



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

## SECOND SECTION

### CASE OF FAYSAL PAMUK v. TURKEY

*(Application no. 430/13)*

## JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (d) • Fair hearing • Examination of witnesses  
• Conviction based on written statements of absent witnesses, who were examined by the courts of their places of residence • No reasonable efforts by the trial court to secure their attendance • No good reason for non-attendance of witnesses, who provided decisive evidence and without sufficient counterbalancing factors

STRASBOURG

18 January 2022

**FINAL**

**09/05/2022**

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



**In the case of Faysal Pamuk v. Turkey,**

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

Carlo Ranzoni, *President*,

Aleš Pejchal,

Egidijus Kūris,

Branko Lubarda,

Pauliine Koskelo,

Marko Bošnjak,

Saadet Yüksel, *judges*,

and Hasan Bakırcı, *Deputy Section Registrar*,

Having regard to:

the application (no. 430/13) 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 Faysal Pamuk (“the applicant”), on 5 October 2012;

the decision to give notice of the application to the Turkish Government (“the Government”);

the Government’s observations;

Having deliberated in private on 7 December 2021,

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

## INTRODUCTION

1. The application concerns the alleged unfairness of the criminal proceedings against the applicant owing to his alleged inability to confront in person four witnesses who had earlier made incriminating statements about him, indicating his involvement in three different armed activities as a member of a terrorist organisation, namely PKK (Workers’ Party of Kurdistan).

## THE FACTS

2. The applicant was born in 1978 and was detained in Amasya E-type Prison at the time of lodging the application with the Court. He was represented by Mr S. Çelebi and Mrs K. Yılmaz, lawyers practising in Diyarbakır.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Turkey.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 30 October 1995 F.K., who was accused of membership of a terrorist organisation, made statements to the police, submitting, *inter alia*,

that an organisation member with the code name “Avarej”, a “warrior” from Diyarbakır, had taken part in an attack carried out on 24 September 1995 in Mazgirt.

6. On 12 May 1996 Y.A., who was accused of membership of a terrorist organisation, made statements to the police in the absence of a lawyer, submitting, *inter alia*, that an organisation member with the code name “Avareş” had taken part in armed activities on 22 September 1995 in Mazgirt. He further stated that “Avareş” was a warrior under the command of another PKK member with the code name “Navdar” and that he had been carrying a Kalashnikov rifle and wearing metal-rimmed glasses. Moreover, “Avareş” was twenty-five years old, 1.75 metres tall, slim and dark-skinned with black wavy hair.

7. On 17 November 1999 S.Y., who was accused of membership of a terrorist organisation, made statements to the gendarmerie submitting, *inter alia*, that an organisation member with the code name “Avareş” had taken part in an armed conflict between PKK members and the security forces around May or June 1997. According to her police statements dated 21 November 1999, “Avareş” was a “warrior” from Diyarbakır.

8. On 30 November 1999 A.T., who was accused of membership of a terrorist organisation, made statements to the police in the absence of a lawyer submitting, *inter alia*, that an organisation member whom he had known by the code name “Avreş” had taken part in an armed clash with the security forces in autumn 1997 in Mazgirt. According to page fifteen of A.T.’s police statements, “Avreş” was from Ergani and had been arrested, whereas according to page fifty-three of the document, which contained details of the armed clash, “Avreş” was from Kulp. In describing the physical appearance of “Avreş”, A.T. stated that he was short and dark-skinned with lines on his face.

9. On 5 November 2003 the Mazgirt Magistrate’s Court ordered the detention *in absentia* of thirteen individuals, including the applicant, for their alleged involvement in an armed attack on a police checkpoint on 3 September 1997, which had resulted in the death of two privates and another private being injured.

10. On 7 December 2009 the applicant went to the public prosecutor’s office and voluntarily handed himself in, submitting that he had been a member of the PKK for eleven years, from 1994 to 2005.

11. On 10 December 2009 he made statements to the Diyarbakır Anti-Terrorist Branch in the presence of his lawyer in respect of the accusations levelled against him, namely the offences of membership of the PKK/KONGRA-GEL terrorist organisation and carrying out armed activities for the rural cadres of the organisation. In his statements, he described how he had become involved in the terrorist organisation and stated the code names given to him, the places he had been to, the activities he had participated in, the training he had received, the activities of the organisation,

the names of those who had engaged in them and the names of other organisation members he knew. In particular, he submitted that he had first been given the code name “Kendal”, but that it had later (after two months) been changed to “Avareş-Tekoşin” as there had been another person with the code name “Kendal”. When the police officers asked him whether he was the person referred to as “Avareş” in the various statements given by other PKK members at different times, the applicant provided detailed explanations about two other members with the code name “Avareş”, at the same time pointing out that his code name had been “Avareş-Tekoşin” and not just “Avareş”. He also identified certain other organisation members from photographs. At the end of his statements, the applicant expressed his regret for joining the PKK and asked to benefit from Article 221 of the Criminal Code entitled “Active repentance”, which provided for a reduction in the sentence he could be given in exchange for information.

12. On 10 December 2009 the applicant made statements to the public prosecutor in the presence of his lawyer and essentially confirmed the statements he had made to the police. He once again stressed that his code name had been “Avareş-Tekoşin”.

13. On the same day, when the applicant was questioned by the investigating judge in the presence of his lawyer, he essentially reiterated his earlier statements.

14. On 5 January 2010 the Malatya public prosecutor filed a bill of indictment against the applicant with the Second Division of the Erzurum Assize Court, which had special jurisdiction to hear cases relating to the aggravated crimes specified in Article 250 § 1 of the Code of Criminal Procedure, as in force at the material time (hereinafter “the Malatya Specially Authorised Assize Court” or “the trial court”), charging him under Article 125 of the former Criminal Code with carrying out activities aimed at bringing about the secession of part of the national territory. The applicant was accused of having taken part in three specific armed activities:

(i) an armed attack on a police checkpoint on 3 September 1997, which had resulted in the death of two privates and another private being injured (“incident 1”, see paragraph 9 above);

(ii) an armed assault on two police officers, abduction of a prison guard and an armed attack on a block of flats allocated to police officers with a rocket launcher on 22 September 1995 (“incident 2”, see paragraph 6 above); and

(iii) an armed conflict between PKK members and the armed forces on 30 May 1997 resulting in the injury of two gendarmes (“incident 3”, see paragraph 7 above).

15. On 13 January 2010 the trial court held a preparatory hearing in the absence of the parties and ordered copies of statements S.Y. and A.T. had made to the public prosecutor and the investigating judge in the context of other sets of criminal proceedings.

16. At the first hearing, held on 18 February 2010, the applicant gave evidence in person and reiterated his previous statements but submitted that he had not taken part in any armed activities. The public prosecutor asked the trial court to record the applicant's physical appearance. It was noted that he was around 1.60 cm tall, slim and dark-skinned with black hair and lines on both sides of his face due to his being slim. The applicant's lawyer pointed out that the applicant's code name had been "Avareş-Tekoşin", that there had been approximately six or seven organisation members in Tunceli with the code name "Avareş" and that the descriptions given of the perpetrators of the armed activities were different from that of the applicant. The applicant's lawyer also requested that the trial court examine those who had testified that the applicant had taken part in the armed activities and order an in-person confrontation between them and the applicant. The public prosecutor asked the trial court to reject the request for a confrontation, claiming that it would not contribute to the case file given the amount of time that had passed since the armed activities. At the end of the hearing, the trial court decided to deal with that request upon receiving copies of the statements made by S.Y. and A.T.

17. At a hearing held on 1 April 2010 the applicant's lawyer repeated his request for a confrontation to be held between the applicant and S.Y., A.T., Y.A. and F.K. The trial court ordered that photographs be taken of the applicant and stated that a confrontation would take place once the addresses of the individuals had been ascertained.

18. On 13 and 16 April 2010 the trial court sent four different letters of request to the courts of the witnesses' places of residence, asking them to (i) obtain statements from the witnesses; (ii) show them photographs of the applicant and ask them to confirm whether he had been the organisation member with the code name "Avareş-Tekoşin-Kendal", and (iii) inform the applicant's lawyer of the hearings during which the witnesses would give evidence. The applicant was in pre-trial detention at the time and remained there until his conviction.

19. On 28 April 2010 the Elbistan Assize Court heard evidence from Y.A. in the absence of the applicant's lawyer. Y.A. submitted that he had neither known the applicant nor about the three incidents mentioned in the indictment and whether the applicant had participated in them. Likewise, he was unable to identify the applicant from the seven photographs shown to him. When the court reminded him of the statements he had made on 12 May 1996, Y.A. stated that he did remember a person with the code name "Avareş" "as mentioned in his police statements". Nevertheless, he was still unable to identify the applicant from the photographs, arguing that "fifteen years" had passed since he had given those statements to the police. At the end of the hearing, the Elbistan Assize Court decided to send a summons to the applicant's lawyer and to secure Y.A.'s presence at the next hearing on 26 May 2010. Although the applicant's lawyer attended the hearing in

question, Y.A. was not present as, according to a one-page letter he had sent to the court, he was unwell.

20. On 6 May 2010 a third hearing was held before the trial court, during which the applicant's lawyer submitted that, contrary to the testimony of S.Y. and A.T., the applicant's code name had not been "Avareş" and he was not from Ergani.

21. On 26 May 2010 the Ninth Division of the Istanbul Assize Court, which had special jurisdiction to hear cases relating to the aggravated crimes specified in Article 250 § 1 of the Code of Criminal Procedure, as in force at the material time, heard evidence from S.Y. in the absence of the applicant and his lawyer. S.Y. submitted that there had been two or three people with the code name "Avareş", but that she had not known the applicant. It appears that on 30 April 2010 the court had sent a letter to the applicant's lawyer, inviting him to attend the examination of S.Y.

22. On 27 May 2010 the Muş Assize Court heard evidence from A.T., after noting that the applicant's lawyer had been duly notified of the hearing. A.T. stated that he had not known anyone with the code name "Avareş" or "Avareş-Tekoşin-Kendal" or the people in the photographs shown to him.

23. At a hearing held on 29 July 2010 the trial court noted that F.K.'s work address in Istanbul had been found.

24. At a hearing held on 10 August 2010 the Twelfth Division of the Istanbul Assize Court (hereinafter "the Istanbul Court") noted that the summons sent to F.K.'s work address had been returned as he had not been at that address.

25. At a hearing held on 24 September 2010 the Istanbul Court noted that a letter had been sent to the Istanbul Security Directorate to secure F.K.'s presence, but that no answer had been received. As a result, the court decided to call F.K.'s mobile telephone to request his attendance at the hearing. According to a police report dated 6 October 2010, the police could not locate F.K. because the street name of his address was missing.

26. At a hearing held on 22 October 2010 the Istanbul Court noted that F.K. could not be reached by his mobile telephone and decided to return the letter of request to the trial court.

27. At a hearing held on 11 November 2010 the trial court decided to revoke its decision to hear F.K. because it had been impossible to locate him.

28. On 14 April 2011 the trial court found the applicant guilty as charged and sentenced him to life imprisonment. In convicting the applicant, the trial court relied, *inter alia*, on the evidence given by him and eleven other witnesses, including S.Y., A.T., Y.A. and F.K. In that connection, it held that the fact the applicant had been a "warrior" within the PKK had been established by his confessions and the statements given by the eleven other witnesses.

29. As regards the first incident, the trial court pointed out that the physical description given by A.T. of the perpetrator of the armed activities

perfectly matched that of the applicant. In its view, it was noteworthy that the applicant had lines on his face, as indicated by A.T., since the likelihood of two persons having lines on their face was very small.

30. As regards the second incident, the trial court noted that although Y.A. had stated in 1995 that a person with the code name “Avareş” had taken part in it, he had not known where “Avareş” was from. However, F.K. had indicated in his statements in 1996 that the “Avareş” he had known who had taken part in that incident was from Diyarbakır. The trial court thus found it established that the “Avareş” who had taken part in the second incident was the applicant.

31. As regards the third incident, the trial court noted that S.Y. had testified in her statements in 1999 that a person with the code name “Avareş” had taken part in that incident who had been a warrior from Diyarbakır under the command of a person with the code name “Karker”. Noting that three other witnesses (including A.T.) had also stated that “Avareş” and “Karker” had been in the same group, the trial court concluded that the “Avareş” indicated in S.Y.’s statements was the applicant.

32. Moreover, the trial court went on to hold that the reason why A.T., S.Y. and Y.A. had stated that they could not recall their previous statements was because they had been trying to protect the PKK members or had had fear of reprisals from the PKK.

33. With regard to the applicant’s allegations regarding possible confusion with the code names, the trial court held that his initial code name had been “Kendal” and that it had been changed to “Avareş” as the former had already been used by another member of the organisation. In the trial court’s view, that was the usual practice of the PKK, aimed at preventing any confusion within the organisation. Therefore, even assuming that there had been more than one person using the code name “Avareş” within the PKK, the probability of there being another person (i) from Diyarbakır, (ii) active in the Dersim region, and (iii) with the codename “Avareş” was at odds with the above-mentioned practice of the organisation. Accordingly, and having regard to the applicant’s admission that he had been in Dersim at the time the incidents had taken place and the fact that the evidence given by the different members of the PKK arrested at different times and places had been consistent, the trial court rejected the applicant’s defence submissions.

34. In appeal submissions dated 2 June 2011, the applicant’s lawyer mainly criticised the trial court’s stance *vis-à-vis* the applicant, who had voluntarily handed himself in to the authorities, arguing that it had failed to consider that the applicant had joined the PKK at the age of sixteen, when he had been thoughtless. The lawyer also pointed out that the applicant’s submission that there had been three other persons from Diyarbakır with the code name “Avareş” within the PKK had been verified and that the trial court had failed to respond to his submission that his code name had been



“Avareş-Tekoşin” and not merely “Avareş”. In those submissions, the lawyer also stated:

“... even though we asked for a confrontation with a view to uncovering the truth, the trial court sent letters of request to the relevant places for photographic identifications. None of the witnesses was able to identify the applicant, as could be understood by the replies given to the letters of request. Moreover, it was decided not to take statements from F.K. because they could not be taken. Although all these developments were in favour of the applicant, the trial court did not release [him]. Accordingly, the applicant was convicted and an unlawful judgment was handed down.”

35. On 5 April 2012 the Court of Cassation upheld the trial court’s judgment in a summary fashion.

## RELEVANT LEGAL FRAMEWORK

36. Article 125 of the former Criminal Code (Law no. 765) provided as follows:

“Whosoever shall attempt to alter or amend in whole or in part the Constitution of the Republic of Turkey or to effect a *coup d’état* against the Grand National Assembly formed under the Constitution or to prevent it by force from carrying out its functions shall be liable to the death penalty.”

37. The relevant parts of Article 180 of the Code of Criminal Procedure (Law no. 5271 of 4 December 2004), entitled “Examination of witnesses and experts by a delegated judge or on commission”, provide as follows:

“(1) In cases where it is impossible for a witness or an expert to be present at a hearing for a long and unanticipated period of time owing to sickness, invalidity or any other unavoidable reason, the court may decide [that] he or she shall be examined by a delegated judge or on commission.

(2) This provision shall also apply in respect of witness[es] and expert[s] [in cases] where it is difficult to bring them to court because their [private] place of residence is located outside the jurisdiction of the competent court.

...

(5) If there is a possibility, pursuant to the above paragraphs, that witness[es] and expert[s] may be examined *via* the use of audiovisual communication techniques, evidence shall be taken by using this method. The conditions and procedure for the installation and use of technical equipment allowing this [method to be employed] shall be laid down in a regulation.”

38. Article 181 provides as follows:

“(1) The date on which a witness or an expert is to give evidence shall be notified to the public prosecutor, the victim and his or her representative, the accused and his or her defence counsel.

(2) The above provision shall also apply in cases where a new physical examination [of the accused] and reconstruction of events are required.

(3) A detainee may only ask to be present during acts of this type in the court of his place of detention. However, in cases where it is deemed necessary, the judge or court may decide to have a detained suspect or accused present during such acts.”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

39. The applicant complained under Article 6 § 3 (d) of the Convention that he had not had a fair trial in that he had been prevented from confronting certain witnesses in person. The relevant parts of Article 6 read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing by [a] ... tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

#### A. Admissibility

40. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

#### B. Merits

##### *1. The parties’ submissions*

41. The applicant did not submit any observations within the time-limit allocated for that purpose.

42. The Government argued that the trial court’s decision to have the four witnesses examined by the courts of their places of residence pursuant to letters of request sent to those courts had been taken in accordance with Article 180 of the Code of Criminal Procedure, which provided for such a method under certain circumstances. Y.A., S.Y. and A.T. were all convicted persons who had been serving prison sentences in three different cities in Turkey. As for F.K., the trial court had revoked its decision to take evidence from him after efforts to locate him had been to no avail. While A.T., S.Y. and Y.A. could not recall their previous statements, arguing that a long time had passed since then, the latter had been able to recall a person with the code

name “Avareş” as written in his statements. Furthermore, although the applicant’s lawyer had been notified of the hearings held in the courts which had taken evidence from those witnesses, he had not attended any of the commission hearings.

43. Moreover, the trial court had carried out a meticulous assessment of the evidence in the case file before convicting the applicant. In that connection, it had not found credible the evidence given by the witnesses before the courts acting on the letters of request, setting out the reasons leading it to attach more weight to their initial statements. Similarly, the trial court had also provided a reasoned reply to the applicant’s allegations that there had been more than one person with the code name “Avareş”. The Government therefore asked the Court to find that there had been no violation of Article 6 of the Convention.

## 2. *The Court’s assessment*

### (a) **General principles**

44. The key principle governing the application of Article 6 is fairness. The right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 § 1 of the Convention restrictively (see *Asatryan v. Armenia*, no. 3571/09, § 51, 27 April 2017).

45. The general principles with regard to complaints relating to the examination of absent witnesses and use by the courts of the evidence given by those witnesses may be found in *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 100-131, ECHR 2015), and *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, §§ 118-147, ECHR 2011; see also *Seton v. the United Kingdom*, no. 55287/10, §§ 57-59, 31 March 2016 for a concise summary of those principles).

46. In sum, these principles lay down a tripartite test whereby the Court is required to examine: (i) whether there was a good reason for the non-attendance of the absent witness at the trial; (ii) whether the evidence given by the absent witness was the sole or decisive basis for the applicant’s conviction or carried significant weight in that regard; and (iii) whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured *vis-à-vis* the evidence given by the absent witness. Moreover, the Court has also pointed out that, as with all complaints under Article 6 § 3, the defendant’s inability to examine a witness should be assessed in the light of the impact that it has had on the overall fairness of his trial (see *Šmajgl v. Slovenia*, no. 29187/10, § 61, 4 October 2016). The Court has already held that the same principles will be applicable in respect of the examination of a witness in the course of the trial, including the relevant modalities thereof (see *Chernika v. Ukraine*, no. 53791/11, § 46, 12 March

2020; *Ürek and Ürek v. Turkey*, no. 74845/12, § 49, 30 July 2019; and *Cherpion v. Belgium* (dec.), no. 47158/11, §§ 35-41, 9 May 2017).

47. The Court reiterates that Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Schatschaschwili*, cited above, § 103, and *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II).

48. Under certain circumstances, it may be necessary for the courts to have recourse to statements made during the criminal investigation stage. If the accused had sufficient and adequate opportunity to challenge such statements, at the time they were taken or at a later stage of the proceedings, their use does not run counter to the guarantees of Article 6 §§ 1 and 3 (d) of the Convention (see *Berhani v. Albania*, no. 847/05, § 51, 27 May 2010, with further references therein). In that connection, the Court further reiterates that evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should, however, be treated with extreme care (see *Visser v. the Netherlands*, no. 26668/95, § 44, 14 February 2002, and *S.N. v. Sweden*, no. 34209/96, § 53, ECHR 2002-V). While it is true that the admission of such evidence will not automatically result in a breach of Article 6, the Court must subject the proceedings to the most searching scrutiny where a conviction is based solely or decisively on the evidence of absent witnesses or where such evidence carried significant weight in respect thereof (see *Al-Khawaja and Tahery*, cited above, §§ 118-147). The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (*ibid.*, § 147).

49. Furthermore, the Court reiterates that failure to recall a witness previously cross-examined by the applicant in the event of a retraction of his or her incriminating testimony may raise an issue under Article 6 §§ 1 and 3 (d) of the Convention (see *Bondar v. Ukraine*, no. 18895/08, § 75, 16 April 2019). This approach is *a fortiori* applicable in respect of witnesses that have not been cross-examined at any stage of the proceedings by the applicant.

50. As regards confrontations, the Court has already held that it is normally desirable that witnesses should identify a person suspected of serious crimes in person if there is any doubt about his or her identity (see *Šmajgl*, cited above, § 70) and that the absence of such identification necessarily creates difficulties for the defence. Furthermore, as regards the

criteria developed by the Convention organs to examine whether the absence of a direct confrontation in an individual case complies with the requirements of Article 6 §§ 1 and 3 (d) of the Convention, the Court notes that the first question addressed is similar to that applicable to cases involving absent or anonymous witnesses, namely whether there was a good reason to hear evidence from a witness in the absence of the accused. In cases where it was found that such a good reason existed, the Convention organs have further examined whether the applicants were substantially affected in the exercise of their defence on account of the lack of such a confrontation (see *Šmajgl*, cited above, § 64).

**(b) Application of those principles to the instant case**

- (i) *Whether there was a good reason for the non-attendance of witnesses S.Y., A.T., Y.A. and F.K. at the trial*

51. The Court notes that the applicant went to the police and voluntarily handed himself in, confessing to his involvement with the PKK. In that connection, although he spelled out, *inter alia*, the activities he had carried out for the PKK over a span of approximately eleven years, he denied having carried out or taken part in any of the armed activities. Nevertheless, the public prosecutor relied on the statements eleven other organisation members had made in the course of different criminal proceedings. He argued that four of those witnesses, namely S.Y., A.T., Y.A. and F.K., had described a certain organisation member with the code name “Avareş” as the person who had taken part in, *inter alia*, the three armed activities, which had later formed the basis of the indictment lodged against the applicant. Relying on the evidence given by those four witnesses between 1995 and 1999, the public prosecutor averred that the individual described by them was the applicant.

52. The Court notes that it is not disputed that when the four witnesses made their statements between 1995 and 1999, neither the applicant nor his lawyer had the opportunity to examine or question them. Moreover, when the applicant’s lawyer asked the trial court to hold a confrontation between the applicant and the four witnesses, the court decided that they would be examined by the courts of their places of residence. In doing so, the trial court invited those courts to examine the witnesses, show them several photographs, including of the applicant, and ask them whether they were able to identify him. It is important to note that none of the witnesses could identify the applicant from those photographs.

53. The method chosen by the trial court, namely the examination of the witnesses by the courts of their places of residence if they were residing somewhere other than where the trial was taking place, appears to result, as the Government have claimed, from the interpretation of the relevant provisions of the Code of Criminal Procedure, in particular Article 180. The Court should therefore first ascertain whether that interpretation could be

considered a good reason in the sense of the term used by the Court in its case-law under Article 6 § 3 (d) of the Convention for the non-attendance of witnesses at trial.

54. In that connection, the Court reiterates that it has already held in *Seton* (cited above, § 61) that the absence of a witness from the country where the proceedings were being conducted was not in itself sufficient reason to justify his or her absence from the trial (see also *Gabrielyan v. Armenia*, no. 8088/05, § 81, 10 April 2012). These considerations hold true *a priori* when witnesses are located in the same country in which the trial against the accused is being held but in different places. Furthermore, the Court has already held that the distance between two cities cannot be regarded of itself and in the abstract as a good reason for failure by judges to ensure the examination of witnesses in person (see *Süleyman v. Turkey*, no. 59453/10, § 78, 17 November 2020) and that the Contracting States are required to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Lastly, the Court has clarified that the fact that witnesses are in prison, in other words in a place within the exclusive knowledge and control of the authorities of the State, cannot by and of itself constitute a good reason for their non-attendance at the trial in person (see *Bondar*, cited above, § 76, and *Daştan v. Turkey*, no. 37272/08, § 24, 10 October 2017).

55. When viewed in the light of the above principles, the Court notes that the interpretation and application of Article 180 of the Code of Criminal Procedure by the trial court meant that the witnesses would always be examined by the courts of their places of residence if they were residing in a city other than where the trial was taking place. Accordingly, the evidence of three of the four witnesses was taken by courts other than the trial court, and the latter admitted copies of their written statements as evidence in lieu of their live in-court testimony. In other words, the crux of the applicant's inability to examine the witnesses in person stemmed from the trial court's inflexible and mechanical approach, which rested on the fact that the witnesses were situated in different cities. In the Court's view, that fact alone, which precludes any individualised assessment of the question whether there were good reasons for the witnesses' non-attendance at the trial and which appears to absolve the domestic courts of their duty to make all reasonable efforts to secure their attendance, cannot be considered a good reason to do away with the applicants' right to confront witnesses before their triers of fact.

56. Indeed, the fact that three of the witnesses were serving their sentences in different prisons in Turkey at the time they gave evidence during the applicant's trial, and were hence under the exclusive authority of the State, did not prompt the trial court to assess whether it was possible to hear them in person.

57. Similarly, the Court finds that the steps taken by the domestic authorities to locate F.K., which consisted only of enquiring at his alleged

work address and calling a mobile telephone number belonging to him do not suggest that they did everything reasonably expected of them to secure his presence (see *Panagis v. Greece*, no. 72165/13, § 47 *in fine*, 5 November 2020, and *Tseber v. the Czech Republic*, no. 46203/08, §§ 50-51, 22 November 2012).

58. In view of the above, the Court cannot conclude that the trial court's decision to send letters of request to the courts was the result of an inability to secure the attendance of the witnesses. Accordingly, it follows that no good reason has been shown by the domestic courts or the Government for the non-attendance of those witnesses at trial.

*(ii) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction*

59. The Court notes that the domestic courts' decisions contain no assessment as regards the weight attached to the evidence given by the absent witnesses. It will therefore proceed with its own assessment on this point. In that connection, the Court observes that while the applicant acknowledged that he had been a member of the PKK and maintained this position throughout the whole criminal proceedings, he consistently claimed that he had not taken part in any armed activities perpetrated by it. That was a crucial point in the instant case because it was the requisite material element of the offence of "carrying out activities aimed at bringing about the secession of part of the national territory" under Article 125 of the then Criminal Code, of which the applicant was eventually found guilty. Indeed, his conviction under that provision and the eventual life imprisonment imposed on him were contingent upon the establishment of his involvement in the three armed activities carried out by the PKK.

60. While it is true that the trial court had in its possession the statements made by other witnesses and incident reports regarding the acts attributed to the applicant, it appears from the trial court's reasoned judgment that the evidence given by the four absent witnesses was central to his conviction given that none of the remaining evidence could have been sufficient of itself to find the applicant guilty (see *Dan v. Moldova*, no. 8999/07, § 31, 5 July 2011). Indeed, the trial court's findings in respect of the first and third incidents decisively consisted of the statements made by Y.A., F.K. and A.T. As regards the second incident, the trial court based the crux of its assessment on the statements given by S.Y., who was the only person to have stated that the organisation member with the code name "Avareş" had taken part in that incident, before corroborating part of S.Y.'s statements (in so far as it concerned his being a warrior from Diyarbakır operating within the "Karker" group) with those of three other witnesses, including A.T.

61. Therefore, in establishing the applicant's involvement in the three armed incidents indicated in the indictment and sentencing him to life imprisonment, the trial court relied, in the Court's view, to a decisive extent

on the evidence given by the absent witnesses (contrast *Verdam v. the Netherlands*, (dec.) no. 35253/97, 31 August 1999).

62. In view of the above, it remains to be seen whether there were any procedural safeguards capable of compensating for the non-attendance at trial of the four witnesses.

*(iii) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured*

63. The Court reiterates that the extent of the counterbalancing factors necessary in order for a trial to be considered fair depends on the weight of the evidence in question. The more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair (see *Schatschaschwili*, cited above, § 116). Given the centrality of witness evidence, the Court considers that weighty counterbalancing factors are required to ensure fairness of proceedings (see *Chernika*, cited above, § 66). The Court has considered the following elements to be relevant in this context: the trial court's approach to the evidence in question; the availability and strength of further incriminating evidence; and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial (see *Schatschaschwili*, § 145, and *Ürek and Ürek*, § 60, both cited above).

64. As regards whether the domestic courts had in place any procedural safeguards with a view to reigning in the negative impact of the admission of the evidence given by the absent witnesses, the Court notes that the Government's arguments on this point were twofold: firstly, they argued that the applicant's lawyer had failed to attend the commission hearings, which would have enabled him to examine the witnesses and, secondly, they laid emphasis on the trial court's meticulous examination of the evidence given by the absent witnesses. The Court will address both of these points in turn.

65. The Court reiterates that the underlying reason calling for procedural safeguards vis-à-vis evidence given by absent witnesses under Article 6 § 3 (d) of the Convention is the need for a fair and proper assessment of the reliability of evidence given by such witnesses with a view to ensuring the overall fairness of the criminal proceedings from the standpoint of Article 6 § 1 of the Convention (see *Al-Khawaja and Tahery*, cited above, § 147).

66. As regards the first limb of the Government's argument, the Court reiterates that it has already found that there was no good reason for the absence of the witnesses due to the trial court's interpretation of Article 180 of the Code of Criminal Procedure. As a result, the Court will subject the proceedings to the most searching scrutiny (*ibid.*, § 147).

67. In that connection, the Court further observes that the second paragraph of Article 180 provides that the examination of witnesses by the courts of their places of residence is only possible if it is difficult to bring them before the trial court. However, the trial court's decision was silent on



this crucial requirement. Similarly, while the fifth paragraph of the same provision stipulates that wherever possible the courts should have recourse to audiovisual means of taking statements from witnesses who reside outside their jurisdiction, the trial court does not appear to have considered that method either. Nor did it provide any reasons capable of showing that it had been prevented from doing so. Accordingly, the Court concludes that the trial court failed to explore alternative measures for obtaining evidence from the absent witnesses.

68. Be that as it may, in order to consider the first limb of the Government's argument, the Court ought also to examine the preliminary question of whether the method the trial court opted for, namely issuing letters of request to the courts of the absent witnesses' places of residence to take evidence from them, was such as to allow the defence to properly and fairly assess the credibility of the evidence. The Court is unable to answer that question in the affirmative in the present case for the following reasons.

69. Firstly, were the Court to accept the Government's contention, the accused and/or defence lawyers would have to travel to different places with a view to attending the hearings where witnesses would be giving evidence in order to benefit from the right to examine witnesses. Such a course of action, requiring lawyers to attend potentially multiple hearings in distant cities would risk placing a disproportionate burden on the defence to an extent incompatible with the principle of equality of arms. In the present case, the applicant's lawyer attended the hearing held before the Elbistan Assize Court with a view to examining Y.A. However, by that time that court had already examined Y.A. at an earlier hearing and the transcript of that hearing contained nothing to indicate that the applicant's lawyer had been duly informed of it. During the second hearing attended by the applicant's lawyer, Y.A. was not present as he was unwell, and the applicant's lawyer could not cross-examine him (see paragraph 19). In any event, at no point did the Government argue that the applicant, who remained in pre-trial detention throughout the criminal proceedings, could attend the commission hearings before the different courts had he so wished. In fact, such a possibility appears to have been ruled out by Article 181 § 3 of the Code of Criminal Procedure, which limits a detainee's right to attend a witness examination to situations where it is carried out by the court of his or her place of detention. The Court reiterates that in cases where physical identification plays a pivotal role, an applicant's personal presence before a trial court together with that of witnesses takes on such an importance that the mere presence of his or her lawyer would not suffice to endorse the rights of defence, even when the lawyer is able to challenge the credibility of those witnesses (see *Fikret Karahan v. Turkey*, no. 53848/07, §§ 54-55, 16 March 2021).

70. Secondly, the trial court's approach is capable of jeopardising the principle of immediacy, in particular when domestic courts have not done everything reasonably expected of them to secure the presence of a witness,

in so far as this approach gives rise to a situation in which the trial court would not have the possibility to directly observe the demeanour and credibility of a certain witness giving evidence in the courts of his or her place of residence. The assessment of the trustworthiness of a witness and the accuracy of his or her statements are complex matters which usually cannot be achieved by a mere reading of his or her recorded words (see *Daştan*, cited above, § 33). Indeed, even if defence lawyers availed themselves of the opportunity to travel to and attend each commission hearing, the purpose sought by the cross-examination of witnesses or their identification of the accused may not be properly served given that the judges who would ultimately adjudicate upon the question of the accused's guilt would not have the benefit of observing the demeanour of the absent witnesses and assessing their credibility without a good reason for their absence. On this point, the present case is distinguishable from other cases where the examination of witnesses in the absence of the accused, but in the presence of his or her lawyer by the trial courts – which, unlike the present case, had ultimately ruled upon the question of guilt – was found to have been compatible with the requirements of Article 6 § 3 (d) of the Convention (see, as regards the absence of a direct confrontation during the trial between the accused and witnesses, *Fikret Karahan*, cited above, § 55; *Šmajgl*, cited above, § 64 and the cases cited therein; and compare *Riahi v. Belgium*, no. 65400/10, §§ 40-42, 14 June 2016 and the cases cited therein as regards the Court's assessment of the existence of a direct confrontation between the applicants and witnesses that had taken place only during the pre-trial investigation; and contrast *Vronchenko v. Estonia*, no. 59632/09, § 56, 18 July 2013 and the cases cited therein for the Court's approach in cases concerning offences of sexual abuse). In the Court's view, the above considerations are all the more significant given that what is at issue in the present case is the confrontation (or lack thereof) of the applicant with the absent witnesses, an issue which *a fortiori* calls for an oral examination of the latter.

71. Accordingly, the Court concludes that the hearing of witnesses by the courts of their places of residence is not capable of operating as a procedural safeguard in the absence of good reasons for the non-attendance of absent witnesses and when the trial court had recourse to it without considering alternative measures for obtaining evidence from the absent witnesses. To conclude otherwise would effectively mean that the underlying principle under Article 6 § 3 (d) of the Convention, namely that “before an accused can be convicted, all evidence against him or her normally has to be produced in his or her presence at a public hearing with a view to adversarial argument” would become the exception without any good reason for the non-attendance of witnesses at the trial or without any due consideration by the domestic courts for less stringent measures. In view of the foregoing considerations, the theoretical possibility for the applicant's lawyer to attend the hearings during which A.T. and S.Y. gave evidence before the Istanbul and Muş

Assize Courts did not constitute a sufficient counterbalancing factor. The Court therefore dismisses the Government's argument on this point.

72. As regards the second limb of the Government's argument, the Court observes that there is no indication in the case file that the national courts either approached the evidence given by the absent witnesses with any particular caution or that they were aware that it carried less weight owing to their absence from the trial (see *Süleyman*, cited above, § 89, with further references therein).

73. Moreover, the Court observes that the trial court concluded that the description given by A.T. in 1999 of the organisation member with the code name "Avreş" who had lines on his face perfectly matched that of the applicant, given that he also had lines on his face. Nevertheless, it is noteworthy that the trial court simply disregarded the fact that A.T. had also stated in 1999 that "Avreş" had been arrested. Given that the applicant was arrested some ten years after that incident, the clarification of that point was crucial and exemplified the need to hear the witnesses in person. Similarly, although the trial court appears to have addressed the applicant's contention that there had been more than one "Avareş" in the PKK, it did not deal with the question of whether the person with the code name "Avreş" as stated by A.T. had been the same "Avareş" as the one indicated by the three other witnesses (F.K., S.Y. and Y.A.) or "Avareş-Tekoşin", the codename allegedly used by the applicant. Those points were all the more significant given that the explanations of those witnesses were not based on an identification made on the basis of the applicant's photographs (see, *mutatis mutandis*, *Fernandes Pedroso v. Portugal*, no. 59133/11, § 102, 12 June 2018). Given the above shortcomings, and reiterating that the assessment of the trustworthiness of a witness is a task which usually cannot be achieved by a mere reading of his or her recorded words (see *Daştan*, cited above, § 33), the Court takes the view that the examination carried out by the trial court was not, by and of itself, such as to counteract the adverse impact that the admission of the evidence given by the absent witnesses had on the fairness of the criminal proceedings against the applicant.

74. As regards the availability and strength of further incriminating evidence, the Court reiterates its above findings as regards the probative value of the evidence given by the absent witnesses for the applicant's conviction (see paragraphs 59 and 61). Although the weight attached by the trial court to the evidence given by the absent witnesses required that it duly applied the procedural safeguards aimed at properly and fairly assessing the reliability and accuracy of such evidence, the Court discerns no such safeguards in the present case. Indeed, the applicant's conviction rested on the untested evidence of the absent witnesses, whom the applicant had no real opportunity to examine either when they made their statements in the period between 1995 and 1999 or when they gave evidence during the criminal proceedings against him.

75. In view of the foregoing considerations, the Court concludes that the four witnesses' non-attendance at trial, the lack of an in-person confrontation between them and the applicant without a good reason and the reliance placed upon their evidence by the trial court in convicting the applicant and sentencing him to life imprisonment without the necessary procedural safeguards, substantially affected the defence's ability to test the truthfulness and reliability of their evidence and, in the circumstances of the present case, tainted the overall fairness of the proceedings against the applicant.

76. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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.”

78. The applicant did not submit any just satisfaction claims. Therefore, the Court makes no award under this head.

79. Notwithstanding that conclusion, the Court notes that Article 311 of the Code of Criminal Procedure allows for reopening of the domestic proceedings in the event that the Court finds a violation of the Convention (see *Fikret Karahan*, cited above, § 64, and *Daştan*, cited above, § 44).

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 18 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı  
Deputy Registrar

Carlo Ranzoni  
President