



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

SECOND SECTION

CASE OF MEHMET ZEKİ DOĞAN v. TÜRKİYE (No. 2)

(Application no. 3324/19)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Reopened criminal proceedings following Court's finding of a violation of Art 6 §§ 1 and 3 (c) in first application brought by applicant (*Mehmet Zeki Doğan v. Turkey*) due to trial court's use of statements made by him without legal assistance • Fresh assessment of criminal charge by trial court in newly reopened proceedings revived process of determination of that charge entailing thus a "new issue" • Jurisdiction *ratione materiae* • Art 6 applicable under its criminal limb to reopened criminal proceedings • Upholding of applicant's previous conviction and life imprisonment sentence based decisively on incriminating statements made by his co-defendants while in police custody in the absence of a lawyer, albeit the subsequent retraction of those statements and the co-defendants not having testified before the trial court • Trial court's failure to duly address or properly scrutinise the doubt stemming from the retraction of the statements • Domestic courts' failure to apply necessary procedural safeguards in line with fair-trial guarantees in respect of police statements and the evidence given by applicant's co-defendants • Procedural defect identified in first case replaced by another defect in reopened proceedings undermining the criminal proceedings' overall fairness

Prepared by the Registry. Does not bind the Court.

STRASBOURG

13 February 2024

FINAL

24/06/2024

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

In the case of Mehmet Zeki Doğan v. Türkiye (no. 2),

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

Arnfinn Bårdsen, *President*,

Egidijus Kūris,

Pauliine Koskelo,

Saadet Yüksel,

Frédéric Krenç,

Diana Sârcu,

Davor Derenčinović, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 3324/19) against the Republic of Türkiye 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 Mehmet Zeki Doğan (“the applicant”), on 26 December 2018;

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

the parties’ observations;

Having deliberated in private on 12 December 2023,

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

INTRODUCTION

1. The application concerns the alleged unfairness of criminal proceedings against the applicant which were reopened following the Court’s finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention in *Mehmet Zeki Doğan v. Turkey* (no. 38114/03, 6 October 2009) on account of his lack of access to a lawyer while in police custody in 1998. In that connection, the application focuses on the question whether the use against him in the reopened criminal proceedings of evidence given by the applicant’s co-defendants V.Ç. and M.K. while in police custody, allegedly under duress and in the absence of a lawyer, gave rise to a fresh breach of his right to a fair trial under Article 6 § 1 of the Convention.

THE FACTS

2. The applicant was born in 1978 and lives in Edirne. He was represented by Ms M. Hanbayat Yeşil, a lawyer practising in Istanbul.

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 Türkiye.

4. The facts of the case may be summarised as follows.

I. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT LEADING TO THE COURT'S FINDING IN 2009 OF A VIOLATION OF ARTICLE 6 § 3 (C) IN CONJUNCTION WITH ARTICLE 6 § 1 OF THE CONVENTION

5. On 13 March 1998 the applicant was arrested on suspicion of being a member of an armed terrorist organisation, namely the TKP/ML-TİKKO (Turkish Communist Party/Marxist-Leninist, Turkish Workers' and Peasants' Liberation Army). On 15 March 1998 a statement was taken from him by the police and on 20 March 1998 he was released because of a lack of evidence.

6. On 8 May 1998 the applicant was arrested once again, on suspicion of being a member of the TKP/ML-TİKKO and of having carried out certain activities on its behalf.

7. A police expert report dated 11 May 1998 indicated that an empty cartridge found at the scene of the shooting of A.Ç. had been fired from a pistol which had later been discovered as a result of statements made by V.Ç. during a reconstruction of events which had taken place on an unspecified date.

8. On 12 May 1998 the applicant was interviewed by the police in the absence of a lawyer and made self-incriminating statements. On the same day, another suspect, namely V.Ç., was also interviewed by the police in the absence of a lawyer and, among other things, made incriminating statements in respect of the applicant. Again on the same day, the applicant and V.Ç. participated in further two reconstructions of events (*ifadeli yer gösterme tutanağı*), in the course of which, in the absence of a lawyer, they admitted their involvement in some of the actions attributed to them, in particular the shooting of A.Ç. and Ş.İ. by V.Ç., in which they said that the applicant had acted as a lookout.

9. On 13 May 1998 another suspect, namely M.K., was interviewed by the police in the absence of a lawyer and gave a detailed account of the activities he had undertaken for the TKP/ML-TİKKO and the people involved in those activities. In that connection, M.K. stated that pursuant to instructions received from his superior R.Ö., he had instructed V.Ç. to shoot A.Ç. and Ş.İ. He further stated that V.Ç. had later told him that he had shot those persons and that the applicant had also been present at the crime scene with V.Ç.; however, M.K. added that he did not know the precise details of how the shooting had taken place.

10. On the same day a certain victim, M.Ç., identified the applicant as the person who had come to his jewellery store and obtained money from him on behalf of the TKP/ML-TİKKO.

11. On 14 May 1998 the applicant, V.Ç. and M.K. gave statements to the Istanbul public prosecutor in the absence of a lawyer. In their statements, the applicant and V.Ç. denied their police statements, whereas M.K. denied his

police statements except for, among other things, his knowledge of the shooting of Ş.İ., which he emphasised that he had only heard about from V.Ç.

12. On the same day, the applicant, V.Ç. and M.K. were questioned by the investigating judge in the absence of a lawyer and all three of them retracted their police statements, while accepting the statements they had made to the public prosecutor.

13. On 25 May 1998 the public prosecutor at the Istanbul State Security Court filed a bill of indictment charging certain people, including the applicant, V.Ç. and M.K., under Article 146 of the Criminal Code as then in force with attempting to disrupt or subvert the constitutional order and to undermine Parliament or prevent it by the use of force from carrying out its role. The applicant was accused of having taken part in the activities of the TKP/ML-TİKKO, specifically that (i) he had acted as a lookout in the shootings of A.Ç. and Ş.İ. in 1996, and that (ii) he had extorted money on behalf of that organisation.

14. At a hearing held on 20 October 1998, M.Ç. gave evidence in person and testified that the applicant had come to his jewellery store and asked for money and that he had given him some money, understanding him to be a poor student in need of help who was from the same town as himself. Explaining that the applicant had not made any mention of an illegal organisation when asking him for money, M.Ç. added that he had given some money to him out of pity.

15. During the trial, M.K. also denied the statements he had made during the investigation stage of the proceedings without having had access to a lawyer.

16. On 13 December 2001 the Istanbul State Security Court convicted the applicant of being a member of a terrorist organisation and sentenced him to fifteen years, seven months and fifteen days' imprisonment.

17. On 8 July 2002 the Court of Cassation quashed the applicant's conviction, finding that the trial court had erred in its application of the law and that it should have convicted the applicant under Article 146 of the Criminal Code as then in force, in view of his involvement in the armed activities of the TKP/ML-TİKKO.

18. On 12 November 2002 the Istanbul State Security Court found the applicant guilty under Article 146 of the Criminal Code as then in force, finding it established, among other things, that he had acted as a lookout in the shooting of A.Ç. and Ş.İ. and that he had collected money for the TKP/ML-TİKKO. In its judgment, the trial court cited only the evidence given by the applicant during the various phases of the proceedings before sentencing him to life imprisonment.

19. On 5 May 2003 the Court of Cassation upheld the applicant's conviction.

20. On 13 November 2003 the applicant lodged an application with the Court in which he complained about, among other things, the systemic

restriction of his right of access to a lawyer while in police custody and the use made by the domestic courts of his police statement, allegedly obtained under duress, in convicting him.

21. On 6 October 2009 the Court delivered its judgment in respect of the applicant in *Mehmet Zeki Doğan v. Turkey* (no. 38114/03, 6 October 2009), finding a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 on account of the applicant's lack of access to legal assistance while in police custody, but declaring inadmissible his complaint concerning the use of his police statements which he had allegedly made under duress.

II. REOPENING OF THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT AND THE ENSUING PROCEEDINGS

22. By a letter dated 19 April 2010 the applicant asked the Tenth Chamber of the Istanbul Assize Court (hereinafter "the Istanbul Assize Court"), which had jurisdiction to try certain aggravated offences as set out in Article 250 of the Code of Criminal Procedure as in force at the material time, to reopen the criminal proceedings against him on the basis of the Court's above-mentioned judgment in his case.

23. On 26 May 2010 the Istanbul Assize Court held a preparatory hearing (*tensip duruşması*) and granted the applicant's request for the reopening of the criminal proceedings in accordance with Article 311 § 1 (f) of the Code of Criminal Procedure.

24. On 15 July 2010 the Istanbul Assize Court held the first hearing in the reopened criminal proceedings. The applicant gave evidence in person and asked for additional time to prepare his defence submissions on the grounds that he had been unable to consult his lawyer. Stressing that he was being held in conditions amounting to isolation in prison, the applicant asked to be released, but his request was refused.

25. At a hearing on 7 December 2010 the applicant asked the Istanbul Assize Court to take into account the statements which the victims had given in court, adding that they had given their earlier statements on the instructions of the police. The applicant further asked the Istanbul Assize Court to hear those people in person, but the court did not rule on that request.

26. At a hearing held on 10 May 2011 the public prosecutor gave his opinion on the merits of the case. After summarising the Court's conclusions in *Mehmet Zeki Doğan* (cited above) and in *Salduz v. Turkey* ([GC], no. 36391/02, §§ 50-62, ECHR 2008), the public prosecutor expressed the view that the level of detail contained in the statements made by the applicant while in police custody showed that they had played an important role in his previous conviction, thereby affecting the overall fairness of the criminal proceedings against him. Observing that the applicant had been a minor at the time of the two shootings of which he had previously been convicted (which had occurred in 1996) and having regard to the time he had already spent in

prison, the public prosecutor indicated that account should be taken of national and international materials, notably the United Nations Convention on the Rights of the Child, and asked the Istanbul Assize Court to accept the request for the reopening of the criminal proceedings. For the same reasons, the public prosecutor asked the court to suspend the execution of the applicant's sentence and to order his release under judicial supervision.

27. At the end of the hearing, the Istanbul Assize Court decided to (i) accept the applicant's request for the reopening of criminal proceedings in accordance with Article 311 § 1 (f) and Article 319 § 1 of the Code of Criminal Procedure; (ii) ascertain the prison at which V.Ç. was being held and summon him to give evidence at the trial in relation to the shootings; (iii) ask the Ministry of Justice for a certified Turkish translation of the Court's judgment in *Salduz*; (iv) grant additional time to the applicant and his defence counsel so that they could prepare submissions and adduce evidence; and (v) question the applicant at the next hearing. Lastly, the trial court held that there was "at that stage" no need to suspend the execution of the applicant's sentence and dismissed the public prosecutor's request to that effect.

28. The Istanbul Assize Court held another hearing on 4 October 2011 and decided to adjourn it to 16 February 2012.

29. At the hearing of 16 February 2012 the trial court took evidence from the applicant, who reiterated the submissions he had made on 7 December 2010. Asked about the statements he had made to the police, the public prosecutor and the investigating judge in 1998, the applicant simply denied the content of his police statements, arguing that he had been subjected to psychological pressure and duress. Asked about the statements and identification made by M.Ç., the records of the reconstructions of the shooting of Ş.İ. and A.Ç. and of the house search, as well as the expert reports drawn up by the police, the applicant stated that he did not accept the points against him, adding that he did not remember any details, given the substantial amount of time that had elapsed since the actions attributed to him. The applicant's defence counsel pointed out that the applicant had been denied access to a lawyer during his seven-day detention after arrest, that he and V.Ç. had been subjected to torture and that he had retracted the statements he had made to the police as soon as he had appeared before the public prosecutor. Noting that the Court had found a violation of Article 6 of the Convention because the applicant had been denied access to a lawyer, defence counsel argued that the police statements made by the applicant and V.Ç. should not be admitted in evidence. Furthermore, at no point during the criminal proceedings had A.Ç. or Ş.İ. identified the applicant. Similarly, M.Ç. had also retracted the statements he had made to the police and had told the court that he had given money to the applicant because he had pitied him. Even if the trial court were to rely on the applicant's police statements, defence counsel noted that there was no evidence corroborating those

statements. Lastly, defence counsel reiterated the request that the victims be heard by the trial court, while leaving the decision as to whether to rehear V.Ç. to the court itself.

30. Noting that a warrant had been issued for the arrest of V.Ç. and that his address was indicated as being in France, the trial court found that it was not even clear whether V.Ç. had ever lived there and concluded that the rehearing of V.Ç. would take a long time and would not make any new contribution to the applicant's trial, given that he had previously been tried as a co-accused in the proceedings against the applicant. The trial court reversed its decision to hear V.Ç. and decided not to hear evidence from the victims, having regard to the content of their statements, the passage of time, and the fact that it was not even certain whether they could be located. Accordingly, the trial court decided that the case should be referred to the public prosecutor so that the latter could either make a request for the extension of the investigation or prepare his opinion on the merits of the case if no such request were made.

31. At a hearing on 26 April 2012 a new public prosecutor gave his opinion on the merits of the case and argued that the Court had found a violation merely because of the absence of a lawyer while the applicant had been in police custody, and that this did not necessitate the reopening of the criminal proceedings or the suspension of the execution of the applicant's sentence. Accordingly, the prosecutor asked the trial court to confirm the applicant's conviction. The trial court granted a request by the applicant's defence counsel for additional time to prepare her submissions in response to the public prosecutor's opinion on the merits of the case and adjourned the hearing.

32. At a hearing on 19 July 2012, a new public prosecutor appeared for the first time and asked the trial court to send him the case file so that he could examine it, arguing that he had not previously had sufficient opportunity to do so. Pointing out that the applicant had been in detention for more than sixteen and a half years, the applicant's defence counsel stated that the Court had established the unlawfulness in the case (the systematic restriction imposed on his right of access to a lawyer) and contended that there was no evidence in the case file other than the applicant's police statements which had been given under torture. Defence counsel further argued that the applicant's co-defendant M.K. had admitted having carried out some of the acts attributed to the applicant and observed that the statements made by the victims of the shootings and M.Ç. had supported the applicant's case. The trial court adjourned the hearing pending the public prosecutor's opinion on the merits of the case.

33. At a hearing on 9 October 2012 the public prosecutor once again gave his opinion on the merits of the case and stated that the Court's finding of a violation of Article 6 of the Convention in respect of the applicant did not contain a provision requiring the reopening of criminal proceedings. The trial

court granted a further request by the applicant's defence counsel for additional time to prepare her submissions in response to the public prosecutor's opinion on the merits of the case, and adjourned the hearing.

34. At a hearing on 22 November 2012, the applicant's defence counsel once again asked for additional time to prepare her defence submissions, arguing that she had not been able to do so owing to the sickness of her mother. The trial court granted her request and adjourned the hearing.

35. At a hearing on 14 February 2013, the applicant's defence counsel filed submissions and asked the trial court to quash the applicant's conviction which had been based on the statements taken by the police in the absence of a lawyer. At the end of the hearing, the trial court decided to uphold the applicant's previous conviction under Article 146 of the former Criminal Code and confirmed his sentence of life imprisonment. In doing so, the trial court held as follows:

"... Even if it is accepted that the right set out under Article 6 § 3 [*sic*] of the Convention was violated, it was not established that the applicant's police statements or the statements made by V.Ç. and M.K. had been taken under duress, and even if the police statements of the applicant or the evidence he had given during the reconstruction of events were to be excluded, the statements made by M.K. and the victim M.Ç. throughout the proceedings, as well as the police statements of V.Ç. and the evidence he had given during the reconstruction of events, would oblige the court to conclude that the applicant had committed the actions attributed to him ..."

The trial court went on to state that another co-accused, B.T., had also made statements attesting to the applicant's membership of the TKP/ML-TİKKO, as he had provided information concerning the applicant's involvement in certain reportedly illegal demonstrations and actions he had carried out on those occasions. The trial court found that even though during the trial M.Ç., who had accepted in his police statements that he had given money to the applicant, had changed his version of events in a manner favourable to the defence, he had not denied that such an incident had taken place.

36. On 12 April 2016 the Court of Cassation upheld the trial court's judgment, observing that the retrial of the case had been carried out in conformity with the Court's finding of a violation in respect of the applicant.

37. On 8 November 2016 the applicant lodged an individual application with the Constitutional Court, complaining that, among other things, he had not had a fair trial in the reopened criminal proceedings because the domestic courts' interpretation and application of the Court's judgment in his case had amounted to a denial of justice and constituted arbitrariness. In that connection, the applicant argued that the Court's finding that the use of unlawfully obtained evidence during the preliminary investigation to convict him had given rise to a breach of his right to a fair trial had rendered his conviction unlawful. In his view, therefore, the approach to be adopted during a retrial was to treat the police statements, the reports drawn up by the police

and the steps taken during the preliminary investigation stage as inadmissible in evidence and to apply all necessary procedural safeguards in that regard. Accordingly, all the investigative steps should have been carried out again or, if that proved impossible, the previous evidence should have been excluded from the case file. The applicant further noted that not only he but also all the other accused who had been tried in the same set of criminal proceedings had been denied the right to legal assistance during the preliminary investigation stage and he asserted that the Court's judgment had shown that that stage of the proceedings had been carried out in an unlawful manner. Accordingly, the trial court's judgment dated 14 February 2013 had not been based on accurate and justified reasons, had been formalistic and arbitrary and had thus given rise to a violation of his right to a fair trial.

38. The Committee of Ministers of the Council of Europe, in its Resolution CM/ResDH(2018)219 adopted on 5 June 2018, and in view of the individual and general measures adopted by the respondent State, declared that it had exercised its functions under Article 46 § 2 and decided to close the examination of *Salduz* (cited above) and eighty-three other cases against Türkiye, including that of the applicant (see *Mehmet Zeki Doğan*, cited above).

39. On 2 July 2018 the Constitutional Court declared the applicant's individual application inadmissible as being manifestly ill-founded. Despite stating, in the part of its decision entitled "subject matter of the application", that the application concerned, among other things, "the use [by the domestic courts] of statements made in the absence of a lawyer while in police custody and the delivery of a judgment without any reasons", the Constitutional Court examined those complaints under two headings, namely (i) the right to a reasoned judgment, and (ii) the allegedly unjustified outcome of the applicant's trial, and declared them inadmissible, for the following reasons.

As to item (i), the Constitutional Court found that the trial court's decision to convict the applicant had contained sufficient reasoning, and had been given after the domestic courts had duly discussed all the accusations and defence submissions that could have had an impact on the outcome of the case. As to item (ii), the Constitutional Court observed that the thrust of the applicant's complaints concerned the outcome of his criminal trial. Noting that the trial court had reheard the applicant in the presence of his lawyer, made an assessment of the admissibility of the evidence, and excluded from evidence the statements that the applicant had made during his police interview without having access to a lawyer, the Constitutional Court took the view that the applicant's arguments concerned the assessment of evidence and the application of domestic law. The applicant's application was thus in the nature of a further appeal and should therefore be declared inadmissible, given that the domestic courts' decisions did not contain any manifest error of assessment or arbitrariness.

RELEVANT DOMESTIC LAW

40. The relevant provisions of the former Code of Criminal Procedure (Law no. 1412), namely Articles 135, 136 and 138, as then in force, provided that anyone suspected or accused of a criminal offence had a right of access to a lawyer from the moment he or she was taken into police custody. In accordance with section 31 of Law no. 3842 of 18 November 1992, which amended the legislation on criminal procedure, the above-mentioned provisions were not applicable to persons accused of offences falling within the jurisdiction of the State Security Courts. On 15 July 2003, by virtue of Law no. 4928, the restriction on an accused's right of access to a lawyer in proceedings before the State Security Courts was lifted (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 27-29, ECHR 2008).

41. Article 311 § 1 of the Code of Criminal Procedure, entitled “Grounds for reopening criminal proceedings (*yargılamanın yenilenmesi*) for the benefit of convicted persons”, provides as follows:

“Criminal proceedings terminated by a final judgment shall be re-examined by way of reopening the proceedings for the benefit of convicted persons if:

...

(f) the European Court of Human Rights finds a violation of a right protected by the Convention and its Protocols and establishes that the criminal conviction is based on that violation. In such a case, a request for the proceedings to be reopened may be made within one year of the date of the judgment of the European Court of Human Rights becoming final.

...”

42. Article 312 of the Code of Criminal Procedure, entitled “Postponement or stay of execution [of sentence]”, provides as follows:

“(1) An application for the reopening of proceedings shall have no effect on the execution of a [previously imposed] sentence. However, the court may suspend or stay the execution [of the sentence].”

43. Article 318 of the Code of Criminal Procedure, entitled “Decision and authority [competent to rule] on the admissibility or otherwise of an application to reopen the proceedings”, provides as follows:

“(1) An application for the reopening of [criminal] proceedings shall be made to the court which gave the [previous] judgment. That court shall rule on the admissibility of the application.

(2) Where the Court of Cassation [sitting as a court of first instance] has given judgment in the case pursuant to Article 303, the application shall be lodged with the court that gave the [previous] judgment.

(3) A decision as to whether an application for the reopening of the proceedings is admissible or not shall be given without holding a hearing.”

44. The first paragraph of Article 319 of the Code of Criminal Procedure, entitled “Grounds for [finding] an application to reopen proceedings

inadmissible and actions to be carried out where such an application is accepted”, provides as follows:

“Where an application for the reopening [of criminal proceedings] has not been made in the manner provided for by law or no grounds requiring the reopening of the proceedings have been shown or no supporting evidence has been adduced, the application shall be dismissed as being inadmissible.”

45. Article 320 of the Code of Criminal Procedure, entitled “Collection of evidence”, provides as follows:

“(1) If the court finds an application for the reopening of criminal proceedings admissible, it may delegate the collection of evidence to one of its judges or to another court on commission, or it may carry out these actions itself.

(2) The provisions concerning investigations shall be applied to the collection of evidence by the court or delegated judge or on commission.

(3) After the collection of evidence is completed, the public prosecutor and the person convicted in the previous judgment shall be asked to submit, within seven days, their conclusions or observations.”

46. Article 321 of the Code of Criminal Procedure, entitled “Dismissal of an application for the reopening of [proceedings] for lack of merit, or acceptance [thereof]”, provides as follows:

“(1) If the claims underpinning an application for the reopening of proceedings have not been sufficiently verified or in the cases enumerated in sub-paragraphs (a) and (b) of Article 311 or sub-paragraph (a) of the first paragraph of Article 314, it appears from the state of the case that the [grounds put forward would] have no effect whatsoever on the judgment, the application for the reopening of the [criminal] proceedings shall be dismissed, without holding a hearing, for lack of merit.

(2) Otherwise, the court shall order the reopening of the proceedings and hold a hearing.

(3) An objection may be lodged against decisions made pursuant to this provision.”

47. Article 323 § 3 of the Code of Criminal Procedure, entitled “Judgment to be given following a rehearing”, provides:

“(1) [Following] the rehearing ..., the court shall either uphold the previous judgment or quash it and give a fresh judgment.

(2) If the application for the reopening of the proceedings was lodged for the benefit of the accused, the fresh judgment ... shall not impose a heavier sentence than the sentence set out in the previous judgment.

(3) In the event that an acquittal or a decision not to impose a sentence (*ceza verilmesine yer olmadığı kararı*) is delivered following the reopening of criminal proceedings, then, in accordance with Articles 141-144 of this Code, the person in question shall be compensated for any pecuniary and non-pecuniary damage that he or she sustained from the partial or full execution of the earlier judgment on conviction.”

THE LAW

I. SCOPE OF THE CASE

48. The Court reiterates that the complaints an applicant proposes to make under Article 6 of the Convention must contain all the parameters necessary for the Court to define the issue it will be called upon to examine (see *Grosam v. the Czech Republic* [GC], no. 19750/13, § 89, 1 June 2023). It must be stressed that the scope of application of Article 6 of the Convention is very broad and that the Court's examination is necessarily delimited by the specific complaints submitted to it (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 104, 6 November 2018).

49. In order to be able to lodge an application in accordance with Article 34 of the Convention, an individual must be able to show that he or she was directly affected by the measure complained of; this is indispensable for putting the protection mechanism of the Convention into motion (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 96, ECHR 2014). Likewise, the Court can base its decision only on the facts complained of (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 120-21 and 124, 20 March 2018). It is therefore not sufficient that a violation of the Convention is "evident" from the facts of the case or the applicant's submissions. Rather, the applicant must complain that a certain act or omission entailed a violation of the rights set forth in the Convention or the Protocols thereto (*ibid.*, § 110), in a manner which should not leave the Court to second-guess whether a certain complaint was raised or not (see, in the context of exhaustion of domestic remedies, *Farzaliyev v. Azerbaijan*, no. 29620/07, § 55, 28 May 2020).

50. This means that the Court has no power to substitute itself for the applicant and formulate new complaints simply on the basis of the arguments and facts advanced (see *Grosam*, cited above, § 91).

51. In the present case, the Court notes that while the applicant complained of the unfairness of the reopened criminal proceedings, which, in his view, were reopened in name only, his complaint in that regard was limited to the use made by the trial court of the statements made by two of his co-defendants, namely V.Ç. and M.K., allegedly under duress and without a lawyer being present. Accordingly, whilst all the guarantees of the criminal limb of Article 6 of the Convention are fully applicable to newly reopened proceedings, the Court's examination in respect of Article 6 § 1 of the Convention in the present case will solely encompass the particular aspects in respect of which the applicant lodged a complaint, due account will nevertheless be taken of the impact of any procedural shortcomings complained of on the overall fairness of the reopened proceedings (see also paragraph 90 below)."

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

52. The applicant complained that he had not had a fair trial in the reopened criminal proceedings following the Court's judgment in his case because the domestic courts had had regard to evidence allegedly obtained from certain other co-defendants under duress and in the absence of a lawyer in confirming his previous conviction. Article 6 § 1 of the Convention reads, in so far as relevant, as follows:

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

A. Admissibility

53. The Government raised three different preliminary objections based on (i) non-compliance with the six-month time-limit laid down in Article 35 § 1 of the Convention; (ii) non-exhaustion of domestic remedies; and (iii) the application being manifestly ill-founded, and invited the Court to declare the application inadmissible on any one of those grounds.

54. Before proceeding to assess those objections, the Court reiterates that in examining the admissibility of the present application it must first ascertain whether it has jurisdiction to consider the applicant's complaint without encroaching on the prerogatives of the respondent State and the Committee of Ministers under Article 46 of the Convention. It must also examine whether the guarantees of the criminal limb of Article 6 of the Convention were applicable to the proceedings which took place after the applicant's request for the reopening of the criminal proceedings based on the Court's finding of a violation in respect of him in *Mehmet Zeki Doğan v. Turkey* (no. 38114/03, 6 October 2009).

55. While it is true that the Government neither argued that the Court lacked jurisdiction under Article 46 of the Convention to examine the present case nor raised an objection to the applicability *ratione materiae* of the criminal limb of Article 6 of the Convention, those matters go to the Court's jurisdiction, the scope of which is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case. Accordingly, the Court has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the question of its jurisdiction of its own motion (see *Grosam*, cited above, § 107).

1. *Whether the Court lacks jurisdiction ratione materiae under Article 46 of the Convention to examine the present application*

56. The Court reiterates that the Committee of Ministers' role in the sphere of execution of its judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in the execution of a judgment if that application contains relevant new

information relating to issues undecided by the initial judgment (see *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, § 33, ECHR 2015, and *Serrano Contreras v. Spain* (no.2), no.2236/19, § 24, 26 October 2021). The determination of the existence of a “new issue” very much depends on the specific circumstances of the case in question, and distinctions between cases are not always clear-cut (see *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, § 47, 11 July 2017).

57. In the present case, the Court holds that its finding below that the process of the determination of the criminal charge against the applicant in the newly reopened proceedings was revived because of the fresh assessment carried out by the trial court (see paragraphs 60 and 66 below) necessarily entailed a “new issue” which was not decided by the Court’s previous judgment in respect of the applicant in *Mehmet Zeki Doğan* (cited above). Accordingly, the Court is not prevented by Article 46 of the Convention from examining the applicant’s new complaint concerning the alleged unfairness of the reopened criminal proceedings resulting in the Istanbul Assize Court’s judgment of 14 February 2013.

2. *Applicability of the criminal limb of Article 6 of the Convention to the reopening of criminal proceedings*

58. Concerning the applicability *ratione materiae* of Article 6 § 1 to the applicant’s complaint in the framework of the reopening of criminal proceedings, the Court reiterates the principles set out in *Moreira Ferreira* (cited above). Under the Turkish legal system, the concept of the reopening of criminal proceedings, as regulated by the Code of Criminal Procedure, consists of three stages. In the first stage, the trial court assesses whether the application for the reopening of criminal proceedings is admissible, by examining (i) whether the application falls within one of the grounds indicated in Article 311 § 1 of the Code of Criminal Procedure; (ii) whether the conditions laid down in Article 319 of the Code are met, namely whether the application has been made in the manner provided for by law or whether grounds requiring the reopening of the proceedings have been shown; and (iii) whether supporting evidence has been adduced. If those conditions are fulfilled, the court will proceed to the second stage, at which point it may decide to collect evidence, and once this has been carried out, it will invite the public prosecutor and the defendant to submit their views on the evidence collected. The application will be rejected for “lack of merit” and without holding a hearing where, *inter alia*, (i) the claims underpinning it have not been sufficiently verified, or (ii) it is judged that the application has had no impact whatsoever on the previous conviction (only in respect of applications based on Article 311 § 1 (a) and (b)). If the application is accepted, however, the court will reopen the proceedings and hold hearings. At the third stage, the court will either confirm the previous conviction or quash it and deliver a fresh judgment. Importantly, in Turkish criminal procedural law, the

reopening of proceedings does not automatically entail that the previous conviction is quashed meaning that the conviction remains valid until the completion of the above-mentioned third stage, when the court may either quash or confirm the conviction. In the course of the above-mentioned stages, the court may, however, suspend or stay the execution of the applicant's sentence and order his or her release pending the re-examination of the case.

59. In the present case, the trial court first examined the admissibility of the application for the reopening of the criminal proceedings from the point of view of Article 311 § 1 of the Code of Criminal Procedure and found on 26 May 2010 that the application fell within the scope of sub-paragraph (f), being based on a judgment in which the Court had found a violation of the applicant's rights under Article 6 § 3 taken in conjunction with Article 6 § 1. The trial court then held hearings, even though Article 318 § 3 of the Code provides that decisions on the admissibility of an application for the reopening of criminal proceedings must be taken without holding a hearing. On 10 May 2011 the trial court ruled that the application was admissible in accordance with Article 319 of the same Code. Subsequently, the trial court continued to hold hearings, in the course of which it attempted to collect evidence, carried out certain procedural steps, heard the applicant, his lawyer and the public prosecutor and decided to uphold the applicant's previous conviction at the end of the reopened proceedings, which would appear to imply that it incorporated the second stage of the examination provided for in the Code of Criminal Procedure into its decision of 10 May 2011 in which it held that it had accepted the application for the reopening of the criminal proceedings. At the end of the reopened proceedings, the trial court decided to uphold the applicant's previous conviction on the basis of a line of reasoning which was different from the applicant's previous conviction dated 12 November 2002 and the decision of the Court of Cassation dated 5 May 2003.

60. In view of the above and having regard to the nature of the trial court's assessment, as well as the applicant's complaint concerning the fairness of the reopened proceedings, the Court concludes that the guarantees of Article 6 of the Convention were applicable in their entirety to the proceedings from, at least, the trial court's decision on 10 May 2011, after which the proceedings were reopened, since that decision was likely to be decisive for the determination of a criminal charge, given that from that point onwards the trial court was required to assess the previous conviction in the light of the Court's judgment in respect of the applicant and thus make a fresh determination of it, which it eventually did on 14 February 2013 (see *Yaremenko v. Ukraine (no. 2)*, no. 66338/09, § 56, 30 April 2015).

3. *Alleged non-observance of the six-month time-limit*

61. The Government submitted that the applicant's complaint concerning the use of evidence given by V.Ç. and M.K. under alleged duress and without

a lawyer being present had been raised for the first time in the present application, whereas, in their view, the applicant's complaint was neither a new fact nor a new problem; the applicant should therefore have raised it in his first application to the Court, in 2003. As the applicant had failed to do so, the Government argued that the application should be declared inadmissible for his failure to comply with the six-month rule enshrined under Article 35 of the Convention as applicable at the material time.

62. The applicant did not comment on this issue.

63. The Court reiterates that as a general rule, an application for the reopening of proceedings is not an effective remedy, and, as such, does not interrupt the running of the six-month time-limit, except when it is the only judicial avenue available to the applicant in the circumstances of the case (see *Savickis and Others v. Latvia* [GC], no. 49270/11, § 132, 9 June 2022, with further references).

64. If a request for reopening of the proceedings in respect of a final domestic judgment is dismissed, the decision to dismiss the request is not the "final decision" for the purposes of Article 35 § 1 and cannot be taken as the starting-point of the six-month time-limit (see *Sapeyan v. Armenia*, no. 35738/03, § 23, 13 January 2009). If, however, proceedings are reopened or a final decision is eventually reviewed, the running of the six-month period in respect of the initial set of proceedings or the final decision will be interrupted, but only in relation to those Convention issues which served as a ground for such a review or reopening and were the subject of examination before the extraordinary appeal body (see *Savickis and Others*, cited above, § 133). Lastly, if an application for extraordinary review has not led to the reopening of the initial proceedings, but the domestic courts have nevertheless been provided with an opportunity to address the core of the human rights issues that the applicant subsequently brought before the Court and did address them, then the running of the six-month time-limit has to be considered to have restarted (see *Schmidt v. Latvia*, no. 22493/05, §§ 66-67 and 70-71, 27 April 2017).

65. In this connection, the Court notes that the Istanbul Assize Court not only reopened the criminal proceedings following the Court's finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention in accordance with the applicant's request to that effect, but also carried out a fresh assessment of the criminal charge against him (see *Moreira Ferreira*, cited above, § 72). Particular emphasis should be laid on the fact that the decisions which formed the subject of the Court's judgment in respect of the applicant in *Mehmet Zeki Doğan* (cited above), namely the trial court's decision dated 12 November 2002 and the ensuing decision of the Court of Cassation dated 5 May 2003 which upheld it, did not cite or specifically rely on the evidence given by V.Ç. and M.K. Crucially, however, in the newly reopened criminal proceedings, explicit reliance was placed on that evidence in confirming the applicant's previous conviction.

66. In view of the above, the Court finds that the Istanbul Assize Court's fresh assessment of the criminal charge against the applicant meant that the process of determining that charge was revived. Moreover, given that the trial court explicitly relied, arguably for the first time, on the evidence given by V.Ç. and M.K., the Court holds that the six-month time-limit restarted in respect of the complaint concerning the use of those statements, which were made under alleged duress and in the absence of a lawyer. To hold otherwise would risk creating a legal loophole that would enable a procedural shortcoming which had occurred during previous criminal proceedings to be used in ostensibly remedying another shortcoming, thereby giving rise to a situation that would not only impair the practical and effective nature of the right to a fair trial but would also be incompatible with the spirit of the Convention and the Protocols thereto (contrast, as an isolated example, *Wright and Brown v. the United Kingdom* (dec.), no. 52334/13, 18 October 2016, where the Court appears to have declined to accept that the examination of the merits of the applicants' complaints by the Court of Appeal, following a reference by the Criminal Cases Review Commission, treated "for all purposes as an appeal by the applicant against conviction", constituted an effective remedy under Article 35 of the Convention: the Court concluded that the applicants had failed to exhaust domestic remedies on the grounds that they had not made "normal" use of remedies before the "appropriate domestic body", namely before the trial court in the original proceedings, and therefore, notwithstanding the examination of the merits of their complaints by the Court of Appeal in the context of the above-mentioned extraordinary review process, the applicants' application was declared inadmissible).

67. Accordingly, by duly exhausting the domestic remedies in respect of his complaint following the Constitutional Court's decision dated 2 July 2018 and lodging his application with the Court on 26 December 2018, the applicant complied with the six-month time-limit then applicable under Article 35 of the Convention. In view of the above, the Court cannot uphold the Government's objection on this point.

4. Alleged failure of exhaustion of domestic remedies

68. The Government argued that the applicant had failed to raise any complaint in his individual application to the Constitutional Court about the use of statements made by V.Ç. and M.K. allegedly under duress and in the absence of a lawyer. The present application, in their view, should thus be declared inadmissible for failure to exhaust domestic remedies.

69. The applicant submitted that he had raised the substance of his complaint in his application form lodged with the Constitutional Court.

70. The Court upholds the Government's plea of non-exhaustion in so far as it concerns the use of evidence obtained under duress, given the applicant's failure to raise that matter before the Constitutional Court, and declares this part of the application inadmissible under Article 35 § 1 of the Convention

for non-exhaustion of domestic remedies and rejects it pursuant to Article 35 § 4 of the Convention.

71. Conversely, the Court observes that before the Constitutional Court the applicant argued, among other things, that the Court's finding of a violation on account of the systemic restriction imposed on his right of access to a lawyer while in police custody had required the domestic courts to regard the reports drawn up by the police, the records of police interviews and the other investigative actions that had been affected by that procedural shortcoming as inadmissible in evidence. Therefore, those actions should have either been carried out again or the evidence previously obtained thereby should have been disregarded (see paragraph 39 above). The fact that the applicant raised that argument when complaining about the domestic courts' failure to deliver a reasoned judgment or the perceived arbitrary and formalistic manner in which they had conducted the reopened criminal proceedings – in other words, in relation to different aspects of Article 6 – does not detract from the fact that in the Constitutional Court he did raise the substance of his complaint concerning the use of statements that his co-defendants had given without having access to a lawyer. On that account, the Court dismisses the Government's plea of non-exhaustion.

5. Allegedly manifestly ill-founded nature of the application

72. The Government asserted that the application should be declared inadmissible as being manifestly ill-founded because the trial court had reopened the criminal proceedings against the applicant following the Court's above-mentioned judgment in his case and had resolved the legal issue, namely his lack of access to a lawyer, which had also been reviewed by the Court of Cassation and the Constitutional Court. In any event, the applicant had failed to lodge an objection against the trial court's decision not to hear V.Ç. and the victim M.Ç.

73. The applicant did not comment on this issue.

74. Having regard to its conclusion at paragraph 70 above, the Court considers that the application, which concerns the use of the police statements made by V.Ç. and M.K. without access to a lawyer, raises complex issues of fact and law, which cannot be determined without an examination on the merits. The Court further finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

6. Conclusion on the admissibility of the application

75. The Court holds that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

76. The applicant complained that the essence of his right to a fair trial had been breached in the reopened criminal proceedings by the domestic courts' use of the evidence and the police statements given by his co-defendants, who had also been held in police custody in the same conditions as him – without the benefit of legal assistance.

77. The Government submitted that in view of the statements made by the victim Ş.İ. and the applicant's co-accused B.T., and the expert report indicating that the bullets and the empty cartridge found at the scene of the shooting of the victim A.Ç. had been fired from a Browning pistol, which had been among the pistols found buried in a forest during the reconstruction of events attended by V.Ç., there was sufficient evidence, other than the statements made by V.Ç. and M.K. in the absence of a lawyer, to justify the applicant's conviction. Accordingly, the fact that the disputed statements had been made in the absence of a lawyer had not prejudiced the overall fairness of the criminal proceedings.

78. In any event, at every stage of the proceedings the applicant had had the opportunity to submit his arguments and to adduce any evidence he had seen fit and to effectively challenge the evidence submitted against him. Similarly, the trial court had taken evidence from the applicant in the presence of his lawyer in the reopened criminal proceedings and his police statements that had been taken in the absence of a lawyer had been excluded from evidence following a discussion on admissibility in line with the Court's judgment in the applicant's case. Accordingly, none of the domestic courts involved in his case had made a manifest error or had otherwise acted arbitrarily. Having regard to the foregoing and bearing in mind that the applicant's conviction had not been solely based on the contested evidence, the Government took the view that the proceedings had been fair as a whole and invited the Court to hold that there had been no violation of Article 6 of the Convention.

2. The Court's assessment

(a) The general principles

79. The right to a fair trial under Article 6 § 1 is an unqualified right. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III). The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010; *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015; and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 250, 13 September 2016).

80. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (see *Beuze v. Belgium* [GC], no. 71409/10, § 121, 9 November 2018). In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, *Salduz v. Turkey* [GC], no. 36391/02, § 50, ECHR 2008; *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010; *Dvorski v. Croatia*, no. 25703/11, § 76, ECHR 2015; and *Schatschaschwili*, cited above, § 100). However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Beuze*, cited above, § 122; see also *Mayzit v. Russia*, no. 63378/00, § 77, 20 January 2005, and *Seleznev v. Russia*, no. 15591/03, § 67, 26 June 2008).

81. While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts (see *Moreira Ferreira*, cited above, § 83, and *Yüksel Yalçinkaya v. Türkiye* [GC], no. 15669/20, § 302, 26 September 2023).

82. There is a distinction to be made between the admissibility of evidence (that is to say, the question of which elements of proof may be submitted to the relevant court for its consideration) and the rights of the defence in respect of evidence which in fact has been submitted to the court (see *Yüksel Yalçinkaya*, cited above, § 310). There is also a distinction between the latter (that is to say, whether the rights of defence have been properly ensured in respect of the evidence taken) and the subsequent assessment of that evidence by the court once the proceedings have been concluded (see *SA-Capital Oy v. Finland*, no. 5556/10, § 74, 14 February 2019, and the references therein, and *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, § 125, 27 October 2020).

83. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not (see *Yüksel Yalçinkaya*, cited above, § 303). Its task under Article 6 § 1 is rather to assess the fairness of the proceedings as a whole, taking into account the specific nature and circumstances of the case, including the way in which the evidence was taken and used, and the manner in which any objections concerning the evidence were dealt with (see

Bykov v. Russia [GC], no. 4378/02, § 89, 10 March 2009, and *Yüksel Yalçınkaya*, cited above, § 310). This involves an examination of the “unlawfulness” in question and, where a violation of another Convention right is concerned, the nature of the violation found (see *Bykov*, cited above, § 89).

84. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined, in particular, whether the applicant was given the opportunity to challenge the evidence and to oppose its use (see *Yüksel Yalçınkaya*, cited above, § 303).

85. From the perspective of the rights of the defence, issues under Article 6 may arise in terms of whether the evidence produced for or against the defendant was presented in such a way as to ensure a fair trial, because a fair trial presupposes adversarial proceedings and equality of arms; thus, possible flaws in the process of administration of evidence may be examined under Article 6 § 1 (ibid.; see also *Mirilashvili v. Russia*, no. 6293/04, § 157, 11 December 2008).

86. Accordingly, a review of the overall fairness of the proceedings must also incorporate an assessment as to whether the applicant was given the opportunity of challenging the evidence and of opposing its use in circumstances where the principles of adversarial proceedings and equality of arms between the prosecution and the defence were respected. The question whether the applicant’s challenges to the evidence were properly examined by the domestic courts, that is, whether the applicant was truly “heard”, and whether the courts supported their decisions with relevant and adequate reasoning, are also factors to be taken into account in conducting this assessment. In this regard, it should be reiterated that while courts are not obliged to give a detailed answer to every argument raised, it must be clear from the decision that the essential issues of the case have been addressed (see *Yüksel Yalçınkaya*, cited above, § 324, with further references).

87. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Bykov*, cited above, § 90; *Yüksel Yalçınkaya*, cited above, § 303; see also, among other authorities, *Lisica v. Croatia*, no. 20100/06, § 49, 25 February 2010, and *Ayetullah Ay*, cited above, § 126). While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see *Bykov*, cited above, § 90; *Yüksel Yalçınkaya*, cited above, § 303; see also *Lee Davies v. Belgium*, no. 18704/05, § 42, 28 July 2009; and *Bašić v. Croatia*, no. 22251/13, § 48, 25 October 2016). In undertaking this examination, the Court also has regard to the state of the other evidence in the case file and attaches weight to whether the evidence in question was or was not decisive

for the outcome of the proceedings (see *Gäfgen v. Germany* [GC], no. 22978/05, § 164, ECHR 2010, and *Yüksel Yalçınkaya*, cited above, § 303). In this connection, it may also be reiterated that the burden of proof is on the prosecution, and any doubt should benefit the accused (see *Ayetullah Ay*, cited above, § 126).

88. When determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him or her be gathered lawfully (see *Jalloh c. Allemagne* [GC], n° 54810/00, § 97, CEDH 2006-IX, and *Prade v. Germany*, no. 7215/10, § 35, 3 March 2016).

89. Furthermore, the general principles concerning the use of evidence given by co-defendants in the absence of a lawyer have been summarised in *Stephens v. Malta* (no. 3) (no. 35989/14, §§ 64-67, 14 January 2020) and *Erkapić v. Croatia* (no. 51198/08, §§ 72-73, 25 April 2013). In such cases, the Court's task under Article 6 of the Convention primarily focuses on the assessment of domestic courts regarding the impact that the absence of a lawyer may have had on the overall fairness of criminal proceedings and, on that basis, to ascertain whether it was such as to render the proceedings incompatible with the guarantees of a fair trial. Ensuring that an applicant has been able to test the admissibility, reliability, authenticity and veracity of the evidence given without a lawyer being present constitutes the central pillar of the Court's examination.

(b) Application of those principles to the instant case

90. The Court reiterates that when criminal proceedings are reopened after a judgment became final, all guarantees under Article 6 of the Convention apply fully to the subsequent reopened proceedings, whatever the reason for that reopening may be, given that those proceedings concern the “determination of a criminal charge” against the accused (see also paragraphs 60, 65, and 79-89 above). Accordingly, in the new set of proceedings, the guilt of the accused will have to be assessed afresh on the basis of the evidence presented within the framework of these new proceedings and in a manner compatible with the requirements of Article 6. Thus, for instance, the restrictions and safeguards relating to the use of any incriminating evidence by witnesses whose statements have not been examined, and cross-examined, before the trial court (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 100 and 101, 15 December 2015) apply in the context of the new proceedings as in the original trial. In this respect, the Court takes note of the fact that the applicant did not specify how the reopened proceedings were conducted in the light of the relevant standards under Article 6. The applicant solely submitted that the essence of his right to a fair trial had been breached in the reopened criminal proceedings by the domestic courts' use of the evidence and the police statements given by his

co-defendants, who had also been held in police custody in the same conditions as him – without the benefit of legal assistance. The Court will limit its assessment in the current case accordingly, without, however, losing sight of the fact that what is in any event ultimately at stake is the overall fairness of the reopened proceedings.

91. The Court notes that the present case concerns the alleged unfairness of the criminal proceedings which had been reopened in accordance with the Court's judgment in *Mehmet Zeki Doğan* (cited above), in which a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 had been found in respect of the applicant on account of the lack of legal assistance provided to him while in police custody. After holding several hearings in the reopened criminal proceedings, the trial court decided to uphold the applicant's previous conviction for attempting to disrupt or subvert the constitutional order under Article 146 of the former Criminal Code and his consequent sentence to life imprisonment. In that connection, the trial court appears to have demonstrated its willingness to meaningfully engage with the Court's finding of a violation in respect of the applicant by excluding the evidence he had given during his police interview. However, when upholding the applicant's previous conviction, it relied on, *inter alia*, (i) the evidence given by a co-defendant, V.Ç., during his police interview (held on the same day the applicant made his police statements) and the reconstruction of events (in which he took part with the applicant); (ii) the evidence given by another co-defendant, M.K., during the investigation and trial stages; (iii) the statements of a certain witness, M.Ç., who had identified the applicant as the person who had extorted money on behalf of an armed terrorist organisation; and (iv) the statements of B.T., which, according to the trial court, showed the applicant to be a member of the TKP/ML-TİKKO.

92. The Court further notes that, given that neither V.Ç. nor M.K. had had the assistance of a lawyer when giving the above-mentioned evidence, which was a structural problem giving rise to a violation of Article 6 §§1 and 3 (c) of the Convention in respect of the applicant in *Mehmet Zeki Doğan* (cited above), the question therefore arises as to whether the trial court subjected the evidence given by them to proper scrutiny in conformity with the requirements of a fair trial under Article 6 § 1 of the Convention. In that connection, the Court reiterates that where a procedural defect has been identified, it falls in the first place to the domestic courts to assess whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being *prima facie* incompatible with the requirements of a fair trial under Article 6 of the Convention. In the absence of any such assessment, the Court must nevertheless make its own determination (see *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, § 51, 28 January 2020).

93. Furthermore, the Convention does not enshrine an absolute right to have incriminating statements made by a third party without the assistance of

a lawyer excluded (see *Tonkov v. Belgium*, no. 41115/14, § 68, 8 March 2022). Particular caution should nevertheless be exercised with regard to such statements since the lawyer's presence and active assistance during questioning by police is an important procedural safeguard.

94. The Court notes that when relying on, among other things, the evidence given by V.Ç. and M.K. in upholding the applicant's previous conviction, the trial court explained that there was no indication that V.Ç. and M.K. had been subjected to duress. While the trial court's finding on this point was in keeping with the right to remain silent and the privilege against self-incrimination, which are generally recognised international standards lying at the heart of the notion of a fair trial under Article 6, and it was thus capable of constituting a crucial procedural safeguard that would have offset the procedural shortcoming identified in the present case, namely the absence of a lawyer when V.Ç. and M.K. had given the above-mentioned evidence, the Court is unable to conclude that the domestic court's approach was such as to ensure the overall fairness of the criminal proceedings against the applicant in the particular circumstances of the present case, for the following reasons.

95. The Court further observes that V.Ç. made statements to the police on the same day as the applicant, namely on 12 May 1998, without a lawyer being present. Similarly, the applicant and V.Ç. had together taken part in the same reconstructions of events referred to by the trial court, again on the same day and without the presence of a lawyer. M.K. had also been denied the right to legal assistance when making statements to the police on 13 May 1998, and he had later retracted those statements during the criminal proceedings. The Court notes that in those statements M.K. attested that V.Ç. had told him that he had shot A.Ç. and Ş.İ. and that the applicant had been involved in those incidents.

96. Moreover, the Court notes that when they appeared before the investigating judge immediately after their police interviews, both M.K. and V.Ç. retracted the statements they had made to the police which contained, *inter alia*, incriminating remarks concerning the applicant. This gave rise to some doubt about the veracity of those statements which should have been addressed by the trial court (see paragraph 12 above). In that connection, the Court reiterates that where domestic judicial authorities are confronted by several conflicting versions of the truth offered by the same person, a final preference for a statement given at the pre-trial stage over one given in open court does not of itself raise an issue as regards the overall fairness of the proceedings where that preference is substantiated and the statement itself was given of the person's own volition (see *Makeyan and Others v. Armenia*, no. 46435/09, § 47 *in fine*, 5 December 2019). Nevertheless, the trial court in the applicant's case neither attempted to dispel the doubt cast on the veracity of the police statements made by M.K. and V.Ç., nor did it substantiate its

preference for taking into consideration only the witnesses' police statements when upholding the applicant's previous conviction.

97. While the trial court concluded that the applicant's right of access to a lawyer under Article 6 § 3 (c) of the Convention had been violated and did not rely on the evidence which he had given in his police interview, it appears to have denied the applicant the same procedural safeguard in respect of the evidence given by V.Ç. and M.K. in the absence of a lawyer. This is apparent from the court's failure to duly justify its decisions to, on the one hand, exclude the applicant's police statements and the evidence given by him at the reconstruction of events, because he had had no access to legal assistance, while on the other hand relying on the police statements of V.Ç. and the evidence that V.Ç. had given at the same reconstruction of events as the applicant, despite the fact that V.Ç. had likewise not had legal assistance while in police custody. In any event, the trial court does not appear to have addressed that issue; nor did the Court of Cassation or the Constitutional Court draw the necessary inferences to remedy the prejudice stemming from the trial court's approach, with the result that the opportunity given to the applicant to challenge the evidence was merely nominal and was not capable of ensuring the practical and effective exercise of his rights under Article 6 § 1 of the Convention (see *Shabelnik v. Ukraine (no. 2)*, no. 15685/11, §§ 50-55, 1 June 2017).

98. The Court notes that the Government's argument to the effect that the overall fairness of the criminal proceedings had been ensured because there was adequate evidence other than that given by V.Ç. and M.K. The Court observes, however, that where the domestic courts had found that an applicant's conviction had been justified on the basis of evidence other than statements given in the absence of a lawyer, this was not a substitute for their failure to assess whether the overall fairness of the proceedings had been prejudiced by the absence of a lawyer (see *Brus v. Belgium*, no. 18779/15, § 34, 14 September 2021 where a violation of Article 6 §§ 1 and 3 (c) of the Convention was found on account of the use made of the statements that the applicant had made in the absence of a lawyer). The Court further notes that in the present case, the trial court relied on the statements made by V.Ç. and M.K. in their interviews by the police, notwithstanding the fact that those statements had subsequently been retracted and that neither of them had appeared to testify before the trial court at any stage of the proceedings. It also notes that the trial court has not provided any assessment of whether the other evidence could have been sufficient to establish the applicant's guilt in terms of the charges brought against him. Under such circumstances, and as the domestic courts failed to conduct an assessment of the overall fairness of the criminal proceedings against the applicant, an assertion by the Government of the strength of the other evidence cannot on its own serve to ensure that the proceedings were as a whole "fair" as required under Article 6 § 1 of the Convention. In this respect, the Court must base its assessment on

the evidence which formed part of the domestic courts' examination, as reflected in their judgments. Accordingly, the expert report dated 11 May 1998, to which the Government referred in support of their argument that the overall fairness of the criminal proceedings had been ensured by the strength of other evidence in the case file (see paragraph 77), cannot be taken into account in the overall fairness assessment, since the report in question does not appear to be among the evidence forming the basis of the trial court's decision dated 14 February 2013. As regards the other evidence referred to by the Government and taken into account by the domestic courts, the Court notes that they comprised (i) the statements made by the victim Ş.İ., who had neither identified the applicant as a perpetrator nor made any other incriminating statements in respect of him; (ii) the statements of B.T., which were regarded by the trial court as showing that the applicant was a member of the TKP/ML-TİKKO, and therefore as falling short of demonstrating that he had committed the offence of which he was eventually found guilty (under Article 146 of the previous Criminal Code); and (iii) the statements made by witness M.Ç. during the investigation stage, which had later been retracted during the trial. In such circumstances, the Court cannot but note that the evidence given by M.K. and V.Ç. in the absence of a lawyer was decisive for the trial court's decision to uphold the applicant's previous conviction (compare and contrast *Deckmyn v. Belgium* (dec.), no. 44813/14, 7 November 2023 where the domestic courts excluded the statements that the applicant had made in the absence of a lawyer and relied on other evidence which was independent of his statements in question to refuse his request to reopen the criminal proceedings; *Kohen and Others v. Turkey*, nos. 66616/10 and 3 others, § 61, 7 June 2022 where the overwhelming evidence, which was discovered or collected either prior to the statements made without a lawyer and/or without being the direct or indirect result of such statements, formed the backbone of the domestic courts' findings in respect of the applicants' convictions and the trial court's reliance upon the statements that the applicants made without a lawyer being present, was not such as to irretrievably prejudice the overall fairness of the criminal proceedings; *Pervane v. Turkey*, no. 74553/11, § 30, 8 September 2020 where the domestic courts did not rely on the statements the applicant had made in the absence of a lawyer to establish his criminal responsibility for the armed clash, which constituted the crucial material element of the offence of which he was convicted).

99. Against this background, the Court also reiterates that the absence of an appropriate response from the domestic courts to a substantiated claim that a certain piece of evidence was obtained in breach of statutory requirements or of the rights and freedoms protected by the Convention and the Protocols thereto would, in principle, be incompatible with the requirements of a fair trial, particularly where the evidence was of decisive importance in the conviction (see *Budak v. Turkey*, no. 69762/12, § 80, 16 February 2021).

100. In view of the above, the Court takes the view that when the requisite procedural review has not been carried out by the domestic courts, the mere existence of other evidence cannot be regarded as sufficient by and of itself to justify the trial court's decision to afford a procedural safeguard to the applicant in the form of excluding the statements he had given in the absence of a lawyer while denying him the very same procedural safeguard in respect of the evidence given by his co-accused, also in the absence of a lawyer, in particular when that evidence played an important role in his conviction – as the statements of M.K. and V.Ç. did in the present case (see, to the same effect, *Brus*, cited above, §§ 34-36). In the present case, that shortcoming was further exacerbated by the trial court's decision to attach weight to the police statements made by M.K. and V.Ç. without duly addressing or properly scrutinising the doubt stemming from their subsequent withdrawal of the statements in question (see paragraphs 8, 9, 12, and 96 above).

101. Furthermore, the Court is likewise unable to uphold the Government's argument that the applicant had failed to lodge an objection against the trial court's decision not to hear V.Ç., given that the reason for the trial court's decision not to summon him, namely that "hearing him again would not make a new contribution to the trial, given that he had previously been tried as an accused in the proceedings", appears to have rendered such an objection futile (compare *Lutsenko v. Ukraine*, no. 30663/04, §§ 50-52, 18 December 2008). This view seems to have been supported by the trial court's failure to neither call nor examine B.T. and M.Ç., who were also tried as accused in the same proceedings and on whose evidence it relied on to confirm the applicant's previous conviction.

102. Accordingly, the Court concludes that the domestic courts failed to apply the necessary procedural safeguards in line with the fair-trial guarantees under Article 6 § 1 of the Convention in respect of the police statements and the evidence given by M.K. and V.Ç. (see *Ömer Güner v. Turkey*, no. 28338/07, § 38, 4 September 2018). In other words, the procedural defect identified in the first case – namely the trial court's use of statements made by the applicant without any legal assistance – was replaced by another defect in the reopened proceedings in the second case, which undermined the overall fairness of the criminal proceedings against the applicant.

103. It follows that there has been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. 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."

A. Damage

105. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

106. The Government contested that claim, arguing that it was excessive.

107. The Court awards the applicant EUR 7,800 in respect of non-pecuniary damage, plus any tax that may be chargeable.

108. The Court further reiterates that the most appropriate form of redress would be a retrial in accordance with the requirements of Article 6 of the Convention, should the applicant so request (see *Süleyman v. Turkey*, no. 59453/10, § 110, 17 November 2020).

B. Costs and expenses

109. The applicant also claimed 12,450 Turkish liras (TRY) in respect of costs and expenses incurred before the Court, including TRY 12,000 to be paid to his lawyer for his legal representation and TRY 450 for expenses relating to postage, stationery, and photocopying.

110. The Government argued that the amount claimed had neither been sufficiently itemised nor substantiated with any documentary proof.

111. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, among many other authorities, *L.B. v. Hungary* [GC], no. 36345/16, § 149, 9 March 2023). In the present case, the Court rejects the applicant's claim for costs and expenses because of his failure to submit any supporting documents.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the applicant's complaint concerning the use of the police statements and the evidence given by V.Ç. and M.K. while in police custody and in the absence of a lawyer admissible, and the remainder of the application inadmissible;
2. *Holds*, by five votes to two, that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*, by five votes to two,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable, to be converted

into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;

- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 February 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Arnfinn Bårdsen
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Yüksel and Derenčinović is annexed to this judgment is annexed to this judgment.

A.R.B.
H.B.

JOINT DISSENTING OPINION OF JUDGES YÜKSEL
AND DERENČINOVIĆ

1. For the reasons set out below, we respectfully disagree with the majority's conclusion that there has been a violation of Article 6 § 1 of the Convention. Consequently, we voted against the finding of a violation of this provision in the present case.

2. At the outset, we wish to recognise the trial court's willingness to meaningfully engage with the Court's finding of a violation in *Mehmet Zeki Doğan v. Turkey* (no. 38114/03, 6 October 2009). In the reopened proceedings, the applicant's police statement was duly excluded from the case file and a fresh assessment was made on the basis of the other evidence. This, in our view, constituted a sincere effort on the part of the national judicial authorities to act in accordance with the Convention and to avoid any arbitrariness in their decision-making processes.

3. In the present case, the Court was called upon to assess the overall fairness of a set of criminal proceedings on the basis of a procedural defect stemming from the absence of a lawyer at a point in the investigation when the co-accused gave incriminating evidence against the applicant. In this connection, it fell first to the domestic courts to assess whether the procedural defect identified had been remedied in the reopened proceedings. Indeed, the lack of an assessment to that effect is in itself *prima facie* incompatible with the requirements of a fair trial and in the absence of such an assessment, the Court must make its own determination (see *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, § 51, 28 January 2020). However, we emphasise that in doing so, it is not the Court's task to embark upon an assessment of evidence so as to determine whether a given procedural shortcoming has or has not irretrievably prejudiced the overall fairness of the proceedings, matters that primarily fall within the domain of the national courts, in accordance with the principle of subsidiarity (*ibid.*, and *Kohen and Others v. Turkey*, no. 66616/10 and 3 others, § 59, 7 June 2022).

4. Bearing in mind the importance of this fundamental principle, we are of the opinion that the majority's reasoning in the present case extends beyond the Court's supervisory jurisdiction and encroaches on the margin of appreciation afforded to States by engaging in an assessment of the facts and evidence.

5. Firstly, we respectfully disagree with the majority's finding that "the evidence given by M.K. and V.Ç. in the absence of a lawyer was decisive" in upholding the applicant's conviction (see paragraph 98 of the judgment).

6. In this context, we would point out that it is not for the Court to determine the weight to be attached to particular evidence, its admissibility, or the way in which it should be assessed (see *Moreira Ferreira v. Portugal (No. 2)*, no. 19867/12, § 83, 11 July 2017 and the authorities cited therein). It therefore goes beyond the Court's remit to step into the role of the domestic

court and engage in an assessment or share its opinion of how credible, convincing or substantial the evidence was.

7. In our view, the evidence presented before the domestic court in the original trial – including the statements of the co-accused (M.K., V.Ç. and B.T.), witness testimony from M.Ç., Ş.İ. and A.Ç., the findings of the reconstruction of events and the related expert reports – all corroborated the incriminating remarks made by M.K. and V.Ç., thus suggesting that, taken as a whole, the entire body of evidence built up a composite picture of the applicant's alleged involvement in the offence.

8. Secondly, we are not convinced that the majority's analysis is consistent with the Court's case-law. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016, and *Beuze v. Belgium* [GC], no. 71409/10, §§ 121-22, 9 November 2018). However, contrary to this case-law, the majority seem to focus on one particular aspect of the proceedings, considered in isolation, namely the domestic courts' lack of justification (see paragraph 97 of the judgment). Having regard to the proceedings as a whole, we are not convinced that this alleged shortcoming is sufficient to lead to the conclusion that there has been a violation in this case.

9. The Court's task under Article 6 of the Convention is not to pronounce on the probative value or sufficiency of evidence for a particular outcome, but to assess whether the overall fairness of the proceedings was ensured through the lens of the procedural and institutional safeguards and the fundamental principles of a fair trial inherent in Article 6 of the Convention (see *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, § 194, 27 October 2020). While we agree that a failure by the domestic court to provide reasoning to substantiate judicial decisions can, in some instances, be qualified as arbitrary to the point of prejudicing the fairness of proceedings (see *Moreira Ferreira (no. 2)*, cited above, § 85), we emphasise that the extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, 21 January 1999 and the authorities cited therein).

10. Turning back to the facts of the present case, we stress that the trial court established that the impugned evidence had not been given under duress (see paragraph 35 of the judgment). Nor was its veracity or reliability challenged by the applicant. In addition, the trial court took the view that the other evidence, such as the statements of B.T. and M.Ç., corroborated the impugned evidence, thus supporting its accuracy (*ibid.*). When scrutinising

the evidence, full justification was given as to the decision not to rehear witnesses, reasoning to which it appears that the applicant did not object (see paragraphs 30 and 72-73 of the judgment). For these reasons, and bearing in mind that Article 6 § 1 cannot be understood as requiring a detailed answer to every argument (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A no. 288), we are unable to agree with the majority's conclusion that the domestic decision lacked reasons.