



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

FIRST SECTION

CASE OF ŞARLI v. TURKEY

(Application no. 24490/94)

JUDGMENT

STRASBOURG

22 May 2001

This judgment may be subject to editorial revision.

In the case of Cemile Şarlı v. Turkey,

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

Mrs E. PALM, *President*,

Mrs W. THOMASSEN,

Mr L. FERRARI BRAVO,

Mr J. CASADEVALL,

Mr B. ZUPANČIČ

Mr R. MARUSTE, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 15 June 2000 and 3 May 2001,

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

PROCEDURE

1. The case originated in an application (no. 24490/94) against Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Cemile Şarlı ("the applicant"), on 23 June 1994.

2. The applicant, who had been granted legal aid, was represented by Mr K. Boyle and Ms F. Hampson, lawyers practising in the United Kingdom. The Turkish Government ("the Government") were represented by their Agent, Mr M. Özmen.

3. The applicant alleged that her son Ramazan Şarlı and her daughter Cemile Şarlı had disappeared after being taken from their home by security forces in December 1993. Before the Commission, she invoked Articles 2, 3, 5, 13, 14 and 18 of the Convention, as well as former Article 25 of the Convention in respect of measures taken against her lawyer in Diyarbakır. In her memorial to the Court, she maintained her complaints under Articles 5, 13 and former Article 25 of the Convention.

4. The application was declared admissible by the Commission on 28 November 1995. In its report of 21 October 1999 (former Article 31 of the Convention), it expressed the opinion unanimously that there had been no violation of Articles 2 and 3 of the Convention, by 22 votes to 3 that there had been no violation of Article 5 of the Convention, unanimously that there had been a violation of Article 13 of the Convention, unanimously that there had been no violation of Article 14 of the Convention and unanimously that the State had failed to comply with its obligations under former Article 25 of the Convention. The Commission referred the case to

the Court on 30 October 1999 in accordance with Articles 32 § 1 and 47 of the Convention. Before the Court the applicant withdrew her complaints under Articles 2, 3 and 14 of the Convention.

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge in his place (Article 27 of the Convention and Rule 29 § 1).

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

7. The facts of the case, particularly concerning events during December 1993 when Ramazan and Cemile Şarlı went missing, were disputed by the parties. The Commission, pursuant to former Article 28 § 1 (a) of the Convention, conducted an investigation with the assistance of the parties.

8. The Commission Delegates (Mrs J. Liddy, Mr M. P. Pellonpää and Mr P. Lorenzen) heard witnesses in Ankara on 4 October 1997 and on 4 to 6 May 1998. These included the applicant; her son Menan Şarlı; Keyvan Şarlı, wife of Ramazan Şarlı; Necla Şarlı, the wife of Menan Şarlı; Ali İlban, the muhtar of Ulusoy; İsmet Orakçı, a villager; Abdullah Milyas, a villager; Ali Veriş, a former PKK team commander; Kamil Kaya, a former high ranking member of the PKK; Dursun Ertuğrul, Bitlis-Tatvan district gendarme commander; Yavuz Gürbüz, commander of the local gendarme station at Yelkenli; Servet Urhan, deputy commander at Yelkenli; Mustafa Yanaboğlu, Tatvan public prosecutor; and Halis Küçüşubaşı, Diyarbakır State Security Court prosecutor.

9. The Commission's findings of fact are set out in its report of 21 October 1999 and summarised below (Section A). The applicant accepted the Commission's findings of fact. The Government's submissions concerning the facts are summarised below (Section B).

A. The Commission's findings of fact

1. General background

10. Ulusoy was a small village of about 50 houses, situated in the region of Tatvan in the south-east of Turkey. The nearest gendarme station was

7-8 km away at Yelkenli. Ulusoy was about 35 km from Tatvan, where the district gendarme headquarters were based.

11. Ulusoy was about 1 kilometre from the highway leading from Van to Tatvan. While the ground between the village and the highway was generally described as being open and flat, there was higher ground behind the village and a forested area. About an hour to an hour and a half behind the village to the south was the mountainous area known as Anadere. As elsewhere in the region in 1993, PKK activity was intense. Anadere was used by them as a base for their activities. Ulusoy lay in the so-called 1st district of Garzan (the name given by the PKK to this region) and was known by the security forces to be under the command of a man code named “Berham”. There was another member of the PKK, a woman known as “Takoşin”, who was active in visiting the villages in this district.

12. The village school was close to the main highway. In December 1993, it was closed, apparently due to fear that it would be subject to attack. The evidence from villagers indicated that the district gendarme commander Captain Dursun Ertuğrul had instructed them to protect their village. Captain Ertuğrul denied giving any such instructions to persons who were not part of the security forces or official village guards. The Commission noted that he might have nonetheless “encouraged” them to do what they could to protect their school. In any event for a short period before 23 December 1993, villagers, armed with their own shotguns, stood guard during the night at the school.

2. The events of 23-24 December 1993

(a) The incident at the school

13. On the night of 23 December 1993, four villagers, Kazım Aydın, Reşit Tarçın, Yakup Çaca and Naif Ariç were on guard at the school at Ulusoy. According to their statements taken by the gendarmes the next day, four to five armed men arrived in a vehicle below the school from the direction of the tarmac road at times given variously as 22.30 or 23.30 hours. After Yakup Çaca challenged the approaching men, the villagers started firing first and the men responded with automatic weapon fire. The shooting continued for not more than fifteen minutes before the men drove off in the direction of the tarmac road once more. The villagers gathered to see what had happened. They dispersed to their homes, the four guards also.

14. The applicant relied on the statement of her husband Ahmet Şarlı to the Human Rights Association in Diyarbakır (“HRA”) that the men who came to the school were soldiers in a green military vehicle and pointed to the unlikelihood that the PKK would have arrived from the patrolled Van-Tatvan highway or that they would have fled in that direction. She considered that a security force operation took place at that time in the vicinity of the village, perhaps an ambush of the PKK who were expected to

arrive in the village. When the villagers challenged the soldiers arriving to position themselves near the school on the outskirts of the villagers, a clash mistakenly broke out.

15. The Commission noted that a standard form incident report dated 24 December 1993 indeed referred to an armed clash having taken place at 22.30 hours at Ulusoy when security forces were in ambush positions round the village expecting the PKK to arrive for a meeting at the school. A conflict broke out when terrorists were seen at the school. Fire was also opened on the security forces from terrorists on the hill to the south. A description was given of intense firing, involving mortars and tanks, which continued until about 03.30 hours and which necessitated a request for reinforcements. This document was not provided to the Commission before the hearing of witnesses and was not put to Captain Ertuğrul, the district gendarme commander who gave oral testimony that there was no operation at Ulusoy that night. He described an altogether different scenario, according to which the PKK opened fire on a mechanised team patrolling the road near the village at about 03.00-03.30 hours, after which there was only a brief 15-30 minute conflict. The team, on his account, did not enter the village and would not have been able to do so without permission, which they did not request. On this version, the security forces did not enter the village until the morning at 05.00 to 06.00 hours, after the applicants' children had been taken away. This account mirrored the report dated 24 December 1993 issued by the gendarmes investigating the incident.

16. The Commission considered that the standard form incident report cast grave doubts on the reliability of Captain Ertuğrul's evidence. As district gendarme commander, it would have expected that he would be informed of operations conducted in his jurisdiction. Though the document is incomplete at the bottom and no signatory appears, it was sent from the Tatvan district gendarme command which was under his responsibility. It appeared likely from the description of the units involved in the operation that some of his own men were involved. The Commission noted that there was other evidence to support the incident report:

- the written statements of the villagers almost all referred to firing occurring after the incident at the school;
- the applicant in her oral testimony described heavy firing, which lit up the sky;
- Keyvan and Necla Şarlı described firing as occurring over a long period during the night;
- the other villagers Ali İlban and İsmet Orakçi also referred to more firing occurring. Only Abdullah Milyas recalled hearing no more firing after the first clash at the school.
- notwithstanding Captain Ertuğrul's denial that the mechanised team would have entered the village, they were already present on the outskirts of the village when he and Servet Urhan arrived at first light. He also had with

him a special team, specifically trained in counter-terrorism, whose role in events was unspecified.

17. The Commission concluded that an operation took place in close proximity to Ulusoy during the night of 23/24 December 1993, involving heavy firing. While there was some evidence that there were security forces at the school at some point during the night, it would appear at least likely that there were PKK men also in the vicinity. There was no allegation that the security forces were firing punitively at the village as a target throughout the night. On the evidence, it was unable to establish whether the men fired at by the villagers at the school were PKK members or soldiers.

(b) The abduction of Cemile and Ramazan Şarlı

18. At about 03.00-03.30 hours on 24 December 1993, six armed men arrived at İsmet Orakçı's house. These six men required İsmet Orakçı to take them to the house of Ahmet Şarlı. There, they found that his daughter Cemile Şarlı was absent and leaving İsmet at the Şarlı house, took the son Ramazan Şarlı to show them the house of Abdullah Milyas where Cemile was spending the night. They left that house with Abdullah, Ramazan and Cemile. After a while, they released Abdullah and disappeared with Ramazan and Cemile, who were never seen by any of their family or the villagers again.

19. The Commission identified the crucial point of disagreement as being whether the six men were soldiers or members of the PKK.

20. The evidence which supports the allegations that they were members of the security forces included principally:

- Ahmet Şarlı's statement to the HRA of 2 March 1994;
- the oral evidence given to the Commission delegates by the applicant and her two daughters-in-law, Necla and Keyvan, all of whom were present during the incident;
- an inference which could be drawn from the letter of 27 December 1993 from the gendarmes in answer to a letter from the Tatvan public prosecutor that an allegation had been made to the prosecutor that Ramazan and Cemile had been taken into custody, indicating that a complaint was made shortly after the event that the security forces were responsible for the disappearance of the applicant's children.

21. The Commission noted that there was considerably more evidence which identified the six men as members of the PKK. This included principally:

- the written statements taken on 24 December 1993 from the applicant, the muhtar, İsmet Orakçı and the four village guards;
- the written statement taken on 11 January 1995 from Ahmet Şarlı by a public prosecutor;

- the oral evidence given by two eye witnesses Abdullah Milyas and İsmet Orakçı which described the men as wearing civilian clothes and items of dress consistent with PKK usage;
- the oral evidence of the two “confessors” Ali Veriş and Kamil Kaya, who as members of the PKK, alleged that Ramazan and Cemile Şarlı were taken to join the PKK and were executed when they tried to return to their home;
- the oral evidence of gendarme witnesses that Şarlı family were known sympathisers and Ramazan and Cemile Şarlı had left voluntarily.

22. The Commission found that there were difficulties with the evidence on both sides. The patchy nature of the investigative work of the gendarmes was in the circumstances of this case however as equally consistent with negligence and bad practice as with deliberate manipulation of the evidence. The written statements taken by the gendarmes gave largely similar but not identical versions of events and were also supported by the oral evidence of İsmet Orakçı and Abdullah Milyas.

23. The Commission noted the delegates’ assessment of the villager witnesses, Abdullah Milyas and İsmet Orakçı, who were found to be frank and convincing witnesses in the way they told their stories. There was no element in the evidence of either man which cast doubt on their credibility. The Commission’s delegates found no indication, for example, that these two witnesses were motivated by fear in giving their testimony.

24. The Commission gave little weight to the oral evidence of the two “confessors” or ex-members of the PKK. The account of Ali Veriş was riddled with contradictions while Kamil Kaya made an unfavourable impression in the cold-blooded manner in which he gave his testimony. Neither was found to be credible by the Commission’s Delegates and no satisfactory explanation was given as to how they were identified as being able to give relevant testimony, since neither had apparently made any statement to the authorities that they had knowledge of events. While neither witness was a member of the so-called PKK 1st district and both were at pains to point out that members from one district were unable to involve themselves in the affairs of other districts, both claimed to have obtained information about the alleged execution of Ramazan and Cemile Şarlı by the PKK over the radio. Yet neither were apparently aware of the existence of a female terrorist code named “Takoşin” well-known as active in that area. The Commission found their evidence unsatisfactory and unreliable and was not prepared to base any findings of fact on their testimony.

25. As regarded the evidence that Ramazan and Cemile Şarlı were PKK sympathisers, Captain Ertuğrul’s opinion was based on information which he had received from State informers in the villages. The two other gendarme officers from the local station had however no knowledge that the Şarlı family were suspected sympathisers. Servet Urhan expressed the

opinion nonetheless that the two Şarlıs had left voluntarily with the PKK, but was unable to give any firm ground for that belief beyond that this was being said in the village. As pointed out by the applicant, all the written statements referred to their abduction. The oral evidence of the applicant and Keyvan and Necla Şarlı also indicated that the men used force. İsmet Orakçi referred to seeing the men drag some-one out of the Şarlı house while Abdullah Milyas described Cemile Şarlı as acting under duress. The Commission found therefore that there was insufficient evidence to conclude that Ramazan and Cemile Şarlı left with the men voluntarily.

26. The Commission stated that it could give little weight either way to the written statements of Ahmet Şarlı, his statement to the HRA accusing the soldiers and his later statement to the public prosecutor apparently contradicting this version. He had died and was unable to provide any explanation for these differences.

27. The Commission took the view therefore that the key issue in this respect was whether the applicant's oral evidence, supported by her daughters-in-law, was of such a nature as to outweigh and cast substantial doubt on the oral evidence of the other villagers.

28. As regarded the credibility and reliability of the oral evidence given by the applicant, Keyvan Şarlı and Necla Şarlı, the Commission found that their description of the incident at the house when the men arrived varied in significant details. According to the applicant, three men entered the house, wearing camouflage uniform, one of whom wore a red mask. Keyvan Şarlı said that the three men all wore red masks, specifying that they had beards and moustaches attached to the masks. According to Necla, all six men, three of whom had masks, came inside. She and Keyvan described them, in contradiction of the applicant, as speaking only Turkish. The Commission which had not heard in any previous case of a practice of any security forces wearing masks, found this to be a puzzling feature and that this aspect of their testimony was unconvincing. It further noted that the applicant, who was relatively old, had demonstrated a selective memory, in particular in categorically denying recent events. She was not altogether clear in her evidence on some points. Whether this was due to the lapse of time or her own advanced years, it detracted in the Delegates' view from the reliability that could be placed on it. They also found that Necla, who was only sixteen at the time of events, gave an impression of being rehearsed in her account.

29. The Commission concluded that it had not been established, to a standard of proof beyond reasonable doubt that the six men who came to the applicant's house were from the security forces. Nor however was it established that they were from the PKK.

3. Subsequent events in Ulusoy

30. Captain Dursun Ertuğrul and the deputy station commander Servet Urhan entered the village at dawn on 24 December 1993. The station

commander Yavuz Gürbüz arrived at about noon. A search was carried out of the houses. The task of drawing up the incident report, damage evaluation report, sketch map and the taking of statements were assigned to Yavuz Gürbüz as the local station commander. Explosive devices were found during the search and a villager Fadıl was taken into custody.

31. A number of villagers went to the local station that day to make statements – the applicant, the muhtar, the four villager guards and İsmet Orakçı. Abdullah Milyas who had talked to the muhtar about his part in events was not summoned to give a statement by the gendarmes. The evidence as to whether any statement was taken from Ahmet Şarlı conflicted. No written statement has been produced by the authorities.

4. Domestic investigations

32. A complaint that the security forces were involved in detaining Ramazan and Cemile Şarlı was made to the Tatvan public prosecutor on or shortly before 27 December 1993. The Commission was satisfied that this derived from the applicant's family. The only step taken by the Tatvan public prosecutor was to enquire from the district gendarme command whether they held the missing people. Captain Ertuğrul on his own account made no investigation and discussed the matter with no-one as he stated that he knew that they were not in custody.

33. The Yelkenli gendarmes submitted the evidence which they had gathered to the Tatvan public prosecutor – this consisted of the sketch map, scene of incident report, damage evaluation report and the statements of the applicant, Ali İlban, İsmet Orakçı and the four villager guards at the school. It is not established whether or not a statement was ever taken from Ahmet Şarlı. There is no evidence however that one was ever received by a public prosecutor dealing with the case. The Tatvan public prosecutor Mustafa Yabanoğlu considered this material was sufficient to establish the offences clearly and proceeded to issue a decision of lack of jurisdiction on 11 January 1994 in respect of the kidnapping of Ramazan and Cemile Şarlı by six PKK terrorists, sending the case to the Diyarbakır SSC prosecution.

34. A further petition was lodged with the Bitlis public prosecutor on 31 January 1994, in which the uncle of the missing persons claimed that Ramazan and Cemile Şarlı had been taken away by the security forces, asked whether they had been brought before a judge and if not that they should be immediately, and that he requested the necessary steps be taken.

35. The Diyarbakır SSC prosecution sent a standard letter to district authorities on 24 January 1994 requesting them to continue the search for the kidnappers and to report every three months, providing copies of any relevant confessions, statements etc. No information was forthcoming. The request made on 11 January 1995 for statements to be taken from the applicant, Ahmet Şarlı, Abdullah Milyas, Ali İlban, İsmet Orakçı and the four villagers guards was in light of the communication to the Government

of the application to the Commission. Only one statement, that of Ahmet Şarlı, was taken. The public prosecutor, Halis Küçüşubaşı, attributed this to the fact that all the villagers had moved and could not be found. However, a letter dated 11 April 1995 from the Tatvan district gendarmes gave the towns to which the persons were thought to have moved. There was nothing to indicate that any further steps were taken to trace any of them. That Ali İlban, İsmet Orakçı and Abdullah Milyas could be found is indicated by their appearance after being summoned to the hearing in Ankara.

36. On 26 April 1996, the Diyarbakır SSC prosecutor sent a reminder, more than two years later, that the earlier instruction of January 1994 for reports to be made regularly as to the investigation, had not been complied with. He told the Delegates that this was to obtain more effective action from the district authorities. It is not apparent from the material provided that any information was forthcoming. While by this time the two confessors, Ali Veriş and Kamil Kaya, had surrendered (in April and August 1995 respectively) any information provided by them or the fact that they might be in a position to provide information was not passed on to the Diyarbakır SSC public prosecutor, who told the Delegates he would have regarded it as relevant to the investigation. Nor is it evident that any information relating to the alleged execution of the two missing persons was passed on to the local gendarmerie station which made occasional reports to the Tatvan public prosecutor or to the Tatvan district gendarmerie command.

37. On 3 July 1997, the file was transferred following a decision of lack of jurisdiction to the Van SSC prosecutors who on 8 September 1993 made the standard request for reports to be made on the investigation every three months. It is not apparent that they have been provided with any further information. The latest report from Tatvan district gendarmerie command stated that no information was available concerning the abductors of Ramazan and Cemile Şarlı but that the search was continuing.

5. Materials relating to the prosecution of the applicant's lawyer in Turkey

38. On 7 November 1995, a statement was taken from the applicant's lawyer Mahmut Şakar by the Diyarbakır SSC chief public prosecutor. This stated that Mahmut Şakar was registered at the Diyarbakır bar and vice president of the HRA, as well as President of the Diyarbakır branch. He recalled Ahmet Şarlı coming to see him two years before, telling him that his son and daughter had disappeared. He told Ahmet Şarlı that domestic remedies had to be exhausted. He recalled writing to the Governor and SSC chief prosecutor for him and telling him to go to the Tatvan chief prosecutor. After a long while, Ahmet Şarlı came back to the HRA, saying that he had obtained no results from the authorities save a document which said that his son and daughter had been kidnapped by the PKK. As he disagreed with this, Mahmut Şakar told him that he could apply on the basis

of the State's ratification of the Convention. He confirmed that it was his signature on the document shown to him. His signature was not based on any power of attorney but on the basis of the purpose of the HRA.

By an indictment dated 21 March 1996 by Diyarbakır SSC chief public prosecutor, Mahmut Sakar was accused of violating Law no. 3713 between 24 December 1993 and 2 March 1994. It was stated that the defendant had prepared an application titled European Human Rights Project without a client-solicitor relationship having been established. The purpose of this was to degrade the State and make propaganda in favour of the PKK. His prosecution under Law no. 2485 as well as appropriate action under Law no. 3717, Articles 1 and 8/1 was requested.

B. The Government's submissions on the facts

39. The Government submitted that at about 22.30 hours on 23 December PKK terrorists arrived at the Ulusoy village and opened fire on the school. At about 01.00 hours, six armed PKK terrorists wearing local *peşmerge* dress came to the applicant's house and took away her son Ramazan. They went to a neighbour's house and took Cemile Şarlı away also.

40. At about 3.30 hours, a mechanised team patrolling the Tatvan-Van highway arrived at the village and fire was exchanged between them and the terrorist group. After 15 minutes, the terrorists ran away towards the Anadere region. At 6.00 hours, the security forces entered the village for investigation. It was established that the village school had been damaged and Ramazan and Cemile Şarlı taken away by PKK terrorists. The evidence of Kamil Kaya and Ali Veris indicated that Ramazan and Cemile Şarlı had been aiding and abetting the terrorists and when their identity had become known it was necessary for the PKK to kidnap them. They joined the PKK in the mountains under the code names 'Roken' and 'Dilgeç'. When they tried to leave, they were executed by the PKK.

41. The applicant in her statement to the gendarmes, which accorded with the statements of the other villagers, identified the PKK as the perpetrators.

C. New material

42. The Government have provided the Court with a copy of the decision of Diyarbakır State Security Court No. 4, dated 24 December 1996, acquitting the lawyer Mahmut Sakar of the charge under section 8 paragraph 1 of the Law no. 3713. The court found that the statement taken from Ahmet Şarlı by Mahmut Sakar did not contain expressions of written propaganda.

II. RELEVANT DOMESTIC LAW AND PRACTICE

43. The principles and procedures relating to liability for acts contrary to the law may be summarised as follows.

A. Criminal prosecutions

44. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. It is also an offence for a government employee to subject some-one to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment) or to deprive an individual unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants).

45. The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

46. In the case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate system of State Security prosecutors and courts established throughout Turkey.

47. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants (sometimes referred to as the Official Conduct Act), which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

An appeal to the Supreme Administrative Court lies against a decision of the Council. If a decision not to prosecute is taken, the case is automatically referred to that court.

48. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 47 above) also applies to members of the security forces who come under the governor's authority.

49. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 45 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

50. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

51. Article 125 §§ 1 and 7 of the Constitution provides:

"All acts or decisions of the authorities are subject to judicial review...

The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

52. Article 8 of Legislative Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 51 above), provides:

“No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification.”

53. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant’s guilt (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in principle, only bring an action against the authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. When an act is found to be illegal or tortious and, consequently, is no longer an “administrative act” or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim’s right to bring an action against the authority on the basis of its joint liability as the official’s employer (Article 50 of the Code of Obligations).

THE LAW

I. THE COURT’S ASSESSMENT OF THE FACTS

54. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31). While the Court is not bound by the Commission’s findings of fact and remains free to make its own assessment in the light of all the material before it, it is however only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1214, § 78).

55. The applicant accepted that Commission’s finding of fact that it has not been established beyond reasonable doubt that the men who abducted Ramazan and Cemile Şarlı were from the security forces but maintained that there was an arguable claim that the security forces were responsible for the

abduction. The Government, relying on the evidence of the two ex-members of the PKK, submitted that Ramazan and Cemile Şarlı had been taken away by the PKK who had then executed them when they tried to leave.

56. The Court observes that the Government's points were taken into consideration by the Commission in its report, which approached its task of assessing the evidence with the requisite caution, giving detailed consideration to the elements which supported the parties' claims and those which cast doubt on their credibility. It does not find that the criticisms made by the Government raise any matter of substance which might warrant the exercise of its own powers of verifying the facts. In these circumstances, the Court accepts the facts as established by the Commission, in particular its finding that in light of the evidence that both security forces and members of the PKK may have been present in the village at the relevant time it was not possible to determine which were responsible for the disappearance of Ramazan and Cemile Şarlı. (see paragraphs 18-29 above).

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

57. The Government submitted that neither the applicant nor any other member of the family made a complaint to the public prosecutor against security officers. The petition of Tevfik Şarlı was a request for information. The applicant in her statement to the gendarmes accused the PKK of taking her children. Furthermore, the applicant did not initiate an action before the Administrative Court to obtain compensation nor in any proceedings allege that the Government had infringed provisions of the Convention. The applicant had therefore failed to exhaust the domestic remedies available to her as required by Article 35 § 1 of the Convention.

58. The applicant alleged that the complaint had been brought to the attention of the public prosecutor and that the subsequent investigation was ineffective. Before the Commission, she pointed out that the investigation had been transferred to the Diyarbakır State Security Court on the basis that any crime had been committed by terrorists.

59. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see the *Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-VI, pp. 2275-76,

§§ 51-52, and the *Akdivar and Others v. Turkey* judgment, cited above, p. 1210, §§ 65-67).

60. The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see the *Akdivar and Others v. Turkey* judgment cited above, p. 1211, § 69, and the *Aksoy v. Turkey* judgment, cited above, p. 2276, §§ 53 and 54).

61. The Court notes that Turkish law provides administrative, civil and criminal remedies against illegal and criminal acts attributable to the State or its agents (see paragraphs 44 et seq. above).

62. With respect to an action in administrative law under Article 125 of the Constitution based on the authorities' strict liability (see paragraphs 50–52 above), the Court recalls that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if in respect of complaints under those Articles an applicant were to be required to exhaust an administrative-law action leading only to an award of damages (see the *Yaşa v. Turkey* judgment of 2 September 1998, *Reports* 1998-VI, p. 2431, § 74). This consideration applies equally under Articles 2 and 5 of the Convention to cases of alleged death in custody following unacknowledged detention.

Consequently, the applicant was not required to bring the administrative proceedings in question and the preliminary objection is in this respect unfounded.

63. As regards a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of State agents (see paragraph 53 above), the Court notes that a plaintiff in such an action must, in addition to establishing a causal link between the tort and the damage he or she has sustained, identify the person believed to have committed the tort. In the instant case, the public prosecutor took the view in his decision of non-jurisdiction that the kidnapping had been carried out by six PKK terrorists and transferred the case to the Diyarbakır State Security Court. In

this case, the public prosecutor had not taken any steps to find any evidence confirming or contradicting the account given by the gendarmes as to the course of events at the village. In this situation, it is not apparent that there was any basis on which the applicant could have pursued a civil claim against any state official with any reasonable prospect of success.

64. With regard to the criminal-law remedies (paragraphs 44-49 above), the Court notes that the Tatvan public prosecutor and the Bitlis public prosecutor had been informed on two separate occasions by the family that Ramazan and Cemile Şarlı had been taken away by members of the security forces (paragraphs 32 and 34). It is not persuaded by the Government's argument that these were only requests for information and not complaints. The public prosecutor had been informed of the substance of the applicant's allegations. He was accordingly under the duty, imposed by Article 153 of the Code of Criminal Procedure, to investigate whether an offence had been committed. The Court is satisfied in these circumstances that the matter was sufficiently drawn to the attention of the relevant domestic authority. It appears however that few steps were taken to elucidate the facts of the case. Crucial eye-witness evidence from Ahmet Şarlı and Abdulla Milyas was not obtained at the time nor any investigation taken to clarify the events of the night concerning the role played by the security forces.

65. Consequently, in the absence of any prompt or effective investigation by the authorities into the allegations of the applicant, there was no basis for any meaningful recourse by the applicant to the range of remedies described by the Government. The Court also dismisses the Government's preliminary objections as regards civil and criminal law remedies.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

66. The applicant complained that the disappearance of her son and daughter disclosed issues under Article 5 of the Convention which provides:

“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:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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; ...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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.”

67. The applicant submitted that she had an arguable claim, and it was her settled conviction, that the security forces were responsible for the abduction of Ramazan and Cemile Şarlı. She complained that the failure of the authorities to carry out a prompt and effective investigation into her arguable claim that the security forces had abducted and detained two of her children disclosed a violation of Article 5 of the Convention. The obligation to conduct such an investigation in such a case was an essential safeguard to prevent the development of a practice of “disappearances”. The obligation continued until such an investigation was carried out and the explanation as to what happened to the missing persons was forthcoming and the applicant informed of the results. She relied *inter alia* on the dissenting opinion of the minority of the Commission in its report and the case-law of the Inter-American Court.

68. The Government considered that the applicant’s complaints were unfounded and that all necessary steps had been, and were being, taken by the relevant authorities in respect of investigating the disappearance.

69. The Court recalls that it has accepted the Commission’s assessment of the facts, namely, that it has not been proved beyond reasonable doubt that Ramazan and Cemile Şarlı were taken away by members of the security forces and therefore that any detention occurred for which the authorities may be held liable. In the circumstances of this case, it does not consider it appropriate to examine whether the safeguards of Article 5 were complied with and has examined the allegations concerning the effectiveness of the investigative procedures under Article 13 of the Convention, which requires an effective remedy in respect of arguable claims of breaches of the substantive provisions of the Convention.

70. The Court concludes that there has been no violation of Article 5 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

The applicant complained that no effective remedy has been provided as required by Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

71. The applicant submitted, relying on the Commission’s report, that the fundamental flaws in the investigation into the disappearance of her son and daughter gave rise to a violation of Article 13. She pointed to the brevity of the investigation by the Tatvan public prosecutor, the failure to obtain important evidence and to clarify inconsistencies between the gendarme incident report and the accounts given by the villagers.

72. The Government contended that there were no inadequacies in the domestic investigation and that in any event the applicant had failed to make any complaint to the public prosecutor. The case had been transferred from the Diyarbakır State Security Court to the Van State Security Court where the investigation was still pending. Pursuant to Turkish law, the file would be kept open for a time period of 20 years.

73. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the *Aksoy v. Turkey* judgment cited above, p. 2286, § 95; the *Aydın v. Turkey* judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and the *Kaya v. Turkey* judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106).

The Court has further previously held that where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, or where a right with as fundamental an importance as the right to life is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible

and including effective access for the relatives to the investigatory procedure (see the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, § 140, and the Yaşa v. Turkey judgment cited above, p. 2442, § 114).

74. Turning to the facts of the case, the Court considers that the applicant may be regarded as having an arguable complaint that her son and daughter had disappeared after allegedly being taken into custody. A complaint had been made shortly after the events by the family to the Tatvan public prosecutor. The security forces had been conducting an operation close to the village during the night and the identity of the persons who came to take away Ramazan and Cemile Şarlı, known to the district gendarme commander, as suspected aiders and abettors of the PKK, was arguably open to doubt. The applicant was therefore entitled to an effective remedy within the meaning outlined in the preceding paragraph.

75. Accordingly, the authorities were under the obligation to conduct an effective investigation into the disappearance of the applicant's missing children.

76. The Court observes however that the investigation undertaken by the Tatvan public prosecutor lasted until his decision of lack of jurisdiction on 11 January 1995, eighteen days after the events. While statements, whose reliability has been challenged by the applicant, were taken from a number of villagers by the gendarmes, no statement was taken by them or the public prosecutor from either Ahmet Şarlı or Abdullah Milyas who were eyewitnesses to the incident in which six men took away the two missing persons. Though a complaint was made by the family to the Tatvan public prosecutor alleging that the security forces were responsible, no statement was taken from the person concerned. Nor did the Tatvan public prosecutor pursue any enquiries with the security forces to establish what in fact occurred during the night in the village, though the standard form incident report issued concerning the operation at the village contradicted significantly the report issued by the gendarmes concerned in the investigation.

77. Following the referral of the investigation to the Diyarbakır State Security Court and subsequently the Van State Security Court it does not appear that any step of substance has been taken or that any information has been forthcoming. Indeed though a standard request for three monthly progress reports had been made to the Tatvan public prosecutor and the security forces, it appeared that this had not been complied with. Though the Government claimed that information had been received from two ex-PKK members captured by the security forces, in particular, that the PKK had executed Ramazan and Cemile Şarlı, this information had not been communicated to the public prosecutor in charge of the investigation.

78. Accordingly, no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by

Article 2 (see the Kaya judgment cited above, pp. 330-31, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the disappearance of her son and daughter and thereby access to any other available remedies at her disposal, including a claim for compensation.

Consequently, there has been a violation of Article 13 of the Convention.

VI. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLE 13 OF THE CONVENTION

79. The applicant maintained that there was in or around 1993, in south-east Turkey a practice of denial of effective remedies for serious human rights violations, in aggravated violation of Article 13 of the Convention. She referred to other cases concerning events in south-east Turkey in which the Commission and the Court had also found breaches of this provision.

80. Having regard to its findings under Article 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

VII. ALLEGED VIOLATION OF FORMER ARTICLE 25 OF THE CONVENTION

81. Finally, the applicant complained that there had been a serious interference with the exercise of her right of individual petition, in breach of former Article 25 § 1 of the Convention (now replaced by Article 34), which provided:

“The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.”

82. The applicant submitted that institution of criminal proceedings against Mahmut Sakar on account of his having taken her husband's statement and assisted with the application was an interference with her right of individual petition.

83. The Government submitted that Mahmut Sakar was not prosecuted because of his involvement with the Commission but because he was suspected of violating Article 8 of the Anti-Terror Law. They pointed out that in the proceedings the public prosecutor submitted to the Diyarbakır State Security Court that the petition to the European Commission of Human Rights bore no expression of propaganda aiming to disrupt the

indivisible integrity of the territory of the State and that the court acquitted Mahmut Sakar. In any event they claimed that Mahmut Sakar was not the legal representative of the applicant before the Commission and only took the statement of Ahmet Şarlı to send on to the lawyers in the United Kingdom.

84. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by former Article 25 (now replaced by Article 34) that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see the Akdivar and Others judgment, cited above, p. 1219, § 105; the Aksoy judgment cited above, p. 2288, § 105; the Kurt judgment cited above, p. 1192, § 159; and Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1784, § 105). In this context, “pressure” includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy. The threat of criminal proceedings invoked against an applicant’s lawyer concerning the contents of a statement drawn up by him has previously been found to interfere with the applicant’s right of petition (see the above-mentioned Kurt case, pp. 1192-1193, §§ 160 and 164).

85. In the instant case, the Court recalls that Mahmut Sakar, acting as a lawyer for the Human Rights Association in Diyarbakır drew up a petition for Ahmet Şarlı setting out the substance of his complaints under the Convention which were continued by the applicant after her husband’s death. Proceedings were commenced against Mahmut Sakar in or about November 1995 by which he was charged, *inter alia*, with submitting an application with the intention of degrading the State and making propaganda in favour of the PKK. The Court cannot agree therefore with the Government’s assertion that the criminal proceedings were unrelated to the application submitted to the Commission. It is also not material that Mahmut Sakar was not named as the applicant’s representative in the proceedings before the Commission and Court. His role in submitting the petition of the applicant’s husband was instrumental in assisting her lawyers in the United Kingdom in introducing the application. Nor does the fact that Mahmut Sakar was eventually acquitted on 24 December 1996 alter the fact that for a period of over a year he was the subject of criminal investigation and trial proceedings and lived under the deterrent and intimidatory effect of those proceedings.

86. In these circumstances, the pursuit by the authorities of a criminal charge against Mahmut Sakar concerning the petition of the applicant’s husband drawn up for the purposes of an application to the Strasbourg organs must be considered an interference with the applicant’s right of

individual petition and incompatible with the respondent State's obligations under former Article 25 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

88. The applicant claimed non-pecuniary damage for the alleged violations of Articles 5, 13 and former 25 of the Convention. Having regard to the severity of the violations, she claimed the sum of 10,000 pounds sterling (GBP) for the lack of a prompt and effective investigation into her claim that her son and daughter had been detained by the security forces and for the denial of an effective remedy. As the Government had failed to clarify the situation, there was a continuing violation and she claimed GBP 20,000 on this account, unless the Government provided her with a full and reliable explanation as to what has happened to her children.

89. The Government denied that there had been any violation to be compensated and argued that if the Court found a violation of any of the provisions of the Convention, this would constitute sufficient just satisfaction.

90. The Court recalls that it has found a violation of Article 13 and former Article 25 above. It considers that the distress, frustration and uncertainty suffered by the applicant, flowing in part from the lack of an effective domestic investigation into the disappearance of her children, must be regarded as inflicting non-pecuniary damage which cannot be compensated solely by findings of violations. Making an assessment on an equitable basis, the Court awards the applicant the sum of GBP 5,000 to be converted into Turkish liras at the rate applicable at the date of payment.

B. Costs and expenses

91. The applicant claimed a total of GBP 24,836, less legal aid from the Council of Europe. This included a sum of GBP 12,200 for fees and expenses of her two United Kingdom lawyers (at a rate of GBP 100 for 92 hours work by Ms Hampson and 47 hours at a rate of GBP 50 for Ms Reidy), GBP 8,721 for the fees and expenses of her two Turkish lawyers and the sum of GBP 3,915 for the Kurdish Human Rights Project for

administrative work in processing the case, which sum included GBP 2,509.50 for translation costs.

92. The Government considered that the hourly legal fees claimed by the applicant's representatives were exaggerated when compared with the legal fees charged in Turkey. They submitted that fees for both foreign and Turkish lawyers should be evaluated in line with the figures accepted by the İstanbul Bar Association for cases before the Strasbourg organs. They also submitted that the claims for costs and expenses were excessive and unsupported by receipts or other documentation.

93. Save as regards the translation costs, the Court is not persuaded that the fees claimed in respect of the KHRP were necessarily incurred. The fees and hours claimed for work done have not been shown to be unreasonable having regard to the complexity and seriousness of the issues which, however, were all not resolved in favour of the applicant. Deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, the Court awards her the sum of GBP 18,000 together with any value-added tax that may be chargeable, less the 11,500 French francs received by way of legal aid from the Council of Europe. This sum is to be paid into the sterling bank account in the United Kingdom as set out in the applicant's just satisfaction claim.

C. Default interest

94. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objections;
2. *Holds* unanimously that there has been no violation of Article 5 of the Convention;
3. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;
4. *Holds* by six votes to one that the respondent State has failed to comply with its obligations under former Article 25 of the Convention;
5. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months, in respect of compensation for non-

pecuniary damage, 5,000 (five thousand) pounds sterling to be converted into Turkish liras at the exchange rate applicable at the date of settlement;

6. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months, in respect of costs and expenses and into the bank account identified by her in the United Kingdom, 18,000 (eighteen thousand) pounds sterling, together with any value-added tax that may be chargeable, less 11,500 (eleven thousand five hundred) French francs to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;
7. *Holds* by six votes to one that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement of the above sums;
8. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 22 May 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Gölcüklü is annexed to this judgment.

E.P.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my great regret, I am unable to agree with the conclusion of the majority of the Court that there has been a violation of Article 13 of the Convention.

Nor do I agree with the majority that, by exerting a degree of pressure on a lawyer who was quite unconnected with this case, the respondent State failed to comply with its obligation under former Article 25.

Allow me to explain.

1. This case concerns the kidnapping of two people (the applicant's daughter, Cemile Şarlı, and son, Ramazan Şarlı,) by six armed men and their subsequent disappearance.

2. The facts of the case are disputed by the parties. The respondent Government said that the people concerned had been kidnapped by PKK terrorists who had subsequently executed them. The applicant contended that the security forces were responsible. In any event, the events have not been proved or clarified beyond all reasonable doubt. However, the Government's case is the stronger one, as the Court accepts (paragraph 21).

3. The Government are accused of failing to conduct an effective investigation in order to clarify the events, in other words to identify the offenders and bring them to justice. I consider that the respondent Government did everything within their power and means, as can readily be seen on a bona fide examination of the evidence in the case file. It has to be accepted that it is extremely difficult, perhaps even impossible, to conduct an investigation as one would wish when dealing with presumed culprits who are underground members of a terrorist organisation. Most of the countries in the Council of Europe have been and continue to be confronted with that reality.

4. Must I add that it is easy enough for the Court to find, with the benefit of hindsight, omissions or shortcomings in the procedure without taking the trouble to assess whether they had any impact on the outcome or are apt adversely to affect the case as a whole.

5. The Court has said on a number of occasions: "... it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair" (see, among other authorities, the *Vidal v. Belgium* judgment of 22 April 1992, Series A no 235-B, pp. 32-33, § 33; the *Edwards v. the United Kingdom* judgment of 16 December 1992, § 34; likewise the *Luca v. Italy* judgment of 21 February 2001; the *Saidi v. France* judgment of 20 September 1993, Series A no. 261-C, § 43; and the *Stanford*

v. the United Kingdom judgment of 23 February 1994, Series A no. 282-A, § 24).

6. The Court criticises the respondent Government for the fact that two people were not heard as witnesses by the investigators. One was the father of the disappeared, Ahmet Şarlı. The other was Abdullah Milyas, who is described as an “eye witness”, although we do not know “what of”. Contrary to what is said in paragraph 76 of the judgment, Ahmet Şarlı did give evidence and his deposition is to be found in the investigation file (see paragraph 35 of the judgment). Furthermore, he was a very close relative from the Şarlı family (the father of the disappeared and the applicant’s husband) and one might question whether his deposition was reliable and whether it was necessary and of crucial importance.

It is true that Abdullah Milyas was not heard, although I do not know why. The Court does not say a word on whether in the light of facts of the case his deposition constituted important or unavoidable testimony.

7. As regards the necessity, admissibility and weight of the witness evidence, here is the settled case-law of the Court: “The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court’s task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair” (see, among other authorities, the Doorson judgment, p. 470, § 67; and the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997). “The admissibility of evidence is primarily a matter for regulation by national law, and, as a general rule, it is for the national courts to assess the evidence before them. ... [T]he Court’s task ... is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair” (see, as the most recent authority, the Delta v. France judgment of 19 December 1990, Series A no 191-A, p. 15, § 35; and the Isgrò v. Italy judgment of 19 February 1991, § 31).

The following statement of the Court in the case of Bricmont v. Belgium is particularly pertinent on this point (see the judgment of 7 July 1989, § 89): “It is normally for the national courts to decide whether it is necessary or advisable to call a witness. There are exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6...”.

It is to be noted that the Delegation of the Commission heard the witnesses, including Abdullah Milyas, in Turkey. According to the Commission, he was unable to give any details about either the kidnapping or the disappearance.

Indeed, despite its additional inquiries to clarify the case, the Commission did not achieve any better result. That does not prove that the respondent Government did not do everything within their power. It must be borne in mind that the positive obligation of the State is to use best endeavours; it is not absolute.

8. Lastly, the investigation has not been ended. Inquiries are most probably continuing. Therefore, for the time being, the case is pending before the national courts. The prescription period for this type of offence is twenty years.

9. In conclusion, Article 13 has not been violated.

10. The lawyer, Mahmut Sakar, was not prosecuted because of his intervention in the applicant's complaint to the Commission. He has never been her legal representative. Furthermore, he was acquitted at the end of his trial. His case is therefore quite separate from the present one.

11. As I find that there has been no violation of the Convention in this case I consider that Article 41 of the Convention is not applicable.