



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

SECOND SECTION

CASE OF BACAKSIZ v. TURKEY

(Application no. 24245/09)

JUDGMENT

Art 6 § 1 (civil) • Fair hearing • Adversarial proceedings • Trial court's judgement based on expert report without proper summoning of applicant • Cassation Court's limited scope of jurisdiction • Failure to remit the case for fresh trial

STRASBOURG

10 December 2019

FINAL

10/03/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bacaksız v. Turkey,

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

Robert Spano, *President*,

Marko Bošnjak,

Valeriu Grițco,

Egidijus Kūris,

Arnfinn Bårdsen,

Darian Pavli,

Saadet Yüksel, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 19 November 2019,

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

PROCEDURE

1. The case originated in an application (no. 24245/09) 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 Süleyman Bacaksız (“the applicant”), on 3 April 2009.

2. The applicant was represented by Ms A. Nalbant, a lawyer practising in Denizli. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that he had not been able to participate in the proceedings against him, in breach of Article 6 § 1.

4. On 12 December 2016 notice of the complaint concerning the applicant’s inability to participate in proceedings against him was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1960 and lives in Denizli.

6. The facts of the case, as submitted by the parties, and as they appear from the documents submitted by them, may be summarised as follows.

7. On 3 March 2000 the applicant who was driving his car was involved in a traffic accident on the highway involving two other cars and three passengers.

8. A traffic accident report was drawn up by the police officers who were called to the scene. In their report they indicated that the applicant had been travelling in the direction of İzmir while the other drivers had been

travelling in the opposite direction. It was also noted that the applicant had been at fault for causing the accident by crossing to the opposite lane and crashing into Ş.Y.'s car. According to the same report, the other driver, M.B., was at secondary fault because he was following Ş.Y.'s car too closely, while Ş.Y., the third driver, was not at fault. All the drivers as well as the two passengers travelling in the applicant's car and the other passenger travelling in M.B.'s car were indicated as injured.

9. This report was signed only by the police officers. The addresses of the drivers were indicated in the relevant section of the report. Accordingly, the applicant's address was indicated as *Değirmenönü Mah. 1336 Sok. No: 10-2, Denizli*. In their observations, the Government submitted that this was the address that had been recorded at the traffic registration bureau when the applicant had bought and registered his car.

A. Criminal proceedings

10. On 25 October 2000, criminal proceedings were lodged against the applicant and the other drivers on charges of causing injury by imprudence and negligence. The applicant's address was indicated in the preparatory hearing as *Mehmetçik Mah. 2569 Sok. No: 6-2, Denizli* where a summons was successfully served.

11. The applicant, who was represented by a lawyer, attended the proceedings in person.

12. During the proceedings the Selçuk Criminal Court of First Instance in İzmir ("the Criminal Court") conducted an on-site inspection of the road where the accident took place. The applicant, who was present during this exercise, submitted that contrary to the traffic accident report written by the police officers who had been called to the scene, he had been travelling from İzmir and not going in the direction of İzmir. The Criminal Court decided to appoint an expert to determine how the accident had happened and who could be at fault.

13. In his report submitted to the court on 2 November 2001 the expert appointed by the court reconstructed the accident in the following way: the applicant had been travelling to İzmir and had skidded onto the lane with oncoming traffic due to rain and slippery road conditions and had hit Ş.Y.'s car which was travelling from İzmir, on the left rear side. He had then collided with M.B., who was following Ş.Y. too closely. The expert then concluded that the applicant was 5/8 at fault for causing the accident by passing onto the lane with oncoming traffic, and that M.B. was 3/8 at fault for following Ş.Y. too closely.

14. Following the applicant's objections to that report, the court decided to obtain a second opinion from the department of traffic experts at the Forensic Medicine Institute.

15. On 29 January 2002 a panel of four experts submitted their report to the court. The panel noted that in their statements all three drivers had submitted that they had been travelling in the opposite direction of İzmir, whereas in a separate statement, Ş.Y. had stated that the applicant had actually been travelling to İzmir and had crossed over to the lane in which he was driving. The panel noted that M.B. had mentioned that he did not recall the events clearly as a result of the trauma he had suffered in the accident. The panel also took note of the previous expert report in which the accident had been reconstructed. The panel could not conclusively determine which driver had caused the chain accident but noted that whoever had violated the rules on overtaking had been 8/8 at fault for causing the accident. The fact that the place of impact had been on the left shoulder of the highway in the direction of İzmir was an indication of who could be at blame for incorrect overtaking. Accordingly, the panel suggested that whoever was driving to İzmir was the driver at fault.

16. In order to determine the driver who had violated the rules of overtaking and who was going in which direction at the time of the accident, the Criminal Court requested from the insurance company of Ş.Y. a photograph of Ş.Y.'s damaged car and the repair bills.

17. On 5 June 2002 the insurance company replied to the court's request that the photographs in question had been submitted to the Torbalı Civil Court in İzmir ("the Civil Court") and could be sought from that court. The insurance company identified those proceedings by the docket number.

18. The Criminal Court decided to consult the case-file of the court in the civil proceedings (see paragraphs 23-35 below). It therefore asked that court to forward the photographs taken after the accident showing the damage to Ş.Y.'s car, as well as the parts that had been changed.

19. It appears from the minutes of the hearing of 3 July 2003 that the Criminal Court received the case-file in question from the Civil Court. The Criminal Court also indicated in those minutes of the hearing that the Civil Court had rendered a decision which had not yet become final. Finally, the Criminal Court noted that there were no photographs in the case-file of the Civil Court. Subsequently photographs of the damaged cars were submitted to the Criminal Court on a CD-ROM.

20. The Criminal Court decided to appoint a panel of experts of three traffic engineers. In its report of 15 March 2004, the panel submitted that the photographs of the cars taken after the accident showing the impact of the accident did not correspond to the version of events described in the traffic accident report drawn up by the police officers. Accordingly, the panel held that the way the damage had occurred on the cars implied that the applicant and Ş.Y. had been travelling from İzmir and that it was in fact M.B. who was going in the direction of İzmir. They explained that M.B. must have crossed over to the opposite lane and hit Ş.Y.'s rear left side with his car's front left side. The impact of the accident had made M.B. lose

control of his car, which had ended up in a vertical position on the road and had then been hit by the applicant's on its right side. The panel accordingly concluded that the entire fault rested with M.B. and that the other drivers could not be attributed any fault in the accident.

21. On 29 April 2004 the Criminal Court acquitted the applicant and Ş.Y. on the basis of the final expert report and convicted M.B., sentencing him to three months of imprisonment and a monetary fine.

22. On 8 June 2004 the Criminal Court's judgment became final.

B. Civil proceedings

23. On 11 April 2001 the insurance company of Ş.Y. brought a case against the applicant and M.B. before the Civil Court, claiming reimbursement of the cost of the sums it had paid to Ş.Y. as a result of the accident. In its petition it indicated the applicant's address as the one that had been written in the traffic accident report (see paragraph 9 above).

24. On 7 May 2001 the Civil Court sent a notice of proceedings to the applicant at that address, including the insurance company's petition, and invited him to comment within ten days of the receipt.

25. On 23 May 2001 the summons was returned to the court since the applicant had moved from that address.

26. On 9 July 2001 the Civil Court wrote to the Security Directorate with a view to finding the applicant's current address, indicating the registration number of the applicant's car.

27. On 24 July 2001 the Security Directorate replied to the court informing it of the home and work address of the applicant – both of which had been declared by the applicant at the time of registration of the car. The home address was the same as the one where delivery had already been attempted by the Civil Court.

28. On the basis of the reply of the Security Directorate, the court sent another notice to the applicant's home address with an invitation to appear at the hearing on 4 December 2001. The delivery was attempted on 16 November 2001 but failed for the same reasons.

29. On 4 December 2001 the first instance court instructed that the summons be posted on the door of the applicant's previous residence pursuant to section 35 of Notification Law (see paragraph 36 below). Accordingly, the summons was posted on the door of the applicant's previous address where delivery had failed and it was deemed to have been duly served.

30. During the proceedings, which were conducted in the absence of the applicant, the Civil Court sought an expert report to determine the damages and the responsible party. In his report submitted to the court on 12 April 2002 the expert noted that the applicant had violated the rules of overtaking by crossing to the adjacent lane in the opposite direction and crashing into

Ş.Y.'s car head-on. M.B. who was following the latter's car had also been at fault because he had been following Ş.Y. too closely. The Civil Court sent the expert report to the applicant's old address.

31. On 26 December 2002 the Civil Court found for the plaintiff insurance company and decided that the amount that was not covered by the applicant's car insurance plus interest should be reimbursed by the applicant and the other defendant. The court apportioned the fault ratio as 75% for the applicant and 25% for M.B., as had been indicated in the expert report.

32. The applicant claims that he became aware of the proceedings when a relative who lived at his old address found the notification of the expert opinion hung on the door of the building (see paragraph 30 above). On 12 March 2003 the applicant applied to the Civil Court and filed a petition indicating his lawyer's address and requested that the decision of the first-instance court be notified to him.

33. The decision of the first-instance court was notified to the applicant's lawyer on 31 October 2006.

34. The same day the applicant's lawyer lodged an appeal with the Court of Cassation with a request to quash the decision of the first-instance court on the ground that the applicant had not been properly notified of the proceedings lodged against him and that he had been fully acquitted in the criminal proceedings concerning the same accident. He argued that the diametrically opposite findings between the decision of the Civil Court and those of the Criminal Court amounted to a denial of justice, particularly because the detailed investigation made by the Criminal Court had concluded that he had had no fault in causing the accident.

35. On 28 February 2008 the Court of Cassation in its interim decision decided *ex proprio motu* to request the case-file in question from the Criminal Court on the ground that it was necessary for the determination of the merits of the appeal. On 9 October 2008 it dismissed the applicant's appeal on the basis of the case-file. It held that the Civil Court had correctly adjudicated the dispute on the basis of the expert report and that its decision had been in accordance with the law. The Court of Cassation further held that the outcome of the criminal proceedings was not binding on civil courts, which determined the imposition of civil liability. The Court of Cassation did not separately respond to the applicant's argument about not being able to participate effectively in the proceedings as a result of the non-notification of the summons at his actual address nor did it comment on the fact that his address had been easily discovered by the authorities which had conducted the criminal proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Notification Act

36. Section 35 of the Notification Act (Law no. 7201), as in force at the material time, provided:

“Where a person who has been served with a document personally or at his or her home address in accordance with legally established procedures changes address, he or she must without delay communicate the new address to the judicial authority from which the notification emanated. In such cases, [service of] all subsequent notifications must be effected at the new address.

Where [this] person has failed to communicate his or her new address and the notifying officer has been unable to ascertain this new address, a copy of the document to be served shall be posted at the entrance to the building corresponding to the old address; the date on which the copy is posted shall be treated as the date of notification.

[Service of] subsequent notifications effected in this way at the old address shall be deemed to have been effected vis-à-vis the addressee.

Even if no prior notification has been given [in relation to those addresses], the provisions of this section shall also apply in respect of addresses stated on contracts entered into by parties who have accepted signing [those contracts] before the official authorities, and last addresses that are given to public institutions and organisations, to professional bodies with the status of public institutions, to commercial registries, and to registries of tradesmen and craftsmen.”

B. Code of Civil Procedure

37. Article 428 of the Code of Civil Procedure (“CPP”) as in force at the material time (Law no. 1086) listed the grounds of appeal as follows:

“The court of appeal shall set a decision aside if:

- 1) the law or the contract between the parties has been incorrectly applied;
- 2) the [trial] court had no jurisdiction to examine the case;
- 3) conflicting decisions involving identical parties and the same subject-matter have been rendered;
- 4) the procedural rules have been disregarded;
- 5) the facts of the dispute have not been correctly established;
- 6) evidence produced by one of the parties was not accepted in disregard of the law.

In the case of disregard of the procedural rules by a trial court, that decision shall only be set aside on appeal if the irregularity complained of is capable of affecting the outcome of the proceedings or when the trial court did not examine a party’s [well-founded] complaint about the procedural irregularity.”

38. Article 429 of the CPP as in force at the material time described the procedure to be followed when a decision is set aside by the Court of Cassation, as follows:

“If the relevant Chamber of the Court of Cassation quashes the appealed decision, [it] shall remit the case to the [first-instance] court which delivered the decision or to any other court it shall deem appropriate.

That court, [...], shall decide whether to comply with the Court of Cassation’s decision after having invited, on its own motion, the parties for a hearing and having heard them.

If the court persists in its earlier decision, an appeal against the decision to persist shall be made to the Grand Chamber of the Court of Cassation for Civil Law Matters.”

39. Article 432 of the CPP as in force at the material time provided as follows:

“Time to lodge an appeal is fifteen days which starts to run, in respect of each party, from the date of receipt of the communication of the first-instance’s court decision.”

C. Road Traffic Act (Law no. 2918)

40. Section 32 of Law no. 2918 as in force at the material time and in so far as relevant provided as follows:

“It is obligatory to notify the relevant registration office of any change made on vehicles [...] including changes of addresses within 30 days by the licence holder.

...”

D. Case-law of the Court of Cassation

41. On 28 March 2001 the Grand Chamber of the Court of Cassation’s Civil Division (*Yargıtay Hukuk Genel Kurulu*) in its decision no. E.2001/11-295, K.2001/313 concerning a car insurance dispute held that when a party against whom proceedings were brought could not be found at the address declared by him when he registered his vehicle, the summons sent to that address by the court would be deemed to have been duly served and that the trial court could therefore proceed to examine the merits of the dispute. It held in that connection that the vehicle owner had an obligation under the law to notify his change of address to the authorities and that section 35 (4) of the Notification Act provided that notices sent to former addresses would be considered to have been duly served on the individual concerned.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

42. The applicant complained under Articles 1 and 6 of the Convention that he had been unable to participate in the proceedings before the Civil Court. The Court considers that the applicant’s complaint falls to be

examined under Article 6 § 1 of the Convention, the relevant parts of which read as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

43. The Government contested that argument.

A. Admissibility

44. The Government argued that the application should be declared inadmissible for non-exhaustion of domestic remedies in so far as the applicant had not lodged a request for rectification of the Court of Cassation’s decision of 9 October 2008. In this respect, they submitted six decisions of the Court of Cassation dating from 2008 and 2014 where rectification requests had been admitted in cases concerning various insurance disputes between private parties. In those cases, the Court of Cassation had allowed the rectification of its earlier decision either on the grounds that litigation costs had not been correctly taken into account by the first-instance court, or because the expert opinions on which the first-instance court had based its decision had not been conclusive, or because the law had not been correctly applied. None of the decisions submitted by the Government concerned the rectification request of a party on the grounds that the summons had not been served on him, resulting in him losing the opportunity to participate in the first-instance proceedings.

45. The applicant did not submit comments on the admissibility of his application within the time allowed.

46. The Court refers to its well-established case law concerning the obligation to exhaust domestic remedies, as summarised, for instance, in *Vučković and Others v. Serbia* (preliminary objection) [GC], (nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). The Court reiterates that Article 35 § 1 of the Convention, which sets out the rules on exhaustion of domestic remedies, provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. Once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement.

47. Turning to the present case, the Court notes at the outset that in Turkish law, as in force at the material time, the rectification of a decision in civil proceedings was an ordinary remedy and involved asking the appeal court which had given the impugned decision to reconsider its decision on

the grounds that it had made a mistake. If the rectification request was admitted, the court of appeal in question conducted a re-examination of the case without taking new facts or findings into consideration (see, *inter alia*, *Ünal Tekeli v. Turkey* (dec.), no 29865/96, 1 July 2003; *Nacaryan and Deryan v. Turkey*, nos. 19558/02 and 27904/02, § 30, 8 January 2008; *Dedecan and Ok v. Turkey*, nos. 22685/09 and 39472/09, § 23, 22 September 2015).

48. The Court also recalls that in the Turkish context of exhaustion of domestic remedies, as a general rule, the applicants are not required to seek the rectification of an impugned decision before lodging an application with the Court (see, among others, *İhsan and Satun Önel v. Turkey*, no. 9292/02, § 12, 21 September 2006 and *Sarıdaş v. Turkey*, no. 6341/10, § 31, 7 July 2015). At the same time, when an applicant has made use of this remedy, the running of the six-months' time-limit for introducing an application with the Court does not start to run before the rectification proceedings are over (see, among others, *Okan Güven and Others v. Turkey*, no. 13476/05, §§ 58-60, 14 November 2017, with further references) since the domestic decision cannot be considered "final" yet.

In the light of the foregoing, the Court concludes that the Government's preliminary objection of non-exhaustion must be dismissed.

49. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 arguments

50. The applicant did not submit observations on the merits within the time allowed.

51. The Government argued that the notification of the summons to the applicant had been in accordance with domestic law. Secondly, they submitted that the applicant had not reported his change of address to the traffic authorities even though that obligation had clearly been laid out in the provisions of the traffic regulations (see paragraph 40 above). They contended that the said provision had been foreseeable and accessible and that the applicant had a duty to comply with this rule as a car owner. Thirdly, they argued that the applicant could not possibly have been unaware of the civil compensation proceedings lodged against him due to the fact that in the criminal proceedings, the Criminal Court had requested certain evidence from the Civil Court, the fact of which had been recorded in the minutes of the hearings in the Criminal Court and mentioned in the judgment itself. Lastly, they submitted that the Court of Cassation on appeal by the applicant had considered his arguments on the merits and had even

examined the criminal case-file. Therefore, in the Government's opinion, the applicant had had a fair trial in compliance with the requirements of Article 6 of the Convention.

2. The Court's Assessment

(a) General principles

52. The Court reiterates that the Convention system requires the Contracting States to take the necessary steps to ensure the effective enjoyment of the rights guaranteed under Article 6 of the Convention (see *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, § 77, 4 March 2014). The possibility for parties to take part in proceedings flows from the objectives and purpose of Article 6 of the Convention, taken as a whole. The general concept of a fair trial, encompassing also the fundamental principle that proceedings should be adversarial (see *Ruiz-Mateos v. Spain*, 23 June 1993, § 63, Series A no. 262), requires that all parties to civil proceedings should have the opportunity to have knowledge of and comment on the observations filed or evidence adduced with a view to influencing the court's decision (see *Lobo Machado v. Portugal*, 20 February 1996, § 31, *Reports of Judgments and Decisions* 1996-I). Above all, that presupposes that the person against whom proceedings have been initiated should be informed of that fact (see *Dilipak and Karakaya v. Turkey*, cited above, § 77). If court documents, including summonses to hearings, are not served in person, then an applicant might be prevented from defending himself in the proceedings (see *Aždajić v. Slovenia*, no. 71872/12, § 48, 8 October 2015).

53. Article 6 § 1 does not provide for a specific form of service of documents (see *Bogonos v. Russia* (dec.), no. 68798/01, 5 February 2004), and it is not the Court's task to indicate the preferred ways of communicating with litigants, the domestic courts being better placed to assess the situation in the light of practical circumstances (see *Gankin and Others v. Russia*, nos. 2430/06, 1454/08, 11670/10 and 12938/12, § 35, 31 May 2016). Nonetheless, it remains the responsibility of the Contracting States to ensure that the domestic authorities have acted with the requisite diligence in apprising the litigants of the proceedings so that their right to a fair trial is not jeopardised (see *Schmidt v. Latvia*, no. 22493/05, § 86, 27 April 2017).

54. Neither the letter nor the spirit of Article 6 of the Convention prevent a person from waiving, of his or her own free will, the safeguards of a fair trial. However, such a waiver must be established in an unequivocal manner and be attended by the minimum safeguards commensurate with its importance (see, among others, *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII).

55. In numerous cases concerning complaints about the fairness of criminal proceedings, the Court has held that although proceedings which took place in the accused's absence are not in themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he or she waived his or her right to appear and to defend him- or herself (see, for example, *Sejdovic v. Italy* [GC], no. 56581/00, §§ 81-88, ECHR 2006-II, and *M.T.B. v. Turkey*, no. 47081/06, §§ 48-64, 12 June 2018).

56. The Court has applied the same approach to complaints concerning default judgments in civil proceedings (see *Dilipak and Karakaya* and *Aždajić*, both cited above; *Gyuleva v. Bulgaria*, no. 38840/08, §§ 34-48, 9 June 2016 and *Gakharia v. Georgia*, no. 30459/13, § 35, 17 January 2017). Accordingly, in cases such as the present one where civil proceedings had been conducted without the participation of the applicants, the Court verifies (i) whether the authorities had been diligent in informing the applicants of the proceedings, and whether the applicants could be considered to have waived their right to appear before the courts and to defend themselves; and (ii) whether domestic law provided the applicants with the appropriate means to secure a fresh adversarial hearing, once they had learnt of the default judgments against them (see *Dilipak and Karakaya*, § 80; *Aždajić*, § 53; *Gyuleva*, § 38; and *Gakharia*, § 49, all cited above). Finally, even if the parties to proceedings demonstrate a certain lack of diligence, the Court has held that the consequences attributed to their behaviour by the domestic courts must be commensurate to the gravity of their failings and take heed of the overarching principle of a fair hearing (see *Aždajić*, § 71; *Gakharia*, § 50; and *Schmidt*, § 95, all cited above).

57. Lastly, the Court reiterates that a defect at first instance may be remedied on appeal, as long as the appeal body has full jurisdiction to quash the impugned decision and either to take the decision itself, or to remit the case for a new decision (see *M.S. v. Finland*, no. 46601/99, § 35, 22 March 2005, and *Karakuş v. Turkey* (dec.), no. 52438/08, 7 March 2017).

(b) Application to the present case

58. In respect of the first question, the Court must therefore examine whether the national authorities showed sufficient diligence in their efforts to locate the applicant and inform him of the civil proceedings. In that connection, when the trial court sought assistance from the relevant Security Directorate to determine the applicant's current address after the first failed attempt to deliver the summons to the applicant, the Court observes that the Security Directorate replied to the trial court with two possible addresses where the applicant could be found: the address that was given to the Civil Court by the plaintiff where delivery had already been attempted but failed;

and another address declared as his work address by the applicant when he had registered the car, where no delivery had so far been attempted by the trial court. While in those circumstances it would have been more appropriate and reasonable to try the work address of the applicant, the Civil Court chose to send the summons again to the applicant's old home address even though it was obviously futile to do so. The trial court's final step, which was to post the summons at the entrance of the building of the applicant's old address and deem it to be served, could hardly qualify as making reasonable efforts to appraise a defendant of the proceedings against him. In the light of the foregoing, the Court holds that the trial court's efforts to locate the applicant were not Convention-compliant. In that connection the submission that the national courts served the decision in accordance with the domestic legal provisions is not sufficient in itself to relieve the State of its obligations under Article 6 of the Convention.

59. Having regard to the foregoing, the Court is unable to subscribe to the Government's argument that the trial court showed the requisite due diligence in its efforts to locate the applicant (see, *mutatis mutandis*, *M.T.B. v. Turkey*, § 52, cited above).

60. As regards the Government's argument that the applicant could not have been unaware of the civil proceedings lodged against him since in the criminal proceedings that court had requested certain documents and evidence from the Civil Court, the Court notes that there are several references to the civil proceedings in the minutes of the hearings of the Criminal Court as well as in its decision. That being so, there are no references in those documents to the names of the parties in the civil proceedings, a consideration which is important since there were more than two drivers implicated in the traffic accident, several injured passengers and two insurance companies. While the Court agrees with the Government that the applicant could have suspected that the civil proceedings in question concerned him, his lack of diligence is not sufficient for the Court to hold that it amounted to an explicit and unequivocal waiver of the right to participate in the civil proceedings. The same holds true as regards the Government's argument that the applicant's lack of diligence in updating his address with the traffic Registry should be taken as a waiver. The Court reiterates in that respect that the main precondition for waiving a right is that the person concerned is aware of the existence of the right in question, and therefore also aware of the related proceedings (see *Dilipak and Karakaya*, § 87; *Aždajić*, § 58; and *Gyuleva*, § 42, all cited above). It therefore rejects the Government's arguments on these points.

61. As regards the second question, that is, once the applicant learned of the default judgment against him, whether he could get a fresh adversarial hearing, the Court notes that the applicant was able to lodge an ordinary appeal against the default judgment on procedural and substantive grounds and his appeal was examined on the merits. On that point however the Court

observes that the Court of Cassation did not examine the applicant's submission that the impugned proceedings had been conducted in his absence. The Court of Cassation only confined its examination to the substantive arguments of the applicant and upheld the trial court's decision on the grounds that a civil court could arrive at a conclusion different from a criminal court on the basis of the same facts. The Court also observes that the Court of Cassation decided to examine on its own motion the criminal case file within the scope of its appeal review.

62. Accordingly, the Court must determine whether the Court of Cassation's appeal review in the present case remedied the violation of the applicant's right to participate in the trial against him in the first-instance proceedings. The Court would note at this juncture that in similar cases involving default judgments in civil proceedings, it has found a violation of Article 6 § 1 of the Convention because, *inter alia*, none of the applicants seeking to secure a fresh adversarial hearing were given leave to reinstate the proceedings either because such a remedy was not available (see *Gyuleva*, cited above, § 45) or because the domestic courts' approach had been overly formalistic (see *Gakharia*, cited above, § 49) or because the higher court did not give a reason why it refused the request (see *Dilipak and Karakaya*, cited above, § 37).

63. The circumstances of the present case are therefore different from the above cases since the applicant was able to obtain from the appeal court a review of the default judgment against him. It therefore remains to be seen whether the review accorded by the Court of Cassation was capable of remedying the applicant's absence in the first-instance proceedings (see, *mutatis mutandis*, *Idalov v. Russia* [GC], no. 5826/03, § 179, 22 May 2012).

64. In this connection, the Court observes that at the material time, the Court of Cassation's jurisdiction extended to legal and certain factual issues (see Article 438 (5) and (6) of the CPP cited in paragraph 37 above). While its powers of review on points of law was unlimited, the same cannot be said for its review on facts since it did not have full jurisdiction with respect to establishing the facts of the case, such as re-examining evidence or hearing of witnesses, that task being exclusively reserved for the trial courts upon remittal. In the case at hand, the applicant's arguments on appeal involved procedural issues and contested facts. In that respect the applicant complained that he would have been able to raise objections to the findings of the expert opinion submitted to the Civil Court had he had an opportunity to participate in the civil proceedings and moreover present to the Civil Court the opposite conclusions reached in the criminal proceedings. The Court of Cassation did not examine the applicant's complaint about his involuntary non-participation in the proceedings, and limited its review to the general principle that a civil court was not bound by the conclusions of the criminal courts. The reasoning given by the Court of Cassation therefore implies that it reviewed the case solely on points of law even though the

shortcoming complained of by the applicant entailed his non-participation in the proceedings and the lost opportunity to submit evidence and arguments to the trial court concerning the facts. As regards the applicant's submission concerning the procedural defect in the proceedings, namely that he was not notified of the proceedings, the Court observes that the Court of Cassation's decision contains no reasons for dismissing the claim. As regards the applicant's submissions concerning the facts of his case, the Court of Cassation held that the Civil Court had assessed the case correctly on the basis of the expert report taken out in the proceedings; however, for the Court, this assessment on its own was not sufficient to redress the applicant's non-participation in the proceedings since the Court of Cassation's limited scope of review on facts prevented it from assessing in the trial court's place, the factual arguments submitted by the applicant. For the same reason, the Court considers that the fact that the Court of Cassation examined the Criminal Court case-file during its appeal review had no bearing since it could not allow it to change the verdict of the civil court on the basis of facts which had not been examined by that court. The Court notes that the Court of Cassation, by not setting aside the trial court's judgment in the circumstances of the present case, failed to remedy the applicant's non-participation in the first-instance proceedings, as the applicant was not provided with a fresh adversarial hearing.

65. As a result there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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."

67. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 10 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President