



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

CASE OF DEMİR AND OTHERS v. TURKEY

(71/1997/855/1062–1064)

JUDGMENT

STRASBOURG

23 September 1998

In the case of Demir 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 THÓR VILHJÁLMSSON, *President*,

Mr F. GÖLCÜKLÜ,

Mr F. MATSCHER,

Mr J. DE MEYER,

Mrs E. PALM,

Mr A.N. LOIZOU,

Mr J.M. MORENILLA,

Mr A.B. BAKA,

Mr K. JUNGWIERT,

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

Having deliberated in private on 19 May and 26 August 1998,

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 11 July 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in three applications (nos. 21380/93, 21381/93 and 21383/93) against the Republic of Turkey lodged with the Commission under Article 25 by three Turkish nationals, Mr Hüseyin Demir, Mr Faik Kaplan and Mr Şükrü Süsin, on 12 February 1993.

Notes by the Registrar

1. The case is numbered 71/1997/855/1062-1064. 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 § 3 of the Convention.

2. In response 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 Mr Hasip Kaplan, of the Istanbul Bar, as the lawyer who would represent them (Rule 30).

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 then Vice-President of the Court (Rule 21 § 4 (b)). On 27 August 1997, 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 B. Walsh, Mr J. De Meyer, Mr A.N. Loizou, Mr J.M. Morenilla, Mr A.B. Baka and Mr K. Jungwiert (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicants' lawyer and Mrs M. Hion, the Delegate of the Commission, on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the orders made in consequence on 12 September 1997 and 20 January, 11 February and 10 March 1998, the Registrar received the applicants' and the Government's memorials on 16 February and 6 March 1998 respectively and their replies on 26 and 20 March respectively. On 5 May 1998 the Delegate of the Commission submitted written observations on these memorials.

5. In the meantime, Mr F. Matscher, substitute judge, had replaced Mr Walsh, who had died on 9 March 1998. Subsequently Mr Thór Vilhjálmsson, who had been elected Vice-President of the Court, replaced, as President of the Chamber, Mr Bernhardt, who had been elected President of the Court, and Mrs E. Palm was called upon to sit as a full member of the Chamber (Rules 21 § 6 and 24 § 1).

6. On 19 May 1998 the Chamber decided to dispense with a hearing in the case, having satisfied itself that the conditions for this derogation from its usual procedure had been met (Rules 26 and 38).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, Mr Demir, is a businessman who was born in 1950. The second applicant, Mr Süsin, a councillor for the Yenimahalle ward of İdil District Council, was born in 1958. They were respectively the chairman and former secretary of the İdil branch of the People's Social Democratic Party (SHP).

Mr Kaplan, who was born in 1973, was a correspondent of the daily newspaper *Hürriyet* and a member of the executive committee of the İdil branch of the People's Republican Party (CHP).

At the material time the applicants all lived and worked in İdil, a district in the province of Şırnak, which is one of those that since 1987 has been subject to the state of emergency regime proclaimed in south-eastern Anatolia.

8. In January and February 1993 about thirty people, including the applicants, were arrested in İdil on the orders of the public prosecutor attached to the Diyarbakır National Security Court ("the public prosecutor", "the National Security Court").

9. The facts concerning the applicants' detention are disputed.

Mr Demir asserted that he had been arrested by the anti-terrorist branch of the İdil security police ("the security police") and then placed in police custody on 22 January 1993; Mr Kaplan and Mr Süsin maintained that they had suffered the same fate, but on 28 January.

According to the Government, Mr Demir and Mr Süsin were placed in police custody on 26 January 1993 and Mr Kaplan on 30 January.

10. On 27 January 1993 the security police sent Mr Demir and Mr Süsin to the İdil forensic medicine centre to be examined in order to ascertain whether their bodies showed the marks of blows or violence. The medical reports drawn up on the same day concluded that there were no such marks.

On 30 January Mr Kaplan in turn was examined by doctors of the forensic medicine centre, who drew up a report in which they reached the same conclusion.

11. On 12 February 1993 the applicants' lawyer lodged a complaint with the İdil prosecuting authorities against Mr N. Yılmaz, the head of the security police. Relying on Article 5 § 3 of the Convention and the Court's relevant case-law, he complained of the length of time his clients had spent in police custody and asked for charges to be brought against those responsible.

12. Mr Kaplan, on 15 February 1993, and Mr Demir and Mr Süsin on 18 February were brought before the single judge of the İdil Criminal Court, who ordered them to be placed in pre-trial detention.

Before appearing in court, the applicants were re-examined by the forensic medicine centre at the request of the security police. The medical reports drawn up as a result did not mention any marks on their bodies which might have been caused by an assault.

13. The applicants' lawyer was subsequently sent a copy of a decision of 2 April 1993 in which the Criminal Cases Department of the Ministry of Justice informed him that his complaint of 12 February had been dismissed.

14. On 11 June 1993 the public prosecutor filed submissions with the National Security Court against thirty-five defendants, including the applicants, whom he accused of being active members of an illegal organisation, the PKK (Workers' Party of Kurdistan), seeking application of Article 168 § 2 of the Criminal Code (see paragraph 19 below) and section 5 of the Prevention of Terrorism Act (Law no. 3713) (see paragraph 20 below).

As set out by the public prosecutor, the offences of which the applicants were accused may be summarised as follows.

After joining the PKK in 1988 Mr Demir had maintained regular contacts and planned a number of operations with the PKK militant in charge of the İdil sector; in early 1990 he had been appointed head of the PKK's Yenimahalle committee at a secret meeting held at his home; following the killing of a Mr Z. in the Midyat district he had invited several people to gather for the funeral, at which he had shouted slogans and urged the other mourners to do the same; he had also shouted separatist slogans at an illegal demonstration that had taken place after the death of a Mr A., a PKK militant; on 21 March 1992 he had incited the people to rebel; a few months later he had called on shopkeepers to close their shops in protest against the Turkish army; lastly, he had on numerous occasions harboured people who wished to join the PKK.

Mr Süsin had attended a number of illegal meetings and demonstrations; at the end of the meeting held at the home of Mr Demir he had been made a member of the above-mentioned PKK committee; in 1991 he had harboured six people at his home and installed seven more in neighbouring houses while they were waiting to join the PKK; in addition, he had collected money to finance that organisation's activities.

Mr Kaplan had taken part – about a year before his arrest – in an unauthorised shop-closing demonstration; six months earlier he had made photocopies of two PKK leaflets; in addition, he had shouted separatist slogans at two illegal demonstrations that had been held in İdil on 4 and 19 March 1992.

15. On 7 July 1993 the applicants appeared before the National Security Court. Mr Demir and Mr Süsin retracted the confessions they had made at the security police offices, asserting that these had been extracted from them by duress. Mr Kaplan maintained that he had acted under the fear of reprisals by the PKK.

Mr Kaplan was granted conditional release on the same day and the other two applicants after the hearing on 3 February 1994.

16. The National Security Court gave judgment on 14 November 1996. Applying Article 168 § 2 of the Criminal Code, it sentenced Mr Demir and Mr Süsin to twelve years and six months' imprisonment for membership of an armed gang; it sentenced Mr Kaplan, pursuant to Article 169 of the same Code (see paragraph 19 below), to three years and nine months' imprisonment for lending assistance to an armed gang and harbouring known criminals.

17. The applicants appealed to the Court of Cassation, which, in a judgment of 2 March 1998, upheld the impugned judgment.

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

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

Article 168

“Any person who, with the intention of committing the offences defined in Articles ..., 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.”

Article 169

“Any person who, knowing that such an armed gang or organisation is illegal, assists it, harbours its members, provides it with food, weapons and ammunition or clothes or facilitates its operations in any manner whatsoever shall be sentenced to not less than three and not more than five years’ imprisonment...”

20. Under section 3 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), the offence defined in Article 168 of the Criminal Code is classified as a “terrorist act”. Under section 4, the offence defined in Article 169 of the same Code is classified in the category of “acts committed to further the purposes of terrorism”.

Pursuant to section 5 of Law no. 3713, penalties laid down in the Criminal Code as punishment for the offences defined in sections 3 and 4 of the Act are increased by one half.

21. Under section 9 (a) of Law no. 2845 on procedure in the National Security Courts, only these courts can try cases involving the offences defined in Articles 168 and 169 of the Criminal Code.

22. At the material time, section 30 of Law no. 3842 of 18 November 1992 provided that, with regard to offences within the jurisdiction of the National Security Courts – including those mentioned in paragraph 20 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.

23. Section 1 of Law no. 466 on the payment of compensation to persons 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

24. 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, annexed to this notice, 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 labour disputes related activities like strike and lock-out.

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.

25. 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, lock-out and some other activities of labour 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.”

26. 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.”

PROCEEDINGS BEFORE THE COMMISSION

27. The applicants applied to the Commission on 12 February 1993, complaining that they had undergone detention in police custody whose length was incompatible with Article 5 § 3 of the Convention.

28. The Commission declared the applications (nos. 21380/93, 21381/93 and 21383/93) admissible, and ordered them to be joined, on 2 March 1995. In its report of 29 May 1997 (Article 31), it expressed the unanimous opinion that there had been a violation of the provision relied on. The full text of the Commission’s opinion is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

29. The applicants asked the Court to hold that their detention in police custody had breached Article 5 § 3 of the Convention and to award them just satisfaction under Article 50.

30. The Government, for their part

“respectfully [requested] the Court, as their principal submission, to declare that, in view of the particular circumstances surrounding the present case, application of the Turkish derogation was not disproportionate; in the alternative, to declare that not all the pleas provided for in Turkish law were submitted to the domestic courts and ... to declare that there [had] been no violation of the Convention”.

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* 1998), but a copy of the Commission’s report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

31. The applicants complained of the excessive length of their detention in police custody and alleged a violation of Article 5, 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;

...

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.”

The Commission accepted this argument, whereas the Government contested it.

A. The Government's preliminary objection

32. The Government raised a preliminary objection in two limbs pleading non-exhaustion of domestic remedies. The applicants were at fault because in the domestic courts they had not invoked Article 19 § 8 of the Constitution, whose wording was based on Article 5 § 4 of the Convention. It would also have been possible for the applicants to apply for compensation using the procedure laid down in Law no. 466 for those who had been unlawfully deprived of their liberty or, having been detained in accordance with a procedure prescribed by law, had been acquitted, among other possible outcomes.

33. The applicants maintained that they had exhausted domestic remedies. They referred to the complaint lodged by their lawyer with the İdil prosecuting authorities on 12 February 1993, criticising the length of

their detention in police custody. That complaint had been fruitless, because the national authorities had found that the measures in issue had been adopted in accordance with Turkish legislation.

34. The Commission found that in the present case the length of the applicants' detention in police custody had not exceeded the limit prescribed by law, so that the applicants could not successfully challenge it and therefore did not have any remedy within the meaning of Article 26 of the Convention available to them. In addition, in her written observations to the Court, the Delegate of the Commission submitted that the legal procedures mentioned by the Government – though without any specific details about their scope or effectiveness – could not be considered to ensure sufficient protection against abuses by the authorities during such a lengthy period of detention.

35. The Court notes that the first limb of the Government's preliminary objection, relating to Article 19 § 8 of the Constitution (see paragraph 18 above), was not raised before the Commission and that the Government are accordingly estopped from relying on it (see, among other authorities, the *Sakık and Others v. Turkey* judgment of 26 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2624 and 2626, §§ 48 and 56).

36. As to the second limb, relating to section 1 of Law no. 466 (see paragraph 23 above), the Court notes that the provision concerned contemplates compensation for unlawful deprivation of liberty – a situation which did not obtain in the present case (see paragraph 22 above) – and compensation paid to persons who have been lawfully detained but who are subsequently not committed for trial, or are acquitted or discharged after standing trial (see the *Sakık and Others* judgment cited above, p. 2626, § 60). The Court observes that the latter case is not relevant either, since the applicants' conviction was upheld at last instance by the Court of Cassation on 2 March 1998 (see paragraph 17 above).

37. In any event, the Court notes that the applicants complained of the excessive length of their detention in police custody, not that they had no legal remedies whereby they could obtain compensation for detention (see paragraph 31 above). The applicants' complaint therefore goes to Article 5 § 3 of the Convention, whereas the remedy mentioned by the Government concerns Article 5 § 5 only. It follows that this limb of the preliminary objection is without foundation (see, *mutatis mutandis*, the *Yağcı and Sargin v. Turkey* judgment of 8 June 1995, Series A no. 319-A, p. 17, § 44).

38. The Court accordingly dismisses the preliminary objection.

B. Merits of the complaint

1. General considerations

39. The Court observes that in the *Brogan and Others v. the United Kingdom* case it held that a period of detention in police custody of four days and six hours without judicial scrutiny fell outside the strict constraints as to time permitted by Article 5 § 3, even though it was designed to protect the community as a whole from terrorism (judgment of 29 November 1988, Series A no. 145-B, p. 33, § 62).

40. In the present case Mr Demir and Mr Süsin were held in police custody for at least twenty-three days and Mr Kaplan for at least sixteen days, during which time none of them appeared before a judge or other judicial officer. Having regard to the above-mentioned judgment, the Court can only conclude that the periods of detention concerned failed to satisfy the requirement of promptness laid down by Article 5 § 3.

41. Admittedly, the Court has already accepted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see the previously cited *Brogan and Others* judgment, p. 33, § 61; the *Murray v. the United Kingdom* judgment of 28 October 1994, Series A no. 300-A, p. 27, § 58; and the *Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-VI, p. 2282, § 78). This does not mean, however, that the authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence (see, *mutatis mutandis*, the *Murray* judgment cited above, p. 27, § 58).

Similarly, the requirements of the investigation cannot absolve the authorities from the obligation to bring any person arrested in accordance with Article 5 § 1 (c) "promptly" before a judge, as required by Article 5 § 3. Where necessary, it is for the authorities to develop forms of judicial control which are adapted to the circumstances but compatible with the Convention (see, *mutatis mutandis*, the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, pp. 1866 and 1869, §§ 131 and 144).

2. Validity of the derogation notified by Turkey under Article 15

42. The Government submitted that, in any event, it could not be argued that there had been a breach of Article 5 § 3 on account of the derogation notified by Turkey under Article 15 of the Convention, which 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.”

43. The Court recalls that “it falls to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation” (see the *Brannigan and McBride v. the United Kingdom* judgment of 26 May 1993, Series A no. 258-B, pp. 49–50, § 43, and the *Aksoy* judgment cited above, p. 2280, § 68).

(a) Existence of a public emergency threatening the life of the nation

44. The applicants argued that at the material time there was no real public emergency which obliged the national authorities to detain them for so long; even supposing that there was, nevertheless, such an emergency, it was essentially due to the State’s shortcomings and the oppressive conduct of its agents operating in the region.

The Commission accepted the Government’s view that there was an exceptional situation threatening the life of the nation in south-east Turkey.

45. In its Aksoy judgment, cited above, the Court noted: “The particular extent and impact of PKK terrorist activity in south-east Turkey has undoubtedly created, in the region concerned, a ‘public emergency threatening the life of the nation’” (loc. cit., p. 2281, § 70). It does not discern any feature which would justify it in distinguishing, in this respect, the Aksoy case from the present case. The events in which the two cases originated took place, to within a few months, during the same period, and there is nothing to show that the situation has changed since then.

(b) Whether the measures were strictly required by the exigencies of the situation

(i) The arguments of the participants in the proceedings

(α) The applicants

46. The applicants submitted that the deprivation of their liberty was not one of the measures made indispensable by the situation obtaining in the region where the state of emergency had been declared, and that it was in breach of the Government’s obligations under international law. The Government wrongly sought to prove their membership of the PKK; the police had found no evidence of their participation in any armed action. Even had the accusation that they belonged to the PKK been well-founded, it would not have justified the excessive periods of detention in police custody that they had undergone, without any judicial scrutiny and deprived of all contact with a lawyer or their families.

The prevention of terrorism was, admittedly, the State’s *raison d’être* and main task. However, with hundreds of thousands of security-forces personnel deployed in south-east Turkey, the State was obliged to act in such a way as to prevent illegal acts and violence without, however, indiscriminately curbing the citizens’ lawful activities.

(β) The Government

47. As their principal submission, the Government argued that the Turkish derogation had to be interpreted in the light of its object and purpose, namely to enable the State to return to normality for Convention purposes, and accordingly to rescind the derogation, as quickly as possible. By derogating from its obligations under Article 5 of the Convention, Turkey had sought “on the one hand, to strike a proper balance between the terrorist threat to the integrity of the State and the rights and freedoms of individuals who had become innocent hostages and, on the other, to respect the rights and freedoms of individuals in compliance with its commitments under the Convention”.

Observing in that connection that the Court had already acknowledged in the past the special features and difficulties of investigating terrorist offences, the Government drew attention to the extremely serious nature of the offences in question. They argued that, although the present case bore some resemblance to the Aksoy case and, in part, to the Sakik and Others case, it warranted an entirely separate examination, in view of the special features of the events which had given rise to it.

The Government explained that the applicants had been taken into police custody in connection with an investigation conducted by the prosecuting authorities in accordance with the law and had appeared before the judge “as soon as” the investigation was completed. This investigation had been extremely difficult, since it concerned some thirty-five persons accused of belonging to the PKK. Accordingly, “it [had been] necessary to carry out a more thorough and careful police inquiry in order to gather all the evidence and assess it with a view to establishing the facts and identifying the persons who participated”. Moreover, “in some cases, it [was] difficult to identify the PKK members who [had] taken part in terrorist activities because they [used] code-names when carrying them out”.

The *ratio legis* of the statutory provisions governing police custody reflected, *inter alia*, the exceptional complexity of judicial investigations concerning terrorist networks. It was therefore “natural that there should be longer periods of police custody to allow the Turkish authorities to complete the investigation of the offences concerned and thus be sure that they [could] bring those responsible for terrorist acts before the courts”. On that point the Government emphasised that, unlike the position in the Brogan and Others case, in the present case the suspicions which had led to the applicants being detained in police custody had been confirmed and – as the judgment of 14 November 1996 proved (see paragraph 16 above) – the accusations made against them had turned out to be well-founded.

Moreover, Turkey had accompanied its derogation – already limited to the strict minimum – with fundamental guarantees. During periods of detention in police custody, whose maximum duration was fixed by law, “any practice of torture, ill-treatment, the administration of medicines ..., misleading questioning, physical assaults, alteration of the will by physical or psychological intervention and promises of illicit advantages” were prohibited and punishable, and any confessions extracted by such means could not be used in evidence by the prosecution. In the present case the fact that the applicants had been held incommunicado had been counterbalanced by the fact that, despite the seriousness of the suspicions concerning them, they had enjoyed protection against arbitrary treatment and detention while they were in police custody in that they had been examined by a doctor and had had the opportunity to challenge the lawfulness of their detention through their lawyer.

(γ) The Commission

48. The Commission agreed to a large extent with the applicants' arguments. Analysing in particular the Court's findings in the previously cited Brannigan and McBride and Aksoy judgments, it concluded that in the absence of effective guarantees against abuses of authority the applicants' detention had exceeded the margin of appreciation left to the Government under Article 15 of the Convention. In her written observations to the Court the Delegate of the Commission emphasised in particular that the medical examination of the applicants could not in itself be regarded as a sufficient guarantee against such abuse.

(ii) The Court's assessment

49. The Court observes that, in seeking to justify the applicants' detention, the Government referred to the particular requirements of police investigations in the region, which was subject to a state of emergency and locked in a trial of strength with the PKK, and to certain specific aspects of the procedure at issue which distinguished the present case from the above-mentioned Aksoy case. In addition, the Government emphasised that during their detention in police custody the applicants had enjoyed certain legal safeguards.

50. In the Aksoy case the Court, in assessing the validity of the Turkish derogation, took into account in particular the unquestionably serious problem of terrorism in south-east Turkey and the difficulties faced by the State in taking effective measures. Nevertheless, in that case it was not persuaded that the situation necessitated holding Mr Aksoy on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer (judgment cited above, pp. 2282 and 2284, §§ 78 and 84). It noted in particular that the Government had not adduced any detailed reasons as to why the fight against terrorism in south-east Turkey rendered any judicial intervention impracticable (*ibid.*, § 78).

51. In the present case the Government relied on certain aspects of the proceedings against the applicants. They emphasised that they had been taken into police custody in connection with an investigation concerning thirty-five suspects which was conducted in accordance with the relevant legislation. They had appeared in court as soon as the investigation had been completed. The Government submitted that it had been "necessary to carry out a more thorough and careful police inquiry in order to gather all the evidence and assess it with a view to establishing the facts and identifying the persons who participated"; it was "natural that there should be longer periods of police custody to allow the Turkish authorities to complete the investigation of the offences concerned and thus be sure that they [could] bring those responsible for terrorist acts before the courts" (see paragraph 47 above).

52. In the Court's opinion, the mere fact that the detention concerned was in accordance with domestic law – a fact that has not been disputed (see paragraph 22 above) – cannot justify under Article 15 measures derogating from Article 5 § 3. That is also true of the fact that an inquiry or investigation has not been completed, since Article 5 § 3 is intended to apply precisely while inquiries or investigations are in progress; the fact that they have not been completed is therefore not an argument for derogating from it.

As to the Government's assertions about the "thorough" and "careful" nature of the police investigation that had to be conducted, they do not provide an answer to the central question at issue, namely for what precise reasons relating to the actual facts of the present case would judicial scrutiny of the applicants' detention have prejudiced the progress of the investigation. In respect of such lengthy periods of detention in police custody it is not sufficient to refer in a general way to the difficulties caused by terrorism and the number of people involved in the inquiries.

53. The Government further argued that in the present case the suspicions which had prompted the applicants' arrest had been confirmed, as they had been found guilty as charged and had been convicted of a "terrorist" offence (see paragraphs 16, 20 and 47 above).

In that connection the Court reiterates that the eventual conviction of a suspect can at the most serve to confirm that the suspicions which led to his arrest (Article 5 § 1 (c)) were well-founded, but is not indispensable (see, for example, the previously cited *Murray* judgment, p. 30, § 67). On the other hand, it has no bearing on the question whether there was a situation which necessitated the detention of suspects incommunicado for such lengthy periods, as their conviction does not, as such, give any indication of the circumstances surrounding both the deprivation of liberty and the investigation in issue, any more than it can remove after the event the risks of arbitrary treatment which Article 5 § 3 is intended to prevent. Nor, consequently, can the conviction of a suspect justify, under Article 15, the periods of detention in police custody imposed in the present case.

54. Lastly, with regard to legal safeguards and, in particular, the general prohibition of ill-treatment of prisoners which, according to the Government, protected the applicants while they were in police custody, the Court observes that the applicants' legal situation was identical to the one which obtained in the *Aksoy* case (see the previously cited judgment, p. 2279, § 64).

55. In the *Aksoy* judgment the Court noted that the applicant had not enjoyed sufficient safeguards against arbitrary conduct and incommunicado detention, holding: "the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a

court to test the legality of the detention meant that he was left completely at the mercy of those holding him” (see the previously cited judgment, p. 2283, § 83).

56. On this point also, the present case hardly differs from the Aksoy case. The Government pointed out, however, that Mr Demir, Mr Süsin and Mr Kaplan were each examined twice by a forensic medicine centre (see paragraphs 10 and 12 above) and that the applicants’ lawyer had been able to lodge a complaint against the head of the security police, who had ordered their detention (see paragraph 11 above). The Court finds these arguments unpersuasive.

Firstly, according to the instructions sent by the security police to the forensic medicine centre (see paragraphs 10 and 12 above), the centre’s task was confined to ascertaining whether, at the beginning and the end of their detention in police custody, the applicants’ bodies “showed the marks of blows or violence”. In the Court’s opinion, such medical examinations, separated by periods of sixteen or twenty-three days, are not in themselves safeguards sufficient to justify the excessive length of the applicants’ detention.

Secondly, the fact that the applicants’ lawyer was able to lodge a complaint cannot be regarded as an effective guarantee against arbitrary treatment, especially as, being held incommunicado, the applicants were deprived of all contact with him.

57. Consequently, the Court is not convinced that the applicants’ incommunicado detention for at least sixteen or twenty-three days, without any possibility of seeing a judge or other judicial officer, was strictly required by the crisis relied on by the Government.

58. There has accordingly been a breach of Article 5 § 3.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

59. 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. Damages, and costs and expenses

60. The applicants each claimed 200,000 French francs (FRF), that is FRF 600,000 in total, for pecuniary and non-pecuniary damage resulting from their detention.

They also claimed reimbursement of their legal costs and expenses, amounting to FRF 150,000, broken down as follows:

- their lawyer's expenses for travel between İdil and Istanbul, where he practises: FRF 30,000;
- their lawyer's fees, including various administrative costs: FRF 105,000;
- advisers' fees: FRF 15,000.

61. The Government considered the compensation claims exorbitant and totally unjustified. Referring to the Brogan and Others judgment, they submitted that if the Court were to find a breach of the Convention, that finding in itself would constitute sufficient just satisfaction, no causal connection having been established between the damage claimed and the events complained of.

With regard to the claim for costs and expenses, the Government submitted that the sums claimed under this head were excessive and bore no relation to the socio-economic conditions obtaining in Turkey. They also pointed out that no documentary evidence of them had been supplied.

62. The Delegate of the Commission considered that the finding of a breach would not be sufficient to make good the prejudice suffered by the applicants. She further considered that their costs and expenses should, in principle, be reimbursed.

63. The Court notes that the file does not substantiate the existence of pecuniary damage; it cannot therefore allow the claim under this head. On the other hand, it considers that the applicants should be awarded compensation for non-pecuniary damage since they undoubtedly suffered considerable distress on account of the facts of the case. Making an assessment on an equitable basis, as required by Article 50, the Court awards under this head FRF 20,000 to Mr Kaplan and FRF 25,000 each to Mr Demir and Mr Süsin, which sums are to be converted into Turkish liras at the rate applicable on the date of settlement.

64. With regard to costs and expenses, the Court notes that the applicants have not supplied any documentary evidence in support of their claims under this head. Consequently, it cannot allow them (see, *mutatis mutandis*, the Pressos Compania Naviera S.A. and Others v. Belgium judgment of 3 July 1997 (*Article 50*), *Reports* 1997-IV, p. 1299, § 24).

B. Default interest

65. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment, which is 3.36% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a breach of Article 5 § 3 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay, for non-pecuniary damage, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
 - (i) 20,000 (twenty thousand) French francs to Mr Kaplan;
 - (ii) 25,000 (twenty-five thousand) French francs each to Mr Demir and Mr Süsin;
 - (b) that simple interest at an annual rate of 3.36% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;
4. *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 23 September 1998.

Signed: THÓR VILHJÁLMSOHN
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the concurring opinion of Mr De Meyer is annexed to this judgment.

Initialled: Th. V.

Initialled: H. P.

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

In so far as the Court refers, in paragraph 43 of the present judgment, to what it has previously said on the subject of States' "margin of appreciation", I feel compelled to observe that in paragraphs 49 to 57 it demonstrates rather clearly, in the particular field of the emergency conditions provided for in Article 15 of the Convention, the inanity of this fallacious concept.

Where human rights are concerned, States may permit themselves only what the Court considers permissible¹.

1. See part III of my partly dissenting opinion in the case of *Z v. Finland* (judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 357–58).