



ADF INTERNATIONAL

From: Jennifer Lea and Robert Clarke

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Re: Case note on *Altinkaynak and Others v. Turkey* (No. 12541/06)

(a) Facts

1. On 29 September 2004, Mr. Erkin Altinkaynak, along with five other applicants, filed a request to register “the Seventh-day Adventist Foundation of Turkey” as a legally recognized entity in Turkey. The applicants wished to establish and register a religious foundation to provide for the needs of their religious community. The Foundation’s main goal was to meet the religious needs of Turkish and foreign believers living in Turkey, and more specifically to help build houses of prayer, Christian libraries, and educational programs to train and equip religious leaders within the community.
2. On 25 November 2004, the Turkish authorities dismissed the applicants’ request at first instance on the grounds that the foundation’s purpose was contrary to domestic law in that Article 101 §4 of the Turkish Civil Code did not allow foundations to serve solely the interests of members of a specific community.
3. In Turkey, unlike a lesser “association” status, “foundation” status allows organizations to engage in broader economic activities for the benefit of the foundation and its members. By depriving the applicants from setting up their own foundation, the State authorities in this case impacted the long-term sustainability of the undertaking.
4. On 5 April 2005, the Turkish Court of Cassation dismissed the applicants’ appeal, maintaining that Article 101 §4 of the code should be read in light of Article 14 (prohibition of discrimination) of the European Convention on Human Rights (“ECHR” or “Convention”). The Turkish Court found that the proposed foundation wished to provide benefits only to Seventh-Day Adventists believers, as opposed to the general Turkish population, and considered this to be discriminatory.
5. On 2 December 2005, the applicants applied to the Turkish Court of Cassation to harmonize its ruling with the case of Istanbul Protestan Kilisesi Vakfi. Beyoglu 4th Country of Civil Law, E646/1999, K530/1999 10 Nov 1999. The primary distinction in the latter case was that the applicants in that case were successful in registering their religious foundation.
6. In May 2011, ADF International appealed the case to the European Court of Human Rights (“ECtHR” or “Court”) under Articles 9 (freedom of religion), 11 (freedom of assembly and association), 14, 17 (prohibition of abuse of rights), and 18 (limitation on use of restriction of rights) of the ECHR.

7. The questions which the Court considered were:
 - a) Whether there was a violation of Article 11 of the convention because the proposed foundation was denied registration.
 - b) Whether the applicants were discriminated against contrary to Article 14.

(b) Decision

8. On 15 January 2019, in a unanimous decision, the Second Section of the Court found the complaints admissible, and judged that all the complaints could be examined under Article 11. The Court found that there had been a violation of Article 11.¹
9. In examining a complaint under Article 11, the Court will first decide if there has been an interference with the Applicants' Article 11 rights to freedom of association. There will be a violation of those rights *unless* that interference can be shown to be a) prescribed by law, b) in pursuit of a legitimate aim, and c) necessary in a democratic society.
10. In applying the relevant test, the Court agreed with the parties that there had been an "interference" with Article 11 rights. The Court found it at least arguable that this interference was not "prescribed by law", as required by the Convention, but ultimately decided it did not need to rule on the matter given its conclusions on the "necessity" portion of its test.
11. On the question of legitimate aim, the Court accepted that the prohibition of discrimination in the provision of social and humanitarian aid may pursue the legitimate aims of protecting public order and the protection of the rights of others, but questioned whether that was really the aim pursued by the government in this case.²
12. The Court focused the main portion of its analysis on whether the interference was "necessary" in a democratic society. In examining whether the actions were necessary, the Court examined whether those actions a) "met with pressing social needs," b) were "proportionate to the aim pursued," and whether the reasons given by the authorities for their actions were c) "relevant and sufficient."³ The Court also emphasized that any exceptions to Article 11 rights, must be strictly interpreted.⁴
13. The Court first reiterated the general principle that Article 11 guarantees freedom of association. Specifically, the Court stated that: "like political parties, associations

¹ *Altinkaynak and Others v. Turkey*, no 12541/06, 15 January 2019.

² *Ibid.*, § 27.

³ *Ibid.*, § 32-33.

⁴ *Ibid.*, § 32.

and foundations created for various purposes, including the...proclamation and teaching of a religion, ...or the affirmation of a minority conscience are important for the proper functioning of democracy.”⁵

14. The Court went on to find that there was no pressing social need, nor any relevant and sufficient reasons provided to justify the interference. While the Court noted that, on its face, Article 101 §4 of the Turkish code was not incompatible with Article 11 or Article 14 of the ECHR,⁶ the Court found that Article 101 §4 of the Turkish code was unclear in the scope of its application,⁷ and that its interpretation in this case was inherently contradictory.
15. In this respect, the Court held that the actions of the Turkish authorities were intrinsically contradictory. Importantly, the Court found that a state cannot simultaneously hold that individuals are free to practice their religion by establishing a foundation, and on the other hand, effectively bar them because their foundation is designed to meet with the specific needs of their community.⁸ The Court further noted that a foundation whose purpose is to serve adherents of a particular religion cannot, by definition, serve those of another, and that the Turkish interpretation of the law would have had the practical effect of outlawing the type of foundation the law was ostensibly drafted to facilitate.⁹
16. Ultimately, the Court found that the interference was not necessary in that it did not correspond to a “pressing social need,” and that it was not proportionate to a “legitimate aim,” and moreover that the reasons given by the national authorities to justify their actions were not “relevant and sufficient.”

(c) Analysis

17. This decision is a welcome and timely reaffirmation of freedom of (religious) association. It reassures every individual whether in Turkey or in other contracting States of their right to choose their religion and to express it privately, publicly, and in association with others.
18. Moreover, the Court builds on its longstanding holding in *Gorzelik and Others v. Poland*¹⁰ and *Sidiropoulos and Others v. Greece*,¹¹ that the powers of a State to restrict the right to freedom of association are limited and to be narrowly construed. Indeed, the Court underscores that citizens have the right to create legal entities such as foundations endowed with assets, with the purpose of acting for the

⁵ Ibid., § 30. Author’s translation.

⁶ Ibid., § 38.

⁷ Ibid., § 26. See also *Sanoma Uitgevers B.V. v. Pays-Bas* [GC], no. 38224/03, § 81, 14 September 2010.

⁸ *Altinkaynak and Others v. Turkey*, no 12541/06, 15 January 2019, § 35.

⁹ Ibid., § 37.

¹⁰ *Gorzelik and Others v. Poland* [GC], no. 44158/98, §§ 92-93, ECHR 2004-I.

¹¹ *Sidiropoulos and Others v. Greece*, 10 July 1998, Reports of judgments and decisions 1998-IV.

common good of members and beneficiaries of the foundation. The Court notes that this right is one of the most important aspects of the freedom to associate, without which, such a right would be meaningless.¹² In reaffirming the right to association in this context, the Court's judgment also has positive implications for the freedom of expression and religion of such groups.

19. The Turkish Court of Cassation had ruled against the proposed foundation on the basis that it was intended to support "members of the Seventh-day Adventist community exclusively."¹³ In its ruling, the Court criticized this decision as having wrongly conflated an association set up to fulfill needs linked to the collective religious practice of its members with an association set up to help people in need, but restricting its activities to those belonging to a particular community.¹⁴ The Court of Cassation had ruled against the proposed foundation on the basis it was the latter, finding it to be discriminatory, when it was actually of the former type.
20. This aspect of the ruling will be welcome news to religious groups which have established ministries through which their members can serve in different ways, including the educational and spiritual elements present in this case. As an associative outworking of Article 9 manifestation, these are recognized as an important part of a pluralistic society. Yet this ruling stands in contrast to the recent decision of the Supreme Court of Canada which upheld a decision to deny accreditation to a Christian law school on the basis of its "religiously-based code of conduct."¹⁵ As the dissenting Justices emphasized,

freedom of religion under the *Charter*...also captures the freedom of members of the TWU community *to express* their religious beliefs through the Covenant and *to associate* with one another in order to study law in an educational community which reflects their religious beliefs. Religious freedom is 'not just about individuals praying alone but about communities of faith living out their traditions and religious lives'.¹⁶

21. It is to be hoped that an analogous case, decided by the ECtHR, would recognize the individual and collective rights at stake and rule along the lines of the *Altinkaynak* decision.
22. More broadly, this decision sends a clear message to Turkey, and all contracting States, that the right to association and assembly are fundamental rights in respect of which any exceptions must be interpreted strictly. In doing so, the Court more

¹² *Altinkaynak and Others v. Turkey*, no 12541/06, 15 January 2019, § 40.

¹³ *Ibid.*, § 11.

¹⁴ *Ibid.*, § 36.

¹⁵ *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33

¹⁶ *Ibid.*, paras 315-316.

broadly reiterates how essential Article 11 is to a truly pluralistic and democratic society.

(d) Conclusion

23. The Court's decision strengthens lines of interpretation of Article 11 of the ECHR. It reinforces freedom of association and assembly, and re-iterates the importance of pluralistic societies, which respect and protect minority viewpoints, and a free marketplace of ideas as being the hallmark of a free and functioning democracy. In doing so, the Court also sends a timely reminder that contracting States cannot use selective registration laws to undermine the right to freedom of association and religious freedom.