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

CASE OF REFAH PARTISI (THE WELFARE PARTY) AND OTHERS v. TURKEY

(Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98)

JUDGMENT

STRASBOURG

13 February 2003

This judgment is final but may be subject to editorial revision.

In the case of Refah Partisi (The Welfare Party) and Others v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber …

Having deliberated in private on 19 June 2002 and on 22 January 2003,

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

PROCEDURE

1. The case originated in four applications (nos. 41340/98, 41342/98, 41343/98 and 41344/98) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish political party, Refah Partisi (The Welfare Party, hereinafter "Refah") and three Turkish nationals, Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal ("the applicants") on 22 May 1998.

2. The applicants alleged in particular that the dissolution of Refah by the Turkish Constitutional Court and the suspension of certain political rights of the other applicants, who were leaders of Refah at the material time, had breached Articles 9, 10, 11, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1 to the Convention. …

3. On 31 July 2001 the Chamber gave judgment, holding by four votes to three that there had been no violation of Article 11 of the Convention and unanimously that it was not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1. The joint dissenting opinion of Judges Fuhrmann, Loucaides and Sir Nicolas Bratza was annexed to the judgment.

4. On 30 October 2001 the applicants requested, under Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber.

On 12 December 2001 the panel of the Grand Chamber decided to refer the case to the Grand Chamber.

…

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

5. The first applicant, Refah Partisi (the Welfare Party, hereinafter "Refah"), was a political party founded on 19 July 1983. It was represented by its chairman, Mr Necmettin Erbakan, who is also the second applicant. He was born in 1926 and lives in Ankara. An engineer by training, he is a politician. At the material time he was a member of parliament and Refah's chairman….

6. Refah took part in a number of general and local elections. In the local elections in March 1989 Refah obtained about 10% of the votes and its candidates were elected mayor in a number of towns, including five large cities. In the general election of 1991 it obtained 16.88% of the votes. The 62 MPs elected as a result took part between 1991 and 1995 in the work of parliament and its various committees, including the Committee on Constitutional Questions, which proposed amendments to Article 69 of the Constitution that became law on 23 July 1995. …

Ultimately, Refah obtained approximately 22% of the votes in the general election of 24 December 1995 and about 35% of the votes in the local elections of 3 November 1996.

The results of the 1995 general election made Refah the largest political party in the Turkish parliament with a total of 158 seats in the Grand National Assembly (which had 450 members at the material time). On 28 June 1996 Refah came to power by forming a coalition government with the centre-right True Path Party (*Doğru Yol Partisi*), led by Mrs Tansu Ciller. According to an opinion poll carried out in January 1997, if a general election had been held at that time, Refah would have obtained 38% of the votes. The same poll predicted that Refah might obtain 67% of the votes in the general election to be held roughly four years later.

B. Proceedings in the [Turkish][Constitutional Court

1. Principal State Counsel's submissions

7. On 21 May 1997 Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to have Refah dissolved on the grounds that it was a "centre" (*mihrak*) of activities contrary to the principles of secularism. In support of his application, he referred to the following acts and remarks by certain leaders and members of Refah.

– Whenever they spoke in public Refah's chairman and other leaders advocated the wearing of Islamic headscarves in State schools and buildings occupied by public administrative authorities, whereas the Constitutional Court had already ruled that this infringed the principle of secularism enshrined in the Constitution.

– At a meeting on constitutional reform Refah's chairman, Mr Necmettin Erbakan, had made proposals tending towards the abolition of secularism in Turkey. He had suggested that the adherents of each religious movement should obey their own rules rather than the rules of Turkish law.

– On 13 April 1994 Mr Necmettin Erbakan had asked Refah's representatives in the Grand National Assembly to consider whether the change in the social order which the party sought would be "peaceful or violent" and would be achieved "harmoniously or by bloodshed".

– At a seminar held in January 1991 in Sivas, Mr Necmettin Erbakan had called on Muslims to join Refah, saying that only his party could establish the supremacy of the Koran through a holy war (jihad) and that Muslims should therefore make donations to Refah rather than distributing alms to third parties.

– During Ramadan Mr Necmettin Erbakan had received the heads of the Islamist movements at the residence reserved for the Prime Minister, thus assuring them of his support.

– Several members of Refah, including some in high office, had made speeches calling for the secular political system to be replaced by a theocratic system. These persons had also advocated the elimination of the opponents of this policy, if necessary by force. Refah, by refusing to open disciplinary proceedings against the members concerned and even, in certain cases, facilitating the dissemination of their speeches, had tacitly approved the views expressed.

– On 8 May 1997 a Refah MP, Mr İbrahim Halil Çelik, had said in front of journalists in the corridors of the parliament building that blood would flow if an attempt was made to close the "*İmam-Hatip*" theological colleges, that the situation might become worse than in Algeria, that he personally wanted blood to flow so that democracy could be installed in the country, that he would strike back against anyone who attacked him and that he would fight to the end for the introduction of Islamic law (sharia).

– The Minister of Justice, Mr Şevket Kazan (a Refah MP and vice-chairman of the party), had expressed his support for the mayor of Sincan by visiting him in the prison where he had been detained pending trial after being charged with publicly vindicating international Islamist terrorist groups.

Principal State Counsel further observed that Refah had not opened any disciplinary proceedings against those responsible for the above-mentioned acts and remarks. …

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

8. The applicants alleged that the dissolution of Refah Partisi (The Welfare Party) and the temporary prohibition barring its leaders – including Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal – from holding similar office in any other political party had infringed their right to freedom of association, guaranteed by Article 11 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association...
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others..."

A. Whether there was an interference

9. The parties accepted that Refah's dissolution and the measures which accompanied it amounted to an interference with the applicants' exercise of their right to freedom of association. The Court takes the same view.

B. Whether the interference was justified

10. Such an interference will constitute a breach of Article 11 unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of that provision and was "necessary in a democratic society" for the achievement of those aims.

…

– *The main grounds for dissolution cited by the Constitutional Court*

11. The Court considers on this point that among the arguments for dissolution pleaded by Principal State Counsel at the Court of Cassation those cited by the Constitutional Court as grounds for its finding that Refah had become a centre of anti-constitutional activities can be classified into three main groups: (i) the arguments that Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs; (ii) the arguments that Refah intended to apply sharia to the internal or external relations of the Muslim community within the context of this plurality of legal systems; and (iii) the arguments based on the references made by Refah members to the possibility of recourse to force as a political method. The Court must therefore limit its examination to those three groups of arguments cited by the Constitutional Court.

(a) The plan to set up a plurality of legal systems

12. The Court notes that the Constitutional Court took account in this connection of two declarations by the applicant Mr Necmettin Erbakan, Refah's chairman, on 23 March 1993 in parliament and on 10 October 1993 at a Refah party conference (see paragraph 28 above). In the light of its considerations on the question of the appropriate timing for dissolution of the party (see paragraphs 107-110 above) and on the imputability to Refah of Mr Necmettin Erbakan's speeches (see paragraph 113 above), it takes the view that these two speeches could be regarded as reflecting one of the policies which formed part of Refah's programme, even though the party's constitution said nothing on the subject.

13. With regard to the applicants' argument that when Refah was in power it had never taken any concrete steps to implement the idea behind this proposal, the Court considers that it would not have been realistic to wait until Refah was in a position to include such objectives in the coalition programme it had negotiated with a political party of the centre-right. It merely notes that a plurality of legal systems was a policy which formed part of Refah's programme.

14. The Court sees no reason to depart from the Chamber's conclusion that a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system. In its judgment, the Chamber gave the following reasoning:

> "70. ... the Court considers that Refah's proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement.

The Court takes the view that such a societal model cannot be considered compatible with the Convention system, for two reasons.

Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention (see, *mutatis mutandis*, the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 14, § 25).

Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs (see, *mutatis mutandis*, the judgment of 23 July 1968 in the "Belgian linguistic" case, Series A no. 6, pp. 33-35, §§ 9 and 10, and the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment, Series A no. 94, pp. 35-36, § 72).

(b) Sharia…

15. The Court concurs in the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention:

"72. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. ... In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention."

16. The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the

model of society which they had in mind. It considers that, in accordance with the Convention's provisions, each Contracting State may oppose such political movements in the light of its historical experience.

17. The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy (see paragraph 40 above).

(c) Sharia and its relationship with the plurality of legal systems proposed by Refah…

18. The Court is not required to express an opinion in the abstract on the advantages and disadvantages of a plurality of legal systems. It notes, for the purposes of the present case, that – as the Constitutional Court observed – Refah's policy was to apply some of sharia's private-law rules to a large part of the population in Turkey (namely Muslims), within the framework of a plurality of legal systems. Such a policy goes beyond the freedom of individuals to observe the precepts of their religion, for example by organising religious wedding ceremonies before or after a civil marriage (a common practice in Turkey) and according religious marriage the effect of a civil marriage (see, *mutatis mutandis*, *Serif v. Greece*, no. 38178/97, § 50, ECHR 1999-IX). This Refah policy falls outside the private sphere to which Turkish law confines religion and suffers from the same contradictions with the Convention system as the introduction of sharia (see paragraph 125 above).

19. Pursuing that line of reasoning, the Court rejects the applicants' argument that prohibiting a plurality of private-law systems in the name of the special role of secularism in Turkey amounted to establishing discrimination against Muslims who wished to live their private lives in accordance with the precepts of their religion.

It reiterates that freedom of religion, including the freedom to manifest one's religion by worship and observance, is primarily a matter of individual conscience, and stresses that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole.

It has not been disputed before the Court that in Turkey everyone can observe in his private life the requirements of his religion. On the other hand, Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for

Convention purposes (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession). The freedom to enter into contracts cannot encroach upon the State's role as the neutral and impartial organiser of the exercise of religions, faiths and beliefs (see paragraphs 91-92 above).

(d) The possibility of recourse to force…

20. The Court considers that, whatever meaning is ascribed to the term "jihad" used in most of the speeches mentioned … (whose primary meaning is holy war and the struggle to be waged until the total domination of Islam in society is achieved), there was ambiguity in the terminology used to refer to the method to be employed to gain political power. In all of these speeches the possibility was mentioned of resorting "legitimately" to force in order to overcome various obstacles Refah expected to meet in the political route by which it intended to gain and retain power.

21. Furthermore, the Court endorses the following finding of the Chamber:

> "74. ... While it is true that Refah's leaders did not, in government documents, call for the use of force and violence as a political weapon, they did not take prompt practical steps to distance themselves from those members of Refah who had publicly referred with approval to the possibility of using force against politicians who opposed them. Consequently, Refah's leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it (see, *mutatis mutandis*, the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2549, § 58)."

– Overall examination of "pressing social need"

22. In making an overall assessment of the points it has just listed above in connection with its examination of the question whether there was a pressing social need for the interference in issue in the present case, the Court finds that the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a "democratic society" and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a "pressing social need".

(β) Proportionality of the measure complained of

23. After considering the parties' arguments, the Court sees no good reason to depart from the following considerations in the Chamber's judgment:

> "82. ... The Court has previously held that the dissolution of a political party accompanied by a temporary ban prohibiting its leaders from exercising political responsibilities was a drastic measure and that measures of such severity might be applied only in the most serious cases (see the previously cited Socialist Party and Others v. Turkey judgment, p. 1258, § 51). In the present case it has just found that the interference in question met a "pressing social need". It should also be noted that after Refah's dissolution only five of its MPs (including the applicants) temporarily forfeited their parliamentary office and their role as leaders of a political party. The 152 remaining MPs continued to sit in parliament and pursued their political careers normally. Moreover, the applicants did not allege that Refah or its members had sustained considerable pecuniary damage on account of the transfer of their assets to the Treasury. The Court considers in that connection that the nature and severity of the interference are also factors to be taken into account when assessing its proportionality (see, for example, *Sürek v. Turkey (No. 1)* [GC], no. 26682/95, § 64, ECHR 1999-IV)."

24. … It follows that the interference in issue in the present case cannot be regarded as disproportionate in relation to the aims pursued.

4. The Court's conclusion regarding Article 11 of the Convention

25. Consequently, following a rigorous review to verify that there were convincing and compelling reasons justifying Refah's dissolution and the temporary forfeiture of certain political rights imposed on the other applicants, the Court considers that those interferences met a "pressing social need" and were "proportionate to the aims pursued". It follows that Refah's dissolution may be regarded as "necessary in a democratic society" within the meaning of Article 11 § 2.

26. Accordingly, there has been no violation of Article 11 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 11 of the Convention;

2. *Holds* that it is not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 February 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar