CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF İ.A. v. TURKEY

(Application no. 42571/98)

JUDGMENT

STRASBOURG

13 September 2005

FINAL

13/12/2005

In the case of İ.A. v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 28 June and 25 August 2005,

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

PROCEDURE

1. The case originated in an application (no. 42571/98) against the Republic of Turkey lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr İ.A. ("the applicant"), on 18 May 1998.

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

3. On 13 November 2003 the Court declared the application partly admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1960 and lives in France.

5. He is the proprietor and managing director of Berfin, a publishing house which in November 1993 published a novel by Abdullah Rıza Ergüven entitled "*Yasak Tümceler*" ("The forbidden phrases"). The book conveyed the author's views on philosophical and theological issues in a novelistic style. Two thousand copies of it were printed in a single run.

6. In an indictment of 18 April 1994, the Istanbul public prosecutor ("the public prosecutor") charged the applicant under the third and fourth paragraphs of Article 175 of the Criminal Code with blasphemy against "God, the Religion, the Prophet and the Holy Book" through the publication of the book in question.

7. The public prosecutor's indictment was based on an expert report drawn up at the request of the press section of the Istanbul public prosecutor's office by Professor Salih Tuğ, dean of the theology faculty of Marmara University at the material time. In his report of 25 February 1994 the expert observed:

> "... the author arbitrarily uses theories about the physical substance of the universe, creation and the existence of natural laws to sway readers' minds towards the conclusions he wishes to be drawn from the book. In particular, in the passages on theology he imprisons readers within the limits of his own views, which are devoid of all academic rigour. ... He criticises the beliefs, ideas, traditions and way of life of Anatolian Turkish society by adopting the independent and nonconformist viewpoint of the leaders, thinkers and scientists of the Renaissance in order to enlighten and advise our people as he sees fit. ... This way of thinking, based on materialism and positivism, leads to atheism in that it renounces faith and divine revelation ... Although these passages may be regarded as a polemic in support of the author's philosophical views, it may be observed that they also contain statements that imply a certain element of humiliation, scorn and discredit *vis-à-vis* religion, the Prophet and belief in God according to Islam ... In the author's view, religious beliefs and opinions are mere obscurities, and ideas based on nature and reason are described as clear-sighted. The author describes religious faith as a 'desert mirage', a 'primitive idea' and 'desert ecstasy', and religious practices as 'the primitivism of desert life'. ..."

8. In his report the expert quoted numerous passages from the book under review, in particular:

> "... just think about it, ... all beliefs and all religions are essentially no more than performances. The actors played their roles without knowing what it was all about. Everyone has been led blindly along that path. The imaginary god, to whom people have become symbolically attached, has never appeared on stage. He has always been made to speak through the curtain. The people have been taken over by pathological imaginary projections. They have been brainwashed by fanciful stories ...
>
> ... this divests the imams of all thought and capacity to think and reduces them to the state of a pile of grass ... [regarding the story of the Prophet Abraham's sacrifice] it is clear that we are being duped here ... is God a sadist? ... so the God of Abraham is just as murderous as the God of Muhammad ..."

The expert concluded his report as follows:

> "The passages which I have quoted from the book form the *actus reus* of the offence provided for in Article 175 of the Criminal Code. As regards the *mens rea*, my analysis shows that it has been made out, especially since the author entitled his book 'The forbidden phrases'."

9. In a letter of 28 June 1994 to the Istanbul Court of First Instance, the applicant contested the expert report. He requested a second opinion,

arguing that the book was a novel and should have been analysed by literary specialists, and questioned the expert's impartiality.

10. On 2 November 1995 a committee of experts, composed of Professors Kayıhan İçel, Adem Sözüer and Burhan Kuzu, submitted its report.

11. In a letter of 19 April 1996 to the Court of First Instance, the applicant disputed the accuracy of the second expert report and argued that it was a copy of the first report.

12. On 24 April 1996 the applicant submitted before the Court of First Instance that the book was neither blasphemous nor insulting within the meaning of the third paragraph of Article 175 of the Criminal Code and merely conveyed its author's philosophical views.

13. In a judgment of 28 May 1996, the Court of First Instance convicted the applicant and sentenced him to two years' imprisonment and a fine. It commuted the prison sentence to a fine, so that the applicant was ultimately ordered to pay a total fine of 3,291,000 Turkish liras (equivalent at the time to 16 United States dollars). In its reasoning the court referred to the second expert report and cited the following passage from the book:

> "Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal."

14. On 3 September 1996 the applicant appealed to the Court of Cassation. In his grounds of appeal he submitted that in the book in question the author had merely expressed his views, and challenged the content of the expert reports.

15. On 6 October 1997 the Court of Cassation upheld the impugned judgment.

16. The applicant was notified of the final judgment by means of a payment order postmarked 2 December 1997.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The third and fourth paragraphs of Article 175 of the Criminal Code provide:

> "It shall be an offence punishable by six months to one year's imprisonment and a fine of 5,000 to 25,000 Turkish liras to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books ... or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties ...
>
> The penalty for the offence set out in the third paragraph of this Article shall be doubled where it has been committed by means of a publication."

18. Section 16(4) of the Press Act (Law no. 5680) provides:

> "With regard to offences committed through the medium of publications other than periodicals, criminal responsibility shall be incurred by the author [or] translator ... of the publication which constitutes the offence, and by the publisher. ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

19. The applicant alleged that his criminal conviction had infringed his right to freedom of expression. He relied on Article 10 of the Convention, the relevant parts of which provide:

> "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 prevention of disorder or crime, for the protection of ... morals, [and] for the protection of the reputation or rights of others ..."

20. The Government submitted that the applicant's conviction had met a pressing social need in that the book in issue had contained an abusive attack on religion, in particular Islam, and had offended and insulted religious feelings. They argued in that connection that the criticism of Islam in the book had fallen short of the level of responsibility to be expected of criticism in a country where the majority of the population were Muslim.

21. The Court observes that the book in question conveyed the author's views on philosophical and theological issues in a novelistic style. It notes that the domestic courts found that the book contained expressions intended to blaspheme against and vilify religion.

22. The Court notes that it was common ground between the parties that the applicant's conviction constituted interference with his right to freedom of expression under Article 10 § 1. Furthermore, it was not disputed that the interference was prescribed by law and pursued the legitimate aims of preventing disorder and protecting morals and the rights of others, within the meaning of Article 10 § 2. The Court endorses that assessment. The dispute in the instant case relates to the question whether the interference was "necessary in a democratic society".

23. The Court reiterates the fundamental principles underlying its judgments relating to Article 10 as set out, for example, in *Handyside v. the*

United Kingdom (judgment of 7 December 1976, Series A no. 24), and in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-I). Freedom of expression 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 of Article 10, 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 that offend, shock or disturb.

24. As paragraph 2 of Article 10 recognises, the exercise of that freedom carries with it duties and responsibilities. Among them, in the context of religious beliefs, may legitimately be included a duty to avoid expressions that are gratuitously offensive to others and profane (see, for example, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, pp. 18-19, § 49, and *Murphy v. Ireland*, no. 44179/98, § 67, ECHR 2003-IX). This being so, as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration (ibid.).

25. In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society", the Court has frequently held that the Contracting States enjoy a certain but not unlimited margin of appreciation (see *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1956, § 53). The fact that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions means that the Contracting States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion (see *Otto-Preminger-Institut*, cited above, p. 19, § 50; *Wingrove*, cited above, pp. 1957-58, § 58; and *Murphy*, cited above, § 67).

26. A State may therefore legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with respect for the freedom of thought, conscience and religion of others (see, in the context of Article 9, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, and *Otto-Preminger-Institut*, cited above, pp. 17-18, § 47). It is, however, for the Court to give a final ruling on the restriction's compatibility with the Convention and it will do so by assessing in the circumstances of a particular case, *inter alia*, whether the interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued" (see *Wingrove*, cited above, p. 1956, § 53, and *Murphy*, cited above, § 68).

27. The issue before the Court therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely

the right of the applicant to impart to the public his views on religious doctrine on the one hand and the right of others to respect for their freedom of thought, conscience and religion on the other hand (see *Otto-Preminger-Institut*, cited above, p. 20, § 55).

28. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" (see *Handyside*, cited above, p. 23, § 49). Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (see *Otto-Preminger-Institut*, cited above, pp. 17-18, § 47).

29. However, the present case concerns not only comments that offend or shock, or a "provocative" opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: "Some of these words were, moreover, inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal."

30. The Court therefore considers that the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it finds that the measure may reasonably be held to have met a "pressing social need".

31. The Court concludes that the authorities cannot be said to have overstepped their margin of appreciation in that respect and that the reasons given by the domestic courts to justify taking such a measure against the applicant were relevant and sufficient.

32. As to the proportionality of the impugned measure, the Court is mindful of the fact that the domestic courts did not decide to seize the book, and accordingly considers that the insignificant fine imposed was proportionate to the aims pursued.

There has therefore been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

Holds by four votes to three that there has been no violation of Article 10 of the Convention.

Done in French, and notified in writing on 13 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr Costa, Mr Cabral Barreto and Mr Jungwiert is annexed to this judgment.

J.-P.C.
S.D.

JOINT DISSENTING OPINION OF JUDGES COSTA, CABRAL BARRETO AND JUNGWIERT

(Translation)

1. Freedom of expression – "a fundamental feature of a democratic society" – "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 that shock, offend or disturb the State or any sector of the population". This quotation from *Handyside v. the United Kingdom* (judgment of 7 December 1976, Series A no. 24, p. 23, § 49) has frequently been reproduced in the case-law of the European Commission and Court of Human Rights. We consider that these words should not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court.

2. In the present case the applicant, the managing director of a publishing house, published 2,000 copies of a novel in 1993. The evidence before the Court does not indicate how many people actually read the novel but the number is probably small, as is suggested by the fact that the book was never reprinted. Moreover, the limited practical impact on society of the author's statements was not taken into account by the national authorities, which confined themselves to an abstract assessment of the statements (which were made, as has been noted, in a novelistic style).

3. In charging and convicting the publisher, the public prosecutor and the courts highlighted a number of phrases from the novel that criticise beliefs and religions ("all beliefs and all religions" – see paragraph 8 of the judgment), undeniably revealing the novelist's scepticism or indeed atheism. Certainly, in a highly religious society such as Turkey there are relatively few atheists and materialist or atheist views may well offend or shock the faith of the majority of the population. But that does not appear to us to be a sufficient reason in a democratic society to impose sanctions on the publisher of a book; otherwise the above dictum from *Handyside* would be deprived of all effect.

4. What is more troublesome – since it is more shocking – is the passage quoted in paragraph 13 of the judgment, in which the author attacks Muhammad on two counts by claiming that he broke his fast through sexual intercourse and that he did not forbid sexual relations with a dead person or a live animal. We do not have any difficulty accepting that these accusations, particularly the second one, may cause deep offence to devout Muslims, whose convictions are eminently deserving of respect. Admittedly, according to Islam, Muhammad is not God but a man who is God's prophet; however, the position he occupies in a religion of which he was the founder makes him "sacred" in a sense, like Abraham or Moses in the Jewish religion, for example.

5. However, we do not believe that these undoubtedly insulting and regrettable statements can be taken in isolation as a basis for condemning an entire book and imposing criminal sanctions on its publisher. Moreover, nobody is ever obliged to buy or read a novel, and those who do so are entitled to seek redress in the courts for anything they consider blasphemous and repugnant to their faith – in other words, a breach of their rights under both Article 9 and Article 10, paragraph 2, of the Convention. But it is quite a different matter for the prosecuting authorities to institute criminal proceedings against a publisher of their own motion in the name of "God, the Religion, the Prophet and the Holy Book" (see paragraph 6 of the judgment); a democratic society is not a theocratic society.

6. Another point made in the reasoning of the majority in this case is that, all things considered, the penalty imposed on the applicant was light, since his two-year prison sentence was ultimately commuted to a modest fine. However, while this argument is significant, it is not decisive in our view. Freedom of the press relates to matters of principle, and any criminal conviction has what is known as a "chilling effect" liable to discourage publishers from producing books that are not strictly conformist or "politically (or religiously) correct". Such a risk of self-censorship is very dangerous for this freedom, which is essential in a democracy, to say nothing of the implicit encouragement of blacklisting or "fatwas".

7. The Court's case-law does, admittedly, seem consistent with the approach taken in the judgment. In *Otto-Preminger-Institut v. Austria* (judgment of 20 September 1994, Series A no. 295-A) and *Wingrove v. the United Kingdom* (judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V) it held that there had been no violation of Article 10 of the Convention, on account of excessive attacks on the religious feelings of the population and/or blasphemy (in both cases the "victims" were not the Muslim population but the Christian population).

8. However, we are not persuaded by these precedents. Firstly, a film or video is likely to have much more of an impact than a novel with limited distribution, a factor that should be sufficient for a distinction to be drawn between these three cases. Secondly, *Otto-Preminger-Institut* and *Wingrove* were the subject of much controversy at the time (and the European Commission of Human Rights, for its part, had expressed the opinion by a large majority that there had been a violation of Article 10 in both cases). Lastly, the time has perhaps come to "revisit" this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.

9. For all these reasons, and to our regret, we have differed from our colleagues in finding that Article 10 was breached in the present case.