the PKK[1]'s new strategy of action within the framework of civil disobedience, which included, *inter alia*, petitioning for education in Kurdish. The administration considered therefore that the identical petitions submitted around the same time by the applicants, who were persistent and threatening in their requests, were part of a planned and organised action contrary to Article 9 (d) of the Disciplinary Regulations of Higher Education Institutions.

16. In December 2003 the Supreme Administrative Court quashed those decisions and remitted the case to the first-instance court.

17. On 12 May 2004 the Denizli Administrative Court adhered to the Supreme Administrative Court's ruling and annulled the disciplinary sanctions against the applicants. In its decision, the court noted, *inter alia*, that section 74 of the Constitution enables Turkish nationals to petition the authorities in matters concerning their own or the public interest. It further noted that, pursuant to section 4 (a) of Higher Education Law, higher education aimed to train students in becoming citizens who are, *inter alia*, objective, broad-minded, and respectful of human rights, developed physically, mentally, psychologically, morally and emotionally, in a balanced way, and who contribute to the country's development and welfare and at the same time acquire the necessary knowledge and skills for their future vocations. Accordingly, the applicants' petitions to the authorities for optional Kurdish language classes could not be construed as acts which gives rise to polarization on the basis of language, race, religion or denomination within the meaning of Regulation 9 (d) of the Disciplinary Regulations of Higher Education Institutions and did not run counter to the aims sought by higher education under section 4 (a) of Higher Education Law. The court further noted that the latest legislative amendment of 9 August 2002 permitted the creation of private courses in order to allow Turkish citizens to learn different languages and dialects which they would traditionally use in their daily life.

18. In the meantime, criminal proceedings brought against the applicants had ended with their acquittal on charges of aiding and abetting an illegal armed organisation.

[1] The Kurdistan Workers' Party, an illegal armed organisation.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

19. A description of the relevant domestic law at the material time can be found in *Leyla Şahin v. Turkey* ([GC], no. 44774/98, §§ 48 and 50-51, ECHR 2005-XI), and in *Mürsel Eren v. Turkey* (no. 60856/00, § 24, ECHR 2006-II).

20. Regulation 9 (d) of the Disciplinary Regulations of Higher Education Institutions provides that a person who engages in activities which give rise to polarization on the basis of language, race, religion or denomination is to be suspended from the institution in question for either half or a whole term.

21. Under section 13 of the Administrative Procedure Act (Law no. 2577 of 6 January 1982), those who have suffered damage on account of a wrongful act by the administration may bring compensation proceedings against the latter within a year from the date on which they learned of the impugned act and, in any event, within five years from the commission of that act. The proceedings before the administrative courts are in writing.

22. Persons who have sustained damage as a result of an administrative act may also file an application with the superior authority of the relevant administrative body and request the annulment, withdrawal or alteration of the impugned act (section 11 of the Administrative Procedure Act). The administrative authorities' failure to reply within sixty days is considered to be a tacit refusal of that request (section 10 of the Administrative Procedure Act). The persons concerned may then bring an action before the administrative courts requesting the annulment of the administrative act and compensation for the damage they have sustained (section 12 of the Administrative Procedure Act).

23. Article 27 § 2 of the Administrative Procedure Act stipulates that the Supreme Administrative Court or a lower administrative court may decide to stay the execution of an administrative act if its implementation would result in damage which would be difficult or impossible to compensate, and if this act is clearly unlawful.

# THE LAW

## I. PRELIMINARY REMARKS

24. By a letter dated 16 December 2008 the applicants' lawyer informed the Court that one of the applicants, Mr Hamit Çiftçi had died. By a letter dated 9 January 2009 the applicants' lawyer submitted to the Court that

Mr Hamit Çiftçi had no surviving first degree relatives and had grown up in children's homes. However, the lawyer had found out that Mr Hamit Çiftçi had a maternal uncle. In a letter dated 13 January 2009 the applicants' lawyer maintained that he had not been able to obtain authority from the applicant's maternal uncle and that he was trying to establish whether Mr Hamit Çiftçi had other surviving relatives. The Court has not yet received any further information.

25. The Court observes that Mr Hamit Çiftçi died and that no request has been submitted by that applicant's heirs to pursue the examination of the case. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the examination of this application to be continued in so far as it concerned the applicant, Mr Hamit Çiftçi.

26. Accordingly, the part of the application which relates to Mr Hamit Çiftçi should be struck out of the list of cases. Therefore, he may no longer be regarded as an applicant for the purposes of the judgment below.

## II. ALLEGED VIOLATION OF ARTICLES 7, 9 AND 10 OF THE CONVENTION AND ARTICLE 2 OF PROTOCOL No. 1

27. The applicants complained about the imposition of a disciplinary sanction for having petitioned the university authorities to provide optional Kurdish language courses. They submitted that this sanction had infringed their freedom of thought and expression and that their actions could not have been reasonably construed as a criminal offence. In addition, they maintained that they had been denied their right to education as the domestic courts had rejected their request for a stay of execution of the disciplinary decisions. The applicants relied on Articles 7, 9 and 10 of the Convention and on Article 2 of Protocol No. 1.

28. The Court considers that these complaints need only be examined under Article 2 of Protocol No. 1, read in the light of Article 10 of the Convention (see *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 52 *in fine*, Series A no. 23).

29. The relevant part of Article 2 of Protocol No. 1 reads as follows:

> "No person shall be denied the right to education."

### A. Admissibility

30. The Government asked the Court to dismiss the application for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. In this connection they first maintained that it would have been open to the applicants to sue the

university administration for damages in accordance with sections 12 and 13 of the Administrative Procedure Act (Law no. 2577). The Government submitted copies of decisions in a number of previous cases. Secondly, they pointed out that the applicants had lodged their application with the Court before the conclusion of the administrative proceedings before the Denizli Administrative Court concerning the annulment of the disciplinary sanctions.

31. The applicants claimed that the remedy provided under Law no. 2577 did not afford any prospect of success. In this connection, they submitted, firstly, that obtaining compensation would not have redressed the fact that they had lost one year of their education. Secondly, they maintained that even if they had lodged such actions they would not have been entitled to any compensation for pecuniary and non-pecuniary damage because they were students and did not feel remorse for their actions. In this connection, the applicants submitted copies of decisions in two cases in which the domestic courts had dismissed claims for compensation by the plaintiffs (students whose disciplinary sanctions on account of having petitioned the university administration to provide optional Kurdish language courses had subsequently been annulled by the administrative courts). The domestic courts had held, *inter alia*, that the plaintiffs' claims in respect of pecuniary damage were speculative (future loss of earnings) and that they were not entitled to compensation for non-pecuniary damage since the disciplinary sanctions imposed on them had resulted from the administration's misinterpretation of the relevant provisions and not from an arbitrary decision. In this connection, the courts emphasised that, in order to award non-pecuniary damages, the fault and unlawfulness attributable to the administration had to be significant, which was not the situation in the cases before it. The first-instance court decisions in those cases had been given in 2004. They had become final in 2006, when the Supreme Administrative Court had upheld them.

32. As regards the first limb of the Government's objections, the Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants first to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness (see *Burden and Burden v. the United Kingdom*, no. 13378/05, § 35, ECHR 2007-...).

33. In the instant case, the Court notes that the applicants successfully brought an action for annulment before the administrative courts. As to whether they were also required to embark on another attempt to obtain redress by bringing a compensation claim, the Court notes that, although, in principle, persons who have sustained damage as a result of an

administrative act can successfully claim compensation by using the remedy offered by sections 12 and 13 of Law no. 2577, it is clear from the decisions in previous cases submitted by the applicants that, in their particular situation, the remedy in question would not have afforded them any prospect of obtaining damages. The Government have not submitted any examples to the contrary. The Court considers, therefore, that the applicants were not required to use the remedy provided under administrative law in respect of their complaint. Consequently, it dismisses the Government's preliminary objection under this head.

34. As to the second limb of the Government's objections, the Court reiterates that the last stage of domestic remedies may be reached shortly after the lodging of the application, but before the Court is called upon to rule on its admissibility (see, for example, *Sağat, Bayram and Berk v. Turkey* (dec.), no. 8036/02, 8 March 2007, and *Yıldırım v. Turkey* (dec.), no. 40074/98, 30 March 2006). The Court observes that the proceedings concerning the applicants' allegations were concluded on 12 May 2004, before the Court had delivered its decision on admissibility. The Court therefore dismisses the Government's preliminary objection under this head.

35. Moreover, the Court notes that the application 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*

36. The Government, referring particularly to the positive outcome of the administrative proceedings brought by the applicants, submitted that the suspension of the applicants from the university had neither impaired the essence of the right guaranteed by Article 2 of Protocol No. 1 nor amounted to a denial of their right to education.

37. The applicants maintained their allegations. In particular, they submitted that the imposition of a disciplinary sanction for petitioning for the introduction of an optional Kurdish language course – a legitimate and democratic request – had been unjustified and disproportionate and had denied them their right to education for one year. They pointed out that they had already served their disciplinary sanction by the time it had been annulled.

### 2. *The Court's assessment*

38. The Court reiterates the basic principles laid down in its judgments concerning Article 2 of Protocol No.1 (see, in particular, *Leyla Şahin*, cited

above, §§ 152-156 and the references therein). It will examine the present case in the light of these principles.

39. It further reiterates that access to any institution of higher education existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1 and that therefore Article 2 of Protocol No. 1 is applicable in the instant case (see *Mürsel Eren v. Turkey,* cited above, § 41). Indeed, this has not been contested by the parties.

40. The applicants' suspension from the university for either one or two terms, in the Court's view, constituted a restriction on their right to education, notwithstanding the fact that they had been admitted to the university to read the subject of their choice in accordance with the results they had achieved in the university entrance examination (see, *mutatis mutantis*, *Leyla Şahin*, cited above, § 157).

41. In order to ensure that the restrictions which are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they were foreseeable for those concerned and pursued a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of "legitimate aims" under Article 2 of Protocol No.1. Furthermore, a limitation will only be compatible with Article 2 of Protocol No.1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*Ibid,* § 154).

42. In the instant case the Court accepts that there was a legal basis for the restriction, namely Regulation 9 (d) of the Disciplinary Regulations of Higher Education Institutions, and that it was accessible. However, the Court has serious doubts whether the application of this Regulation in the present case served any legitimate aim in Convention terms. Nevertheless, the Court does not deem it necessary to determine the question because, in any event, the key issue to be examined is that of proportionality, i.e. whether a fair balance was struck between the means employed and the aim sought to be achieved.

43. As regards the principle of proportionality, the Court observes that the applicants were subject to a disciplinary sanction for merely submitting petitions which conveyed their views on the need for and the necessity of Kurdish language education and requested that Kurdish language classes be introduced as an optional module, without committing any reprehensible act. In this connection, the Court finds that, in view of the information contained in the case file, the applicants did not resort to violence or breach or attempt to breach the peace or order in the university.

44. The Court finds therefore that the applicants were sanctioned because of the views expressed in their petitions. For the Court, neither the views expressed therein nor the form in which they were conveyed could be construed as an activity which would lead to polarisation on the basis of

language, race, religion or denomination within the meaning of Regulation 9 (d). In this connection, the Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" (see, among many other authorities, *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, § 57, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

45. The Court reiterates that the right to education does not in principle exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with its internal rules (see *Yanasık v. Turkey*, no. 14524/89, Commission decision of 6 January 1993, DR 74, p. 14, and *Sulak v. Turkey*, no. 24515/94, Commission decision of 17 January 1996, DR 84-A, p. 98). However, such regulations must not injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 41, Series A no. 48). In the instant case the applicants were suspended from the university for either one or two terms as a result of the exercise of their freedom of expression.

46. In the particular circumstances of the case and for the reasons stated above, the Court considers that the imposition of such a disciplinary sanction cannot be considered as reasonable or proportionate. Although, it notes that these sanctions were subsequently annulled by the administrative courts on grounds of unlawfulness, regrettably by that time the applicants had already missed one or two terms of their studies and, thus, the outcome of the domestic proceedings failed to redress the applicants' grievances under this head.

47. It follows that there has been a violation of Article 2 of Protocol No. 1 to the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicants each claimed 5,000 euros (EUR) in respect of pecuniary damage. This sum concerned living expenses incurred as a result of the prolongation of their university studies. The applicants each further claimed EUR 10,000 in respect of non-pecuniary damage.

50. The Government contested the amounts.

51. The Court does not discern any causal link between the violation found – the denial of the right to education – and the pecuniary damage alleged; it therefore dismisses this claim (see, for example, *Mürsel Eren,* cited above, § 56).

52. However, the Court finds that the applicants may be taken to have suffered a certain amount of frustration and distress in the circumstances of the case. It considers, therefore, that an award of compensation is justified. Deciding on an equitable basis, the Court awards each applicant the sum of EUR 1,500.

### B. Costs and expenses

53. The applicants also claimed, in total, EUR 2,000 for the costs and expenses incurred before the domestic courts and before the Court. They further claimed EUR 75,000 for lawyers’ fees. In support of this claim the applicants submitted the İzmir Bar Association’s recommended scale of fees in 2007. However, they did not submit any receipts or other relevant documents.

54. The Government contested the amounts.

55. Since the applicants submitted no substantiation of their claims, as required by Rule 60 of the Rules of Court, the Court makes no award under this head.

### C. Default interest

56. 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. *Decides* to strike the application out of its list of cases insofar as it was submitted by Mr Hamit Çiftçi;

2. *Declares* the remainder of the application admissible;

3. *Holds* that there has been a violation of Article 2 of Protocol No. 1;

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 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into new 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 3 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| Françoise Elens-Passos | Françoise Tulkens |
|---|---|
| Deputy Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:

Separate opinion of Judge Ireneu Cabral Barreto;

F.T.
F.E.P.

# SEPARATE OPINION OF JUDGE CABRAL BARRETO

(Translation)

The Chamber decided to examine the applicants' complaints under Article 2 of Protocol No. 1.

I personally had a clear preference for examining the case under Article 10.

1. The applicants received disciplinary sanctions for drawing up a petition requesting the introduction of Kurdish language classes at their university.

The sanctions in question manifestly interfered with the applicants' right to freedom of expression, and although the interference was prescribed by law, it was not at all necessary in a democratic society.

Accordingly, there was a clear violation of Article 10 of the Convention.

2. The Chamber pursued a new approach, which was dangerous and in my view not at all sound.

The applicants were suspended from university for two terms, except Mr Pulat, who was suspended for one term.

After serving their disciplinary sanctions, all the applicants resumed their studies.

We are a long way from situations where, as a result of disciplinary sanctions, people have been permanently refused access to education.

The case before us was more concerned with a restriction of the right to education (see paragraph 40 of the judgment); in my opinion, the very essence of the right in issue was not impaired.

It is true that, in reaching the finding of a violation, the judgment introduced the idea of proportionality, concluding that the sanctions were not reasonable or proportionate.

Although I could agree with this point in principle, I am not sure that Article 2 of Protocol No. 1 permits such reasoning.

Firstly, the wording of Article 2 of Protocol No. 1 does not contain any reference to restrictions; and, above all, the introduction of the notion of proportionality will, in my view, paradoxically weaken the right in question.

Assessing the proportionality of the sanction will make it possible, on the one hand, to accept a sanction which permanently denies a person access to education and, on the other, to find a violation in the case of a mere one-day suspension which was in itself disproportionate because, for example, the person concerned did not do anything.

Moreover, this approach requires the Court to set criteria in order to be able to speak of a violation based on the lack of proportionality between the individual's conduct and the sanction imposed; while that was not impossible, for the sake of caution I would have preferred the Grand Chamber to intervene.

## Appendix to the judgment

List of applicants

1. İrfan TEMEL, born in 1981, lives in K. Maraş
2. Adnan ARICA, born in 1980, lives in İzmir
3. Hasan YILDIRIM, born in 1971, lives in Muğla
4. Atay ATMACA, born in 1980, lives in Ankara
5. Beşir AYLAK, born in 1972, lives in Diyarbakır
6. Hasan RAZİ, born in 1983, lives in K. Maraş
7. Şahturna AKTÜRK, born in 1980, lives in Tekirdağ
8. Şehmus ÇİÇEK, born in 1978, lives in Adana
9. Ercan SAYGIN, born in 1981, lives in Aydın
10. Nuran DUMAN (ÇELEBİ), born in 1977, lives in Adana
11. Cihan PÜLAT, born in 1979, lives in İzmir
12. Mehmet SEVER, born in 1979, lives in Diyarbakır
13. Hamit ÇİFTÇİ, born in 1982, lives in Istanbul
14. Mustafa KAYA, born in 1982, lives in Aydın
15. Yunus GÜNEŞ, born in 1980, lives in Kars
16. Arafat ERTUNÇ, born in 1979, lives in Hakkari
17. Mehmet Emin AKKÖPRÜ, born in 1978, lives in Konya
18. Hasan KARAL, born in 1980, lives in Ş. Urfa