



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

AFFAIRE SAKIK ET AUTRES c. TURQUIE

CASE OF SAKIK AND OTHERS v. TURKEY

(87/1996/706/898-903)

ARRET/JUDGMENT

STRASBOURG

26 novembre/26 November 1997

Cet arrêt peut subir des retouches de forme avant la parution de sa version définitive dans le *Recueil des arrêts et décisions* 1997, édité par Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Cologne) qui se charge aussi de le diffuser, en collaboration, pour certains pays, avec les agents de vente dont la liste figure au verso.

The present judgment is subject to editorial revision before its reproduction in final form in *Reports of Judgments and Decisions* 1997. These reports are obtainable from the publisher Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Köln), who will also arrange for their distribution in association with the agents for certain countries as listed overleaf.

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67,
B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher
(place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

The Netherlands: B.V. Juridische Boekhandel & Antiquariaat
A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC 's-Gravenhage)

SUMMARY¹

Judgment delivered by a Chamber

Turkey – arrest and detention in police custody of six former members of the National Assembly who were prosecuted in a national security court

I. ARTICLE 5 OF THE CONVENTION

A. Derogation under Article 15 of the Convention

Court would be working against object and purpose of Article 15 if, when assessing territorial scope of derogation concerned, it were to extend its effects to part of Turkish territory not explicitly named in notice of derogation.

Conclusion: derogation inapplicable *ratione loci* (unanimously).

B. Article 5 § 1 of the Convention

Applicants accepted Commission's conclusion that this provision had not been breached – no argument presented regarding complaint.

Conclusion: no violation (unanimously).

C. Article 5 § 3 of the Convention

Reference to case-law on effects of Article 5 on investigation of terrorist offences.

In present case, detention in police custody had lasted twelve or fourteen days – even supposing that activities of which applicants stood accused were linked to a terrorist threat, Court could not accept that it was necessary to detain them for such a lengthy period without judicial intervention.

Conclusion: violation (unanimously).

D. Article 5 § 4 of the Convention*1. Government's preliminary objection (non-exhaustion of domestic remedies)*

Objection not raised before Commission – estoppel.

Conclusion: objection dismissed (unanimously).

1. This summary by the registry does not bind the Court.

2. *Merits of the complaint*

Single judge at national security court who had ordered applicants' detention pending trial had not intervened until twelve or in some cases fourteen days after their arrest – such a lengthy period sat ill with the notion of “speedily”.

No example of any person detained in police custody having successfully invoked Article 19 § 8 of the Constitution or Article 5 § 4 of the Convention when applying to a judge for a ruling on lawfulness of his detention or for his release – uncertainty of remedy concerned in practice.

Conclusion: violation (unanimously).

E. Article 5 § 5 of the Convention

1. *Government's preliminary objection (non-exhaustion of domestic remedies)*

First limb of objection: not raised before Commission – estoppel.

Second limb: closely linked to merits of complaint – questions joined.

Conclusion: first limb dismissed; second joined to merits (unanimously).

2. *Merits of the complaint*

No example of any litigant who had obtained compensation referred to in Article 5 § 5 of Convention by relying on Article 19 of Constitution or section 1 of Law no. 466 – latter's provisions concerned conditions for compensation which had not obtained in present case – effective enjoyment of right guaranteed by Article 5 § 5 not ensured with sufficient degree of certainty.

Conclusion: second limb of preliminary objection dismissed after consideration together with merits; violation (unanimously).

II. ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage

Compensation awarded.

B. Costs and expenses

Assessed on equitable basis.

Conclusion: respondent State to pay applicants specified sums for non-pecuniary damage and costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

24.6.1982, Van Droogenbroeck v. Belgium; 22.5.1984, De Jong, Baljet and Van den Brink v. the Netherlands; 29.11.1988, Brogan and Others v. the United Kingdom; 22.2.1989, Ciulla v. Italy; 28.10.1994, Murray v. the United Kingdom; 8.6.1995, Yağcı and Sargin v. Turkey; 15.11.1996, Ceteroni v. Italy; 18.12.1996, Aksoy v. Turkey; 18.2.1997, Nideröst-Huber v. Switzerland

In the case of Sakık and Others v. Turkey¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr THÓR VILHJÁLMSSON,

Mr F. GÖLCÜKLÜ,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr B. WALSH,

Mr A.N. LOIZOU,

Mr J.M. MORENILLA,

Mr P. KÜRIS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 24 June and 20 October 1997,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 10 July 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in six applications (nos. 23878/94 to 23883/94) against the Republic of Turkey lodged with the Commission under Article 25 by six Turkish nationals, Mr Sırrı Sakık, Mr Ahmet Türk, Mr Mahmut Alınak, Mrs Leyla Zana, Mr Mehmet Hatip Dicle and Mr Orhan Doğan, on 11 March 1994.

Notes by the Registrar

1. The case is numbered 87/1996/706/898-903. The first number is the case’s position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case’s position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 of the Convention.

2. In reply to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them. On 1 April 1997 the President of the Chamber gave one of these, Mr Alataş, leave to address the Court in the Turkish language (Rule 27 § 3).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 7 August 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr L.-E. Pettiti, Mr B. Walsh, Mr A.N. Loizou, Mr J.M. Morenilla and Mr P. Kūris (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. The President of the Chamber, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' memorial on 12 March 1997, the Government's memorial on 14 March and the Government's observations on the application of Article 50 of the Convention on 14 April.

5. In accordance with the decision of the President of the Chamber, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 April 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr A. GÜNDÜZ, Professor of International Law,
University of Marmara,
Mrs D. AKÇAY,
Mr A. KAYA,
Miss M. GÜLŞEN,

*Agent,
Counsel,
Advisers;*

(b) *for the Commission*

Mr I. CABRAL BARRETO,

Delegate;

(c) *for the applicants*

Mr C. CHARRIÈRE-BOURNAZEL, *avocat*, of the Paris Bar,
Mr Y. ALATAŞ, *avukat* (lawyer), of the Ankara Bar,
Mr D. JACOBY, *avocat*, of the Paris Bar, *Counsel*,
Mr Ş. YILMAZ, *avukat* (lawyer), of the Diyarbakır Bar, *Adviser*.

The Court heard addresses by Mr Cabral Barreto, Mr Charrière-Bournazel, Mr Alataş, Mr Jacoby, Mr Gündüz and Mrs Akçay.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

A. Arrest and detention in police custody

6. The applicants are former members of the Turkish National Assembly who were elected at the general election of 20 October 1991. At that time they were members of the People's Labour Party (*Halkın Emeği Partisi*), which was founded in June 1990 but proscribed and dissolved by the Constitutional Court on 14 August 1993 on account of what were held to be separatist activities. By that date the applicants had joined the Democracy Party (*Demokrasi Partisi*), which had been set up in the meantime.

7. On 2 March 1994 the National Assembly lifted their parliamentary immunity on an application, first lodged in November 1992 and subsequently resubmitted on several occasions, by the public prosecutor attached to the Ankara National Security Court (*Ankara Devlet Güvenlik Mahkemesi Cumhuriyet savcısı* – “the public prosecutor”). He accused them of committing the offences defined in Article 125 of the Criminal Code (see paragraph 20 below), which were classified as terrorist crimes in the Prevention of Terrorism Act (Law no. 3713 – see paragraph 21 below) and thus came within the jurisdiction of the national security courts (see paragraph 22 below).

8. On the same day, as they were leaving the parliament building, Mr Dicle and Mr Doğan were arrested on the public prosecutor's orders and taken into police custody at the headquarters of the anti-terrorist section of the Ankara security police. On the following day their lawyers asked for their clients to be brought promptly before a judge and asked the public

prosecutor for permission to speak to them. The written authorisation issued by the public prosecutor for that purpose specified that the interview – to be conducted under supervision – was to concern preparation of the appeal the applicants were intending to lodge against the lifting of their parliamentary immunity.

9. The other four applicants had refused to leave the parliament precinct, but on 4 March they suffered the same fate as their two colleagues.

On that day the public prosecutor extended the six applicants' detention in police custody until 16 March 1994 on the ground that further investigations were needed; his decision was based on section 30 of Law no. 3842 governing procedure before the national security courts (see paragraph 23 below). While in police custody the applicants refused to make any statement.

10. On 11 March the lawyer acting for Mr Dicle and Mr Doğan, referring to his request of 3 March that they be brought promptly before a judge (see paragraph 8 above), made another application to the same effect, relying on Articles 5 and 6 of the Convention, *inter alia*.

11. On 21 March 1994 the Constitutional Court dismissed appeals lodged by the applicants against the lifting of their parliamentary immunity.

B. Detention pending trial

12. In the meantime, on 17 March 1994, a single judge of the National Security Court had issued an order for the MPs' detention pending trial, giving as the reasons the "character and nature" of the offence concerned and the "evidence obtained".

13. On appeal by the applicants, a bench of three judges of the same court upheld the above order on 22 March 1994, holding that it was necessary "on account of the classification and nature of the offences [concerned], the charges already preferred, the length of [the applicants'] detention and the fact that the case [was] still at the investigation stage".

14. On 12 April the applicants lodged a further application for release, which was dismissed by the National Security Court on 13 May on the ground that the case was "still at the investigation stage" and that to date there had been "no change in the detained MPs' favour".

C. Trial in the Ankara National Security Court

15. On 21 June 1994 the public prosecutor filed submissions accusing the applicants of separatism and undermining the integrity of the State, which are capital offences under Article 125 of the Criminal Code (see paragraphs 7 above and 20 below).

16. On 8 December 1994 the National Security Court delivered its judgment. Applying section 8 of the Prevention of Terrorism Act (Law no. 3713 – see paragraph 21 below), it sentenced Mr Sakık and Mr Alınak to three years and six months' imprisonment for separatist propaganda and Mr Türk, Mr Dicle, Mr Doğan and Mrs Zana to fifteen years' imprisonment for membership of an armed gang (Article 168 of the Criminal Code – see paragraph 20 below).

17. On appeal by the applicants and the public prosecutor, the Court of Cassation quashed Mr Türk's conviction on 26 October 1995 and ordered his release, on the ground that he had contravened section 8 of the Prevention of Terrorism Act (Law no. 3713) but not Article 168 of the Criminal Code. It upheld the other applicants' convictions.

II. RELEVANT DOMESTIC LAW

18. Article 19 of the Constitution provides:

“Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with the formalities and conditions prescribed by law:

...

The arrested or detained person must be brought before a judge within forty-eight hours at the latest or, in the case of offences committed by more than one person, within fifteen days ... These time-limits may be extended during a state of emergency ...

...

A person deprived of his liberty for whatever reason shall have the right to take proceedings before a judicial authority which shall give a speedy ruling on his case and order his immediate release if it finds that the deprivation of liberty was unlawful.

Compensation must be paid by the State for damage sustained by persons who have been victims of treatment contrary to the above provisions, as the law shall provide.”

19. Article 90 § 5 of the Constitution provides: “International treaties lawfully brought into force shall have the force of law ...”

20. The relevant provisions of the Criminal Code read as follows:

Article 125

“It shall be an offence, punishable by the death penalty, to commit any act aimed at subjecting the State or any part of the State to domination by a foreign State, diminishing the State's independence or removing part of the national territory from the State's control.”

Article 168

“Any person who, with the intention of committing the offences defined in Article 125 ..., forms an armed gang or organisation or takes leadership ... or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years’ imprisonment.

The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years’ imprisonment.”

21. Section 3 of the Prevention of Terrorism Act (Law no. 3713) classifies the offences defined in Articles 125 and 168 of the Criminal Code as terrorist crimes.

Before being amended on 27 October 1995, section 8 (1) of the Act provided:

“Written and oral propaganda, meetings, assemblies, and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of its people are forbidden, regardless of the methods or intentions behind such activities. Those conducting such activities shall be punished with a sentence of between two and five years’ imprisonment and a fine of between 50 million and 100 million liras ...”

22. Under section 9 of Law no. 2845 on procedure in the national security courts, only these courts can try cases involving the offences defined in Articles 125 and 168 of the Criminal Code.

23. At the material time section 30 of Law no. 3842 of 18 November 1992, amending the legislation on criminal procedure, provided that, with regard to offences within the jurisdiction of the national security courts (see paragraph 22 above), any arrested person had to be brought before a judge within forty-eight hours at the latest, or, in the case of offences committed by more than one person, within fifteen days. In provinces where a state of emergency had been declared, these time-limits could be extended to four days and thirty days respectively.

24. Section 1 of Law no. 466 on the payment of compensation to persons unlawfully arrested or detained provides:

“Compensation shall be paid by the State in respect of all damage sustained by persons

(1) who have been arrested, or detained under conditions or in circumstances incompatible with the Constitution or statute law;

(2) who have not been immediately informed of the reasons for their arrest or detention;

(3) who have not been brought before a judicial officer after being arrested or detained within the time-limit laid down by statute for that purpose;

(4) who have been deprived of their liberty without a court order after the statutory time-limit for being brought before a judicial officer has expired;

(5) whose close family have not been immediately informed of their arrest or detention;

(6) who, after being arrested or detained in accordance with the law, are not subsequently committed for trial ..., or are acquitted or discharged after standing trial; or

(7) who have been sentenced to a period of imprisonment shorter than the period spent in detention or ordered to pay a pecuniary penalty only.”

III. THE NOTICE OF DEROGATION OF 6 AUGUST 1990 AND ITS SUBSEQUENT AMENDMENTS

25. On 6 August 1990 the Permanent Representative of Turkey to the Council of Europe sent the Secretary General of the Council of Europe the following notice of derogation:

“1. The Republic of Turkey is exposed to threats to its national security in South East Anatolia which have steadily grown in scope and intensity over the last months so as to [amount] to a threat to the life of the nation in the meaning of Article 15 of the Convention.

During 1989, 136 civilians and 153 members of the security forces have been killed by acts of terrorists, acting partly out of foreign bases. Since the beginning of 1990 only, the numbers are 125 civilians and 96 members of the security forces.

2. The threat to national security is predominantly [occurring] in provinces of South East Anatolia and partly also in adjacent provinces.

3. Because of the intensity and variety of terrorist actions and in order to cope with such actions, the Government has not only to use its security forces but also take steps appropriate to cope with a campaign of harmful disinformation of the public, partly emerging from other parts of the Republic of Turkey or even from abroad and with abuses of trade-union rights.

4. To this end, the Government of Turkey, acting in conformity with Article 121 of the Turkish Constitution, has promulgated on May 10 1990 the decrees with force of law [nos.] 424 and 425. These decrees may in part result in derogating from rights enshrined in the following provisions of the European Convention [on] Human Rights and Fundamental Freedoms: Articles 5, 6, 8, 10, 11 and 13. A descriptive summary of the new measures is attached hereto ...”

The descriptive summary of the content of Legislative Decrees nos. 424 and 425 reads as follows:

“A. By virtue of the decrees having force of law [nos.] 424 and 425 on the state of emergency region, the state of emergency region governorship has been empowered with the following additional powers.

1. The Ministry of Interior, upon the proposal of the Governor of the state of emergency region can temporarily or permanently ban the publication (regardless of the location of the printing press), which is prone to cause a serious disruption in the public order of the region or excitement of the local people or to handicap the security forces in performing their duties by misinterpreting the regional activities. This also includes, if necessary, the power to order the closure of the printing press concerned.

2. The Governor of the state of emergency region can order persons who continuously violate the general security and public order, to settle at a place to be specified by the Ministry of Interior outside the state of emergency region for a period which shall not exceed the duration of the state of emergency. At their request, the persons concerned may receive financial aid from the Development and Support Fund. The particulars for this assistance shall be determined by the Ministry of Interior.

3. The Governor of the state of emergency region (or the delegated provincial Governor) can suspend (up to 3 months) or require prior permission for certain labor disputes related activities like strike and lockout.

4. The Governor can also ban, or take preventive measures against certain activities like destruction, looting, boycotting, slowing down of work, restricting the freedom of work and closing down of business.

5. The Governor of the state of emergency region can order the temporary or permanent evacuation, change of place, regrouping of villages, grazing fields and residential areas for reasons of public security.

6. The Governor of the state of emergency region can order the relevant public institutions in the state of emergency region to transfer permanently or temporarily to other positions their public officials who are deemed to be harmful to general security and public order, the concerned public official shall remain subject to the provisions of the special law on civil service applicable to him.

B. No legal claims of criminal, pecuniary or legal nature can be brought against, nor can any legal steps be taken with the judicial authority for this purpose in respect of any decision taken or any act performed by the Minister of Interior, the Governor of the emergency region and other governors, when exercising the power under the decree no. 424 having force of law.

C. No interim decision to suspend the execution of an administrative act can be taken during proceedings of an administrative suit which has been filed against the act(s) performed when exercising the power given by the law of emergency no. 2935 to the Minister of Interior, the Governor of the state of emergency region and the provincial governors.

D. The suit of nullity can not be filed against administrative acts performed by the Governor of the emergency region when exercising the power given to him under the decree having force of law no. 285.”

According to a note in the notice of derogation, “the threat to national security [was] predominantly occurring” in the provinces of Elazığ, Bingöl, Tunceli, Van, Diyarbakır, Mardin, Siirt, Hakkâri, Batman and Şırnak (see paragraph 28 below).

26. In a letter of 3 January 1991 the Permanent Representative of Turkey informed the Secretary General that Legislative Decree no. 424 had been replaced by Legislative Decree no. 430, promulgated on 16 December 1990. An appendix to the above letter, containing a descriptive summary of the decree, reads as follows:

“1. The powers of the Governor of the state of emergency under Decree with Force of Law no. 425 have been limited to the region where a state of emergency is in force. Thus, the adjacent provinces have been excluded from the competence of the Governor.

2. The special powers given to the Governor of the state of emergency by virtue of Decree with Force of Law no. 425 have been restricted to measures dealing with terrorist activities aiming at the destruction of fundamental rights and freedoms.

3. The powers of the Minister of Interior [to] ban any publication or order the closure of the printing press (regardless of the location) is restricted. According to the new provision, the Minister of Interior has at first to issue a warning to the owner or the publisher of the publication. If the owner or the publisher continues to print or distribute the controversial issue, then the Minister concerned may temporarily or permanently ban the publication and, if necessary, may also order the closure of the printing press for a maximum period of 10 days, which may, however, be extended to one month in case of repetition. No maximum period for closure of the printing press has been stipulated by the (abrogated) Decree no. 424 (Compare § A (1) of the Descriptive Summary attached to the Notice of Derogation of August 6, 1990).

4. The authority of the Governor of the state of emergency to order persons to settle at a specified place outside the state of emergency region has been restricted by virtue of the new Decree. The persons who are expelled from the state of emergency region are not obliged to settle in a specified place. Hence, they will be free to choose their residence out of the region except when they request financial aid. In this case they have to settle at a specified place (See § A (2) of previous Descriptive Summary).

5. Referring to the paragraphs A (3, 4, 5 and 6) of the Descriptive Summary of August 6, 1990 (which are related to strikes, lockout and some other activities of labor unions, evacuation and regrouping of villages, transfer of public officials to other posts or positions), it should be noted that the adjacent provinces have been excluded by virtue of the new decree.

6. As to paragraph 8 of the previous Descriptive Summary, a new clause has been included in the new Decree safeguarding the right to file an action against the administration (State) for loss or damages arising out of the performance of the acts taken under the emergency measures.”

27. On 12 May 1992 the Permanent Representative of Turkey wrote to the Secretary General in the following terms:

“As most of the measures described in the decrees which have the force of law nos. 425 and 430 that might result in derogating from rights guaranteed by Articles 5, 6, 8, 10, 11 and 13 of the Convention, are no longer being implemented, I hereby inform you that the Republic of Turkey limits henceforward the scope of its Notice of Derogation with respect to Article 5 of the Convention only. The derogation with respect to Articles 6, 8, 10, 11 and 13 of the Convention is no longer in effect; consequently, the corresponding reference to these Articles is hereby deleted from the said Notice of Derogation.”

28. On 6 April 1993 the Permanent Representative of Turkey informed the Secretary General that by legislative decrees of 9 March 1993, which had entered into force on 19 March, the state of emergency had been lifted in the province of Elazığ and proclaimed in the province of Bitlis.

PROCEEDINGS BEFORE THE COMMISSION

29. The applicants applied to the Commission on 11 March 1994. They complained:

(1) in respect of their detention in police custody, of its unlawfulness, of its excessive length, of the impossibility of taking proceedings by which its lawfulness could be decided, of the lack of a right to compensation for its excessive length (Article 5 §§ 1, 3, 4 and 5 of the Convention) and of the fact that they did not have the assistance of a lawyer while they were in police custody (Article 6 § 3 (c));

(2) in respect of the proceedings in the National Security Court, that they had not had a fair trial and that the court was not independent and impartial (Article 6 § 1);

(3) in respect of the Constitutional Court's rejection of their application to set aside the lifting of their parliamentary immunity, of the fact that they had not been informed of the reasons for this decision, having been served with the operative provisions only (Article 6 § 1); and

(4) of an infringement of their freedom of expression (Article 10).

30. On 25 May 1995 the Commission declared admissible the complaints relating to the lawfulness and length of the applicants' detention in police custody, the impossibility of securing review by a court and the lack of a right to compensation and declared the remainder of the applications (nos. 23878/94 to 23883/94) inadmissible. In its report of

23 May 1996 (Article 31), it expressed the unanimous opinion that there had been no breach of paragraph 1 of Article 5 but that there had been breaches of paragraphs 3, 4 and 5. The full text of the Commission's opinion is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

31. In their memorial the Government

“respectfully [asked] the Court, primarily, to declare that the Turkish derogation [was] applicable to the facts of the case and that, pursuant to that derogation, there [had] been no violation of Article 5 of the Convention; and in the alternative, to declare that the applicants [had] failed to exhaust all domestic remedies [in connection with] Article 5; to declare that there [had] been no violation of Article 5 §§ 1, 3, 4 and 5”.

32. The applicants asked the Court “to deliver a decision ... consistent with the Commission's conclusions” and claimed just satisfaction under Article 50 of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

33. The applicants complained of breaches of Article 5 §§ 1, 3, 4 and 5 of the Convention (see paragraphs 40, 41, 49 and 58 below), the relevant parts of which provide:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is available from the registry.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

The Government maintained that, as Turkey had exercised the right of derogation under Article 15 of the Convention (see paragraph 25 above), it had not breached these provisions. The Court must accordingly first determine whether the derogation concerned applies to the facts of the case.

A. Applicability of the derogation notified by Turkey under Article 15 of the Convention

34. Article 15 of the Convention provides:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogations from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

35. The applicants submitted that the derogation in question did not apply to the measures imposed on them. The Commission agreed.

36. The Court notes that Legislative Decrees nos. 424, 425 and 430, which are referred to in the derogation of 6 August 1990 and the letter of 3 January 1991, apply, according to the descriptive summary of their content, only to the region where a state of emergency has been proclaimed, which, according to the derogation, does not include the city of Ankara (see paragraphs 25 and 28 above). However, the applicants’ arrest and detention took place in Ankara on the orders first of the public prosecutor attached to the Ankara National Security Court and later of the judges of that court (see paragraphs 7–14 above).

37. The Government submitted that this was no bar to the derogation's applicability. The facts of the case constituted only the prolongation of a terrorist campaign being conducted from inside the area where the state of emergency had been proclaimed, in south-east Turkey. The terrorist threat was not confined to any particular part of Turkish territory. That had to be taken into account if the Turkish derogation was to be interpreted in the light of its object and purpose, namely to enable "normality for the purposes of the Convention" to be restored throughout the country as quickly as possible.

38. In its *Aksoy v. Turkey* judgment the Court has already noted the unquestionably serious problem of terrorism in south-east Turkey and the difficulties faced by the State in taking effective measures against it. It held in that connection that the particular extent and impact of Kurdish Workers' Party (PKK) activity in south-east Turkey had undoubtedly created, in the region concerned, a "public emergency threatening the life of the nation" (see the judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2281 and 2284, §§ 70 and 84).

39. It should be noted, however, that Article 15 authorises derogations from the obligations arising from the Convention only "to the extent strictly required by the exigencies of the situation".

In the present case the Court would be working against the object and purpose of that provision if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation. It follows that the derogation in question is inapplicable *ratione loci* to the facts of the case.

Consequently, it is not necessary to determine whether it satisfies the requirements of Article 15.

B. Article 5 § 1 of the Convention

40. Before the Commission the applicants maintained that their arrest had been in breach of Article 5 § 1 of the Convention. In their memorial to the Court, however, they accepted the Commission's conclusion that this provision had not been breached (see paragraph 30 above). Consequently, they presented no argument regarding this complaint. The Court likewise considers that no breach of Article 5 § 1 has been established.

C. Article 5 § 3 of the Convention

41. The applicants alleged that, contrary to Article 5 § 3 of the Convention, they had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power.

The Commission accepted this argument in substance.

42. The Government pleaded the nature and scale of the terrorist threat in Turkey and the particular difficulties encountered in taking action to ward off that threat, which was incomparably more serious and more imminent than the threat posed by other examples of terrorism in Europe.

In the instant case the public prosecutor had for some considerable time been in possession of information confirming the suspicions of collusion between the applicants and the PKK, but the evidence – twenty-two ring-binders’ full in all – still had to be obtained. That was why it had been necessary to hold the applicants in police custody. Moreover, if they had not chosen to remain silent, thus deliberately adding obstacles to those already encountered by the investigators, they might have been able to cut their detention short.

43. The applicants submitted that the conduct held against them, namely dissemination of what were deemed to be separatist views, did not constitute “terrorism”. Furthermore, since the authorities had originally applied for the lifting of their parliamentary immunity in November 1992, they must already have been in possession at that time of the evidence necessary to prosecute them.

44. The Court has already accepted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 145-B, p. 33, § 61, the *Murray v. the United Kingdom* judgment of 28 October 1994, Series A no. 300-A, p. 27, § 58, and the above-mentioned *Aksoy* judgment, p. 2282, § 78). This does not mean, however, that the investigating authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see, *mutatis mutandis*, the above-mentioned *Murray* judgment, p. 27, § 58).

What is at stake here is the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive is an essential feature of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, “one of the fundamental principles of a democratic society ...”, which is expressly referred to in the Preamble to the Convention” (see the above-mentioned *Brogan and Others* judgment, p. 32, § 58, and the above-mentioned *Aksoy* judgment, p. 2282, § 76).

45. The Court notes that the applicants' detention in police custody lasted twelve days in the case of Mr Sakık, Mr Türk, Mr Alınak and Mrs Zana, and fourteen days in the case of Mr Dicle and Mr Doğan.

It recalls that in the Brogan case it held that detention in police custody which had lasted four days and six hours without judicial control fell outside the strict constraints as to time laid down by Article 5 § 3, even though its purpose was to protect the community as a whole against terrorism (see the above-mentioned Brogan and Others judgment, p. 33, § 62).

Even supposing that the activities of which the applicants stood accused were linked to a terrorist threat, the Court cannot accept that it was necessary to detain them for twelve or fourteen days without judicial intervention.

46. Accordingly, there has been a breach of Article 5 § 3.

D. Article 5 § 4 of the Convention

1. The Government's preliminary objection

47. The Government raised a preliminary objection on the ground of non-exhaustion of domestic remedies. They contended that the applicants had failed to invoke in the national courts, in addition to Article 19 § 8 of the Constitution (see paragraph 18 above), Article 5 § 4 of the Convention itself, which, pursuant to Article 90 § 5 of the Constitution (see paragraph 19 above), has the force of law in Turkey.

48. The Court notes that this preliminary objection was not raised before the Commission. It is therefore inadmissible on grounds of estoppel (see, among other authorities, the Ceteroni v. Italy judgment of 15 November 1996, Reports 1996-V, pp. 1755–56, § 19).

2. Merits of the complaint

49. The applicants complained that they had not been able to take proceedings to have the lawfulness of the public prosecutor's decisions ordering their detention in police custody decided by a judge. The Commission accepted this argument.

50. The Government submitted that the review required by Article 5 § 4 of the Convention was carried out by the single judge who ordered the applicants' detention pending trial (see paragraph 12 above).

51. The Court notes that, irrespective of whether, when ordering the applicants' detention pending trial, the single judge also ruled on the lawfulness of their detention in police custody, that judge did not intervene until the end of the latter, that is to say twelve days, or fourteen days in some cases, after their arrest. Having regard to the conclusion it reached

with regard to Article 5 § 3 (see paragraph 46 above), the Court considers that such a lengthy period sits ill with the notion of “speedily” (see, *mutatis mutandis*, the Van Droogenbroeck v. Belgium judgment of 24 June 1982, Series A no. 50, p. 29, § 53).

52. The Government further maintained that Article 19 § 8 of the Constitution (see paragraph 18 above) provided a remedy which was also available before national security courts. Its wording was almost identical to that of Article 5 § 4 of the Convention, which was itself directly applicable in Turkish law, pursuant to Article 90 § 5 of the Constitution (see paragraph 19 above).

53. The Court reiterates that the existence of a remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness required for the purposes of Article 5 § 4 (see, among other authorities, *mutatis mutandis*, the above-mentioned Van Droogenbroeck judgment, p. 30, § 54, the De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, p. 19, § 39, and the Yağcı and Sargin v. Turkey judgment of 8 June 1995, Series A no. 319-A, p. 17, § 42).

However, the file supplied to the Court contains no example of any person detained in police custody having successfully invoked Article 19 § 8 of the Constitution or Article 5 § 4 of the Convention when applying to a judge for a ruling on the lawfulness of his detention or for his release. The Court does not consider itself to be required to determine this question of Turkish law. However, the lack of precedents indicates the uncertainty of this remedy in practice (see, *mutatis mutandis*, the above-mentioned Van Droogenbroeck judgment, p. 31, § 55, and the above-mentioned De Jong, Baljet and Van den Brink judgment, p. 19, § 39).

54. In conclusion, there has been a breach of Article 5 § 4.

E. Article 5 § 5 of the Convention

1. The Government's preliminary objection

55. The Government raised a preliminary objection in which they pleaded non-exhaustion of domestic remedies on two grounds. Firstly, the applicants had omitted to rely in the domestic courts on Articles 19 § 9 and 90 § 5 of the Constitution read in conjunction with each other (see paragraphs 18 and 19 above). Secondly, they should have sought a remedy under Law no. 466 of 7 May 1964, which guarantees the possibility of an award of damages to any person who has been unlawfully deprived of his liberty, or who, after being lawfully detained, is not subsequently committed for trial or is acquitted or discharged after standing trial (see paragraph 24 above).

56. The Court notes that the first limb of this preliminary objection was not raised before the Commission. It is therefore inadmissible on grounds of estoppel (see paragraph 48 above).

57. It also considers that the second limb is closely linked to consideration of the complaint under Article 5 § 5. It therefore joins it to the merits (see paragraphs 60 and 61 below).

2. *Merits of the complaint*

58. Lastly, the applicants alleged that, in breach of Article 5 § 5, under Turkish law it was not possible for them to claim compensation for a violation of Article 5 in the domestic courts.

59. The Government asserted that this would indeed have been possible if there had been any such violation, which was not the case. The applicants could have relied on the last paragraph of Article 19 of the Constitution, whose wording had been modelled on Article 5 § 5 of the Convention, which was itself directly applicable in the Turkish legal system, pursuant to Article 90 § 5 of the Constitution (see paragraph 19 above). Furthermore, they could have relied, as a *lex specialis*, on section 1 of Law no. 466 on the payment of compensation to persons unlawfully arrested or detained (see paragraph 24 above). As they had not availed themselves of either of these possibilities, the applicants were not entitled to complain of a breach of paragraph 5.

60. As in connection with Article 5 § 4 (see paragraph 53 above), the Court notes that there is no example in the case file of any litigant obtaining the compensation referred to in Article 5 § 5 by relying on one of the provisions mentioned by the Government.

With particular reference to section 1 of Law no. 466, the Court notes, like the Commission and the applicants, that with the exception of the situation – which did not obtain in the instant case – where a person is not committed for trial, or is acquitted or discharged after standing trial (subsection 6), all the cases in which compensation is payable under the provision concerned require the deprivation of liberty to have been unlawful. But the detention in issue was in accordance with Turkish law, as the Government conceded.

In conclusion, effective enjoyment of the right guaranteed by Article 5 § 5 of the Convention is not ensured with a sufficient degree of certainty (see, *mutatis mutandis*, the Ciulla v. Italy judgment of 22 February 1989, Series A no. 148, p. 18, § 44).

61. Consequently, the Court dismisses the second limb of the Government's preliminary objection and concludes that there has been a breach of Article 5 § 5.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

62. Under Article 50 of the Convention:

“If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Non-pecuniary damage

63. The applicants claimed compensation for the non-pecuniary damage resulting from the deprivation of their liberty, which, they asserted, had been aggravated by the damage to their “reputations as members of parliament”. They each claimed 600,000 French francs (FRF) for prejudice suffered in their “private capacity” and the same amount for “damage to their reputations as members of parliament”.

64. The Government submitted that, if the Court were to find a violation, the judgment would in itself constitute sufficient just satisfaction for the purposes of Article 50.

They argued that the applicants’ claims were based on concepts which had nothing to do with the Court’s case-law and were neither justified nor founded, since there was no proof of any causal connection between the length of their detention in police custody and the non-pecuniary damage they had alleged. If there had been any damage to the applicants’ “reputations as members of parliament”, this had been caused not by their detention in police custody but by the lifting of their parliamentary immunity by the Turkish National Assembly.

65. The Delegate of the Commission submitted that compensation should be awarded, but considered the sum claimed excessive.

66. The Court notes that the applicants were detained in police custody for twelve days (Mr Sakık, Mr Türk, Mr Alınak and Mrs Zana) or fourteen days (Mr Dicle and Mr Doğan) without judicial intervention. It is in no doubt that the circumstances in which they were deprived of their liberty must have caused them non-pecuniary damage for which the domestic courts have not awarded them any compensation.

Taking into account the various aspects of the case and making an assessment on an equitable basis, as required by Article 50, the Court awards FRF 25,000 each to Mr Sakık, Mr Türk, Mr Alınak and Mrs Zana and FRF 30,000 each to Mr Dicle and Mr Doğan. These sums are to be converted into Turkish liras at the rate applicable on the date of settlement.

B. Costs and expenses

67. In respect of their costs and expenses for representation before the Turkish authorities and later before the Convention institutions, the applicants claimed FRF 344,546.

68. The Government considered that sum exorbitant and unjustified, in particular because it included the cost of numerous group journeys between Paris and Ankara and was based on an hourly rate which bore no comparison with the normal rate in Turkey.

69. The Delegate of the Commission left the matter to the Court's discretion.

70. Making an assessment on an equitable basis and according to the criteria laid down in its case-law (see, among other authorities, the *Nideröst-Huber v. Switzerland* judgment of 18 February 1997, Reports 1997-I, p. 110, § 40), the Court awards the applicants FRF 120,000 under this head.

C. Default interest

71. The Court deems it appropriate to adopt the statutory rate applicable in France on the date of adoption of the present judgment, that is 3.87% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that the derogation made by Turkey under Article 15 of the Convention is not applicable in the case;
2. *Holds* that there has been no breach of Article 5 § 1 of the Convention;
3. *Holds* that there has been a breach of Article 5 § 3 of the Convention;
4. *Dismisses* the Government's preliminary objection relating to Article 5 § 4 of the Convention;
5. *Holds* that there has been a breach of Article 5 § 4 of the Convention;
6. *Dismisses* both limbs of the Government's preliminary objection relating to Article 5 § 5 of the Convention, the second of which it joined to and considered with the merits;
7. *Holds* that there has been a breach of Article 5 § 5 of the Convention;
8. *Holds*
 - (a) that the respondent State is to pay, within three months, the following sums:

(i) for non-pecuniary damage, 25,000 (twenty-five thousand) French francs each to Mr Sakık, Mr Türk, Mr Alınak and Mrs Zana and 30,000 (thirty thousand) French francs each to Mr Dicle and Mr Doğan, which sums are to be converted into Turkish liras at the rate applicable on the date of settlement;

(ii) for costs and expenses, 120,000 (one hundred and twenty thousand) French francs to the applicants;

(b) that simple interest at an annual rate of 3.87% shall be payable on these amounts from the expiry of the above-mentioned three months until settlement;

9. *Dismisses* the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 November 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar