



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

FIRST SECTION

CASE OF SADAK AND OTHERS v. TURKEY (No. 1)

(Applications nos. 29900/96, 29901/96, 29902/96 and 29903/96)

JUDGMENT

STRASBOURG

17 July 2001

In the case of Sadak and Others v. Turkey (no. 1),

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 C. BÎRSAN,

Mr J. CASADEVALL,

Mr T. PANȚIRU, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

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

Having deliberated in private on 26 June 2001,

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

PROCEDURE

1. The case originated in four applications (nos. 29900/96, 29901/96, 29902/96 and 29903/96) against the Republic of 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 four Turkish nationals, Selim Sadak, Leyla Zana, Hatip Dicle and Orhan Doğan ("the applicants"), on 17 January 1996.

2. The applicants were represented by Mr Y. Alataş, of the Ankara Bar. The Turkish Government ("the Government") were represented by their Agent.

3. Relying on Articles 6 and 10 of the Convention, the applicants alleged, in particular, that they had not had a fair hearing by an independent and impartial tribunal and that their freedom of expression had been infringed.

4. The Commission declared the applications partly admissible on 24 October 1997. In its report of 9 March 1999 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry], it expressed the opinion that there had been a violation of Article 6 of the Convention (unanimously) and that no further examination of the complaints under Article 10 of the Convention was necessary (fourteen votes to three).

5. The applications were 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. Mr R. 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 (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicants and the Government each filed written observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the Government's Agent and the applicant's lawyer, that it was not necessary to hold a hearing (Rule 59 § 2 *in fine*). The Inter-Parliamentary Union, which had been given leave to intervene in the written procedure by the President of the Chamber, also sent written comments (Article 36 § 2 of the Convention and Rule 61 § 3), to which the Government replied (Rule 61 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants are former members of the Turkish National Assembly and of the Democracy Party (DEP), which was dissolved by the Constitutional Court on 16 June 1994.

8. The public prosecutor at the Ankara National Security Court accused them of having infringed Article 125 of the Turkish Criminal Code and made repeated applications – on 27 November 1991, 16 December 1992, 25 May 1993 and 2 July 1993 – for their parliamentary immunity to be lifted.

On 2 March 1994 the National Assembly, having deliberated on the basis of the application of 16 December 1992, decided to lift the applicants' parliamentary immunity under Article 83 of the Turkish Constitution.

9. On 2 March 1994 Mr Dicle and Mr Doğan were taken into police custody on the orders of the public prosecutor at the Ankara National Security Court. On 4 March 1994 Mrs Zana suffered the same fate.

A few days later the public prosecutor at the Ankara National Security Court ordered the detention of those three applicants in police custody to be extended until 16 March 1994.

10. While in custody, the applicants made no statements to the police.

11. On 16 March 1994 they were brought before a judge of the Ankara National Security Court and placed in detention pending trial.

12. On 16 June 1994 the Constitutional Court dissolved the DEP and ordered the party's MPs to vacate their parliamentary seats.

13. Mr Sadak was taken into police custody on 1 July 1994 and placed in detention pending trial on 12 July 1994.

14. In the meantime, on 21 June 1994 the public prosecutor at the Ankara National Security Court had filed a bill of indictment in which he

accused the applicants of treason against the integrity of the State – a capital offence under Article 125 of the Criminal Code. The accusation was based firstly on the activities that the applicants were alleged to have engaged in on behalf of the Workers' Party of Kurdistan (PKK) (harbouring militants and providing one of them with medical care, negotiating with local leaders or proffering threats against them to make them help the PKK establish itself in their regions) and secondly on the content of oral and written statements by the applicants expressing support for PKK activities. On the evening of 21 June 1994 the offences of which the applicants were accused were announced in the news bulletin of the publicly owned TRT 1 television channel.

15. On 8 December 1994, the date of the final hearing before the Ankara National Security Court, the applicants learned that the prosecution was proposing to alter the charge to belonging to an armed gang within the meaning of Article 168 of the Criminal Code. The National Security Court invited the applicants to submit their observations on this new characterisation of the offences. The applicants' lawyers were not present at the hearing because they had decided to protest against the National Security Court's refusal to adopt a procedural measure they had requested of it.

16. In a judgment of 8 December 1994 the Ankara National Security Court sentenced the four applicants to fifteen years' imprisonment for belonging to an armed gang within the meaning of Article 168, paragraph 2, of the Turkish Criminal Code. It rejected the charge under Article 125 of the Criminal Code, which provided for the death penalty in the event of treason against the integrity of the State.

17. It found it established that the applicants had engaged in intensive "separatist" activity under instructions from leaders of the PKK, a separatist armed gang seeking to found a Kurdish State in south-eastern and eastern Turkey. In that context it noted the following points: in the run-up to the 1991 parliamentary election the applicants had given speeches under the PKK banner at meetings where slogans had been shouted such as "Long Live the PKK" and "Strike guerrillas strike, found Kurdistan"; the applicants had provoked unrest among the population and created an atmosphere that had undermined the authority of the State; they had worn PKK colours when they were sworn in as members of the National Assembly in November 1991; at the congresses of their political parties, the HADEP and the DEP, the PKK flag had been hoisted instead of the Turkish flag and the Turkish Republic had been described as an occupier and enemy; conversations recorded between three of the four applicants and heads of clans (*aşiret reisi*) in south-eastern and eastern Anatolia had revealed that the former had used threats to try to persuade the latter to join or support the PKK; one of the applicants had harboured a PKK militant in his official residence, had helped him to obtain medical treatment and had

fraudulently induced the State to pay his hospital bills; another had harboured in his home PKK militants preparing to join those who were already involved in field operations in the region; and all the applicants had made statements on behalf of the PKK in foreign countries and spread lies about the Turkish State intended to uphold the PKK's views. The National Security Court also rejected an application by a co-defendant for a public hearing of a witness for the prosecution owing to the danger that the witness might suffer reprisals at the hands of the PKK.

18. When classifying the facts found in the instant case as offences under Article 168 rather than Article 125 of the Criminal Code, the National Security Court referred to the case-law according to which Article 125 defined a crime in terms of the ends pursued and Article 168 in terms of the means deployed. Treason against the integrity of the State within the meaning of Article 125 was a crime which could only be made out if it was established that acts had been committed which were likely to pose a real threat to the State's survival. Acts of violence and terrorism could fall within the scope of Article 125 if they were serious enough to pose such a threat. Article 168, paragraph 2, on the other hand, made it an offence merely to belong to an armed organisation which was already considered to be acting for a purpose contrary to Article 125. The material element of the offence lay in the fact that the persons in question belonged to an armed organisation of the aforementioned type complete with a system of disciplinary rules and a hierarchical structure. In that context, it was not necessary for the defendants themselves to have committed acts posing a threat to the State's survival. However, Article 168 did require a specific mental element, namely that the offenders were aware that they belonged to the illegal organisation.

19. The applicants and the public prosecutor at the Ankara National Security Court appealed on points of law against the judgment of 8 December 1994.

20. The public prosecutor argued that the offences were indeed punishable under Article 125 of the Turkish Criminal Code.

21. The applicants submitted for their part that the criminal proceedings had been brought for a political purpose, namely to suppress the opinions of members of Parliament defending the Kurdish cause. They contended that the National Security Court by which they had been convicted was a special political court which could not be considered an independent and impartial tribunal.

They also asserted that they had been denied a fair trial because, among other things, their equality of arms with the prosecution had not been respected. They complained in particular that they had been denied the assistance of a lawyer during their fifteen days in police custody; that their representatives had not had access to the documents on the case file during the preliminary investigation; that pressure had been brought to bear on

their representatives by the government as their defence had been the subject of reports by the Turkish secret services and their access to the courtroom had sometimes been impeded; that the applications filed by their representatives had never been allowed by the National Security Court; that they had not been permitted to examine before that court the witnesses interviewed by the prosecution during the preliminary investigation or the experts appointed by the prosecution; that their applications for the examination of the sound and video recordings made by the prosecution had been rejected by the National Security Court for no valid reason; that the evidence on which their conviction had been based had not been read out at the hearing; and that their applications for further witnesses to be heard and second opinions to be sought had been dismissed by the National Security Court. The applicants also argued that the difficulties encountered by certain lawyers and foreign delegations when attempting to enter the courtroom had infringed the requirement of a public hearing. Lastly, they criticised the National Security Court for laying the activities of all pro-Kurdish organisations, whether legal or illegal, at their door and taking account of findings of a political nature having no probative value with regard to the accusations levelled against them.

22. In a judgment of 26 October 1995 the Court of Cassation upheld the decision at first instance as to the applicants' guilt and the sentences imposed on them.

23. On the other hand it held that some of the reasons given by the Ankara National Security Court in its judgment of 8 December 1994 could not be permitted to stand. When the telephone conversations between the applicants and the head of the PKK had been recorded the statutory provisions intended to safeguard the freedom of communication had been infringed; the fact that the applicants' diaries contained the names and addresses of PKK leaders did not prove the accusations; and the fact that some of the defendants (including two of the four applicants) had taken part in a press conference held by the head of the PKK could not in itself be regarded as an offence.

24. In assessing each of the applicants' guilt, the Court of Cassation took account of various public communiqués that they had issued. In those documents they had described the parliamentary oath as racist on the ground that it omitted any reference to the Kurdish identity, and asserted that the Turkish government was waging war on the Kurdish population, that Kurdish uprisings had been suppressed using methods of genocide and that the national rights of the Kurdish people were denied by the Turkish State.

25. Regarding Leyla Zana, the Court of Cassation noted the following: she had undergone political training in a PKK camp in Bekaa (Syria); she had had four conversations with the head of a clan in south-eastern Turkey, advising him not to prevent the PKK from attacking State targets and encouraging him to telephone the head of the PKK, addressing him as "Mr

Secretary General”; she had twice visited the head of another clan to encourage him to join the PKK to help found Kurdistan; she had handed over to the PKK one of its opponents who had been abducted by PKK militants; she had described slogans such as “Long Live Apo [Apo is a diminutive used to refer to Abdullah Öcalan, the head of the PKK]” or “Long Live Kurdistan”, shouted at a demonstration in Cizre, as “slogans of the Kurdish people”; she had declared on German television that she felt like a foreigner in Turkey and that the Turkish parliament, of which she was a member, was constantly taking decisions whose aim was to wipe out the Kurdish people; and she had taken part in a demonstration and a press conference held by the PKK in Brussels and had addressed the participants from a rostrum draped with the PKK flag.

26. Regarding Orhan Doğan, the Court of Cassation noted the following: he had knowingly harboured a PKK militant in his home owing to his organic links with the PKK; he had helped the militant in question to obtain medical treatment and had fraudulently had the costs reimbursed by the National Assembly; he had harboured four other PKK militants who were about to return to the organisation’s camps; he had made statements to foreign embassies to the effect that the villagers leaving Şirnak in August 1992 were actually fleeing the State forces; and he had stated at demonstrations that the Turkish State was repressing the Kurdish people in various ways, while describing the PKK as an army.

27. Regarding Hatip Dicle, the Court of Cassation noted the following: he had put pressure on the head of a clan in south-eastern Turkey to join the PKK, whose aims he had said were to found Kurdistan and destroy the enemy; he had asked the persons attending a public meeting in Diyarbakır to observe a minute’s silence in honour of the PKK’s dead, asserting that the Turkish army had come to the region to repress the Kurdish people; he had stated in an interview given to a Belgian daily newspaper that the Kurds’ ideal would be to found a Kurdish State and that they had been fighting for their freedom since the Treaty of Lausanne (1923); he had described the PKK as a movement with popular roots; he had stated that all those who were against the Kurds should be expelled from their territory even if that would cost them their lives; he had said that the Kurds were engaged in an armed resistance to ensure their survival and that the alleged fight against terrorism amounted to an attempt to crush the Kurds’ claims to nationhood; he had attempted to justify the terrorist attack on the cadets of the military college for infantry conscripts, in which four people were killed and twenty injured, by saying that everyone in uniform was a potential target by virtue of the international conventions on the laws of war; and he had stated at a meeting of his party that the State could not solve the Kurdish problem by banning the PKK.

28. Lastly, regarding Selim Sadak, the Court of Cassation found the following facts established: he had put pressure on the head of a clan in

south-eastern Turkey to accept the authority of the PKK; he had asked the inhabitants of the village of Şenoba (in south-east Turkey) to relinquish their positions as village guards, explaining that they were in Kurdistan and that the Kurdish war of national liberation was soon to be launched against the fascist Turkish State; he had described police officers escorting persons in police custody on suspicion of having been active within the PKK as torturers, while stating that he would prevent the repression of the Kurds by the Turks and that the Kurds would demand some form of retribution; at a meeting held by the PKK in Neuchâtel (Switzerland), he had described the PKK as a guerrilla army fighting for the independence of Kurdistan and the Kurdish people; and in a communiqué sent to foreign embassies in Turkey he had declared that the villagers leaving Şirnak in August 1992 had in fact been fleeing the State forces.

II. RELEVANT DOMESTIC LAW

29. Article 125 of the Turkish Criminal Code provides:

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

30. Article 168 of the above Code provides:

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

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

THE LAW

31. The applicants complained that the criminal proceedings before the Ankara National Security Court were unfair, that that court was not independent and impartial, and of infringements of their freedom of expression and freedom of association; they also asserted that in the enjoyment of the rights thus breached they had been the victims of discrimination on the ground of their political opinions.

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Independence and impartiality of the National Security Court

32. The applicants alleged that the presence of a military judge on the bench of the National Security Court which had tried and convicted them meant that they had been denied a hearing before an independent and impartial tribunal. They relied on Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...”

33. The applicants submitted that the national security courts were special courts. They asserted that the military judges who sat on those courts were dependent on the executive, being appointed by a joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President. The assessment, promotion and security of tenure of those judges were within the control of the executive branch and, in turn, the army. The ties binding them with the executive and the army made it impossible for them to discharge their functions on the bench in an independent and impartial manner.

34. The Government emphasised the need to have particular regard to the national security context in Turkey when the decision was taken to establish national security courts, pursuant to Article 143 of the Constitution. In view of the experience of the armed forces in the anti-terrorism campaign, the authorities had considered it necessary to strengthen those courts by including a military judge who was supposed to provide them with the necessary expertise and knowledge to deal with threats to the security and integrity of the State. The Government asserted that the impartiality and independence of military judges sitting on national security courts had been guaranteed by the Constitution.

The Government also submitted that as a result of the constitutional amendment of 1999, under which military judges could no longer sit on national security courts, the applicants' complaints no longer presented a valid legal interest. Moreover, in previous cases in which the Court had found violations (for example, *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, or *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII), it had not found that the national security courts objectively lacked independence and impartiality, placing the emphasis instead on the apprehension aroused in the applicants by the composition of those courts.

35. The Commission considered for its part that the Ankara National Security Court could not be regarded in the instant case as an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. In its view, the fact that military judges took part in criminal proceedings against civilians in cases that had absolutely nothing to do with the internal rules of the armed forces showed the exceptional nature of such proceedings

and could also be interpreted as interference by the armed forces in the non-military judicial sphere, which in a democratic society must remain above all suspicion of subordination or bias.

36. Relying on the Court's case-law, the Inter-Parliamentary Union considered that because of the presence of a military judge in its composition, the National Security Court could not be regarded as an independent and impartial tribunal within the meaning of Article 6 of the Convention.

37. The Court points out that in *Incal* and *Çıraklar*, cited above, it examined complaints similar to those raised in the instant case. It noted on those occasions that some aspects of the status of military judges sitting as members of national security courts made their independence and impartiality questionable (see *Incal*, cited above, p. 1572, § 68). It pointed out that they were servicemen who still belonged to the army, which in turn took its orders from the executive. They were also subject to military discipline, and decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army (see paragraphs 32-34 above).

38. The Court takes note of the information sent to it by the Government, according to which Turkish law has been amended to satisfy the requirements of the Convention. It points out, however, that its task is confined to assessing the circumstances obtaining in the instant case and therefore it cannot be expected to find that a case is no longer of any valid legal interest to the applicants because there have been developments since the material time.

39. Consequently, the Court must determine whether the manner in which the Ankara National Security Court functioned infringed the applicants' right to a fair trial, and, in particular, whether, viewed objectively, they had a legitimate reason to fear that the court which tried them lacked independence and impartiality (see *Incal*, cited above, p. 1572, § 70, and *Çıraklar*, cited above, pp. 3072-73, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr *Incal* and Mr *Çıraklar*, both of whom, like the present applicants, were civilians. It is understandable in the present case that the applicants, who were tried before a national security court on a charge of attempting to undermine the independence and unity of the State, should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 32 above). On that account they could legitimately fear that the Ankara National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In short, the applicants' doubts as to the court's independence and impartiality can be regarded as objectively justified (see *Incal*, cited above, p. 1573, § 72 *in fine*).

40. The Court finds therefore that, when it tried and convicted the applicants, the Ankara National Security Court was not an independent and impartial tribunal within the meaning of Article 6 of the Convention.

B. Fairness of the proceedings before the National Security Court

1. In general

41. The Court points out that it has already held in previous cases that a court whose lack of independence and impartiality has been established cannot, in any circumstances, guarantee a fair trial to the persons subject to its jurisdiction and that, accordingly, it is unnecessary to examine the complaints regarding the fairness of the proceedings before that court (see, among other authorities, *Çiraklar*, cited above, p. 3074, §§ 44-45).

42. Having regard nonetheless to the particular circumstances of the case, the Court considers that it must proceed with its assessment of the applicants' complaints that their trial was unfair for reasons unrelated to the question of the status of the national security courts. Only in this way will it be able to examine the substance of the applicants' main allegation that the charge against them (belonging to an armed gang) could not have been found to have been made out if they had had a fair trial. Nor should the Court lose sight of the fact that its examination of the complaints under Articles 10, 11 and 14 of the Convention will be conditioned by its answer to the question whether the facts on which the applicants' conviction was based were established as the result of a fair trial.

2. Change in the characterisation of the offences during the trial

43. The applicants considered that the recharacterisation of their offences just before their sentence was passed amounted to a breach of Article 6 of the Convention. The Court will examine this complaint under Article 6 §§ 1 and 3 (a) and (b), which provide as follows:

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

...

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

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

...”

44. The applicants complained in particular that the charges against them had been altered at the last hearing of their trial. They had initially been accused of separatism and undermining the integrity of the State but on the day of the judgment, 8 December 1994, the National Security Court had asked them on the spot to prepare their defence against a new charge, namely belonging to an illegal armed organisation. It had then dismissed their application for additional time to prepare their defence against the new charge. The applicants submitted that they had not been able to defend themselves properly and present their evidence against the new charge.

45. The Commission agreed in substance with that argument. In its opinion, the case file showed that the applicants had not been given sufficient prior notice of the new characterisation of their offences and they had not been afforded the opportunity to reorganise their defence accordingly.

46. The Inter-Parliamentary Union noted that, whereas the applicants had initially been accused of contravening Article 125 of the Criminal Code, an offence which carried the death penalty, the National Security Court had eventually sentenced them to imprisonment for belonging to a separatist organisation. That being so, the applicants must have had the impression that their conviction was based more on political than on legal considerations.

47. The Government argued for their part that the National Security Court could not be criticised for making use of its right to reclassify the offences with which the applicants had been charged to arrive at a characterisation that was less serious for the applicants than the charge initially preferred by the prosecution. They pointed out that the offences covered by Article 125 of the Criminal Code carried the death penalty whereas those covered by Article 168 carried prison sentences. In their view, it was wrong in the instant case to talk of a recharacterisation of the offence in so far as Articles 125 and 168 appeared in the same section of the Criminal Code entitled "Crimes against the State". Article 168 was a "common provision" relating to all the other provisions in that section and covered anyone who "form[ed] an armed gang or organisation ... with the intention of committing any of the offences defined in Article 125 ...". Article 125 defined a crime in terms of the ends pursued, requiring a serious prejudice, whereas Article 168 defined a crime in terms of the means deployed to achieve those ends. The truth was that the applicants' conviction on the basis of Article 168 of the Criminal Code rather than that of Article 125 had been the result of the criminal courts' assessment of the evidence and their consideration of the defence's arguments.

48. The Court points out that the provisions of Article 6 § 3 (a) of the Convention reflect the need for special attention to be paid to the notification of the "accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its

service that the defendant is formally put on written notice of the factual and legal basis of the charges against him (see *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) also affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also, in detail, of the legal characterisation given to those acts (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 51, ECHR 1999-II).

49. The scope of Article 6 § 3 (a) must in particular be assessed in the light of the more general right to a fair hearing guaranteed by the first paragraph of Article 6 of the Convention (see, *mutatis mutandis*, the following judgments: *Deweert v. Belgium*, 27 February 1980, Series A no. 35, pp. 30-31, § 56; *Artico v. Italy*, 13 May 1980, Series A no. 37, p. 15, § 32; *Goddi v. Italy*, 9 April 1984, Series A no. 76, p. 11, § 28; and *Colozza v. Italy*, 12 February 1985, Series A no. 89, p. 14, § 26). The Court considers that in criminal matters the provision of full, detailed information to the defendant concerning the charges against him – and consequently the legal characterisation that the court might adopt in the matter – is an essential prerequisite for ensuring that the proceedings are fair (see *Pélissier and Sassi*, cited above, § 52).

50. Lastly, as regards the complaint under Article 6 § 3 (b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (see *Pélissier and Sassi*, cited above, § 54).

51. In the instant case, the Court notes first of all that in the bill of indictment filed by the prosecution on 21 June 1994 the applicants were accused solely of the crime of treason against the integrity of the State, as provided for by Article 125 of the Criminal Code. Although the applicants' links with PKK members were mentioned by the prosecution, the Court notes that throughout the investigation those links were examined only with a view to establishing the constituent elements of the offence of which the applicants were initially accused by the prosecution. It is not disputed that, up to the last day, the hearing before the National Security Court had related solely to the crime of treason against the integrity of the State.

52. That being so, the Court must ascertain whether it was sufficiently foreseeable for the applicants that the characterisation of the offence could be changed from the one of treason against the integrity of the State of which they were initially accused to that of belonging to an armed organisation set up for the purpose of destroying the integrity of the State.

53. The Court takes account of the interpretation made by the National Security Court in its judgment of 8 December 1994, according to which Article 125 of the Criminal Code defined a crime in terms of the ends pursued and Article 168 in terms of the means deployed. The two crimes

were considered to differ both in their material and in their mental aspects. Treason against the integrity of the State could only be perpetrated through the commission of acts that were serious enough to pose a genuine threat to the survival of the State. On the other hand, the material element of the offence punished under Article 168, paragraph 2, of the Criminal Code lay in belonging to an armed organisation already regarded as acting for a purpose contrary to Article 125 and having its own system of disciplinary rules and a hierarchical structure. It was not necessary in the context of that offence for the defendants themselves to have committed acts likely to pose a genuine threat to the survival of the State. Furthermore, the crime required a specific mental element, namely awareness of belonging to an illegal organisation (see paragraph 18 above).

54. The Court therefore cannot accept the argument that the Government appear to put forward that the offences covered by Articles 125 and 168, paragraph 2, of the Criminal Code amount to varying degrees of the same offence. Although they appear in the same section of the Criminal Code, entitled “Crimes against the State”, there is a clear distinction between the two Articles in both their material and their mental constituent elements.

55. It is not for the Court to assess the merits of the defences the applicants could have relied on if they had had enough time to prepare their defence against the accusation of belonging to an illegal armed organisation. It merely notes that it would be reasonable to argue that the defences would have been different from those used to contest the accusation of treason against the integrity of the State. The hearing on that accusation focused on the question whether the applicants’ activities as such were likely to pose a real threat to the integrity of the State. Yet on being accused of belonging to an illegal armed organisation the applicants had to convince the National Security Court both that they had not taken up a position within the hierarchical structure of the PKK and not been forced to abide by its disciplinary rules and that they had not been aware of belonging to that organisation.

56. In the light of the foregoing, the Court considers that belonging to an illegal armed organisation did not constitute an element intrinsic to the offence of which the applicants had been accused since the start of the proceedings.

57. The Court therefore considers that, in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Ankara National Security Court should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner, particularly by giving them the necessary time to do so. The case file shows that the National Security Court, which could, for example, have decided to adjourn the hearing once the facts had been recharacterised, did not give the applicants the opportunity to prepare their defence to the new charge, which they were not informed of until the

last day of the trial, just before the judgment was delivered, which was patently too late. In addition, the applicants' lawyers were absent on the day of the last hearing. Whatever the reason for their absence, the fact is that the applicants could not consult their lawyers on the recharacterisation of the facts by the prosecution and the National Security Court.

58. Having regard to all the above considerations, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed (see, *mutatis mutandis*, *Pélissier and Sassi*, cited above, §§ 60-63, and *Mattochia v. Italy*, no. 23969/94, §§ 62-72, ECHR 2000-IX).

59. Consequently, there has been a violation of paragraph 3 (a) and (b) of Article 6 of the Convention, taken together with paragraph 1 of that Article, which requires a fair trial.

3. Opportunity to examine or have examined witnesses for the prosecution

60. Selim Sadak, Leyla Zana and Hatip Dicle also complained of having been convicted on the basis of statements made to the public prosecutor at the National Security Court by certain heads of clans without being given the opportunity to examine them or have them examined. They relied in that connection on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which provide:

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

...

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

...

(d) to examine or have examined witnesses against him...”

61. The Government asserted that the witnesses concerned had not been listed among those that the applicants had asked to be examined during the hearing in the National Security Court. They added that the court had also taken account of other evidence when establishing that the applicants belonged to the PKK. Its refusal to examine some of the witnesses for the prosecution had been justified by the threats that had been made against them, not excluding their physical elimination by the PKK, as had happened to a witness against one of the applicants' co-defendants, killed in prison by other inmates who were members of the PKK.

62. The three applicants submitted that although the depositions by the aforementioned heads of clans, taken down by the prosecution on military

premises during the preliminary investigation, had formed the main grounds for their conviction, the defence had never been given the opportunity, either during the investigation or the trial, to confront the persons who had made those depositions; they alleged that the prosecution had deliberately incited these witnesses to give evidence against them. They had not been able to have the witnesses for the prosecution examined or the defence witnesses heard. The Inter-Parliamentary Union agreed in substance with the above submissions.

63. 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, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 50).

64. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49, and *Van Mechelen and Others*, cited above, p. 711, § 51).

65. As the Court has stated on a number of occasions (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 12, § 34, and *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances for the judicial authorities to refer to depositions made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge those depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see the following judgments: *Unterpertinger v. Austria*, 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33; *Saïdi v. France*, 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; and *Van Mechelen and Others*, cited above, p. 712, § 55).

66. Like the Commission, the Court notes that, when finding the three applicants concerned guilty, the two courts to which the case was referred based their decisions to a significant degree on depositions by witnesses who had stated before the public prosecutor prior to the trial that those applicants had acted as spokespersons for the PKK. Neither during the investigation nor during the trial were the applicants given the opportunity to examine these witnesses or have them examined. They were therefore unable to subject their credibility to scrutiny or cast any doubt on their depositions.

67. With regard to the Government's submission that the three applicants had not explicitly requested that the witnesses against them be heard at a public hearing before the National Security Court, the Court reiterates that waiver of the exercise of a right guaranteed by the Convention – in so far as such waiver is permitted in domestic law – must be established in an unequivocal manner (see, among other authorities, *Colozza*, cited above, pp. 14-15, § 28). The Court notes that in the instant case the applicants complained before both the National Security Court and the Court of Cassation that they had been unable to take part in the taking of evidence during the preliminary investigation or the trial. They also questioned the credibility of the testimony against them obtained in the presence of the public prosecutor alone.

In any event, paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him (see *Barberà, Messegue and Jabardo v. Spain*, judgment of 6 December 1988, Series A no. 146, p. 33, § 78). Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *Colozza*, cited above, *ibid.*).

The National Security Court refused to hear the heads of clans whose evidence against the applicants was used at their trial or organise a confrontation between them and the three applicants concerned. On that point the Government have failed to explain in what way the witnesses concerned – whose situation was different from that of the witness killed in prison – would have been exposing themselves to any danger by appearing before the National Security Court.

68. To sum up, the three applicants concerned have suffered such major violations of their defence rights that they have been denied a fair trial. There has, therefore, been a violation of their rights under paragraph 3 (d) of Article 6, taken together with paragraph 1.

4. Other complaints based on the principle of a fair trial set out in Article 6 of the Convention

69. The Court refers to its conclusions in paragraphs 59 and 68 above, considering that it has already dealt with most of the complaints relating to the fairness of the proceedings against the applicants in the domestic courts. It finds therefore that it is unnecessary to examine the other complaints under Article 6 relating to the fairness of the proceedings.

II. ALLEGED VIOLATION OF ARTICLES 10, 11 AND 14 OF THE CONVENTION

70. Relying on Articles 10, 11 and 14 of the Convention, the applicants complained that they had been convicted for expressing, as members of Parliament, the aspirations of people of Kurdish origin in Turkey and for devising peaceful solutions to the Kurdish question in Turkey within their political parties.

71. The Inter-Parliamentary Union supported the applicants' argument and submitted that they had been convicted, *inter alia*, for expressing their political opinions. It considered that, even though there had been some limited progress in Turkish legislation on freedom of expression, it was still subject to major restrictions in Turkey. It also pointed out that in choosing to convict the applicants of belonging to a separatist organisation the domestic courts had made it impossible for them to qualify for remission of sentence or conditional release, whereas both of those possibilities were open to those convicted of crimes of opinion.

72. The Government submitted on the contrary that it was clear from the decisions of the domestic courts that the applicants' views had little to do with the peaceful expression of support for any kind of political cause and clearly reflected their allegiance to an illegal armed organisation from which they received all their instructions.

73. Like the Commission, the Court considers that the main legal question raised by the instant applications is whether the charges against the applicants were made out after a fair trial within the meaning of Article 6 of the Convention. Having already replied to this question in the negative (see paragraph 61 above), it agrees with the Commission that there is no need to give a separate ruling on the complaints under Articles 10, 11 and 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicants alleged that they had sustained pecuniary damage corresponding to the wages that they would have earned as members of Parliament had they not been imprisoned and the loss of earnings that they were likely to have to endure as a result of the restrictions to their civic rights. They assessed that damage at 465,000 United States dollars (USD) each. In addition, they assessed the non-pecuniary damage they had each sustained as a result of their conviction and subsequent detention at USD 6,300,000.

76. The Government submitted that the applicants' claim was excessive and would be likely to lead to unjust enrichment. They argued that a member of Parliament's salary was paid for the performance of quite specific functions and could not be adopted as the basis for the calculation of a sum intended to compensate for the losses of the applicants, who were still in prison.

77. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicants did not have the benefit of the guarantees of Article 6. Whilst it cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicants as having suffered a loss of real opportunities (see *Colozza*, cited above, p. 17, § 38, and *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, § 79, ECHR 1999-VII). To that must be added non-pecuniary damage, which the findings of violations in this judgment do not sufficiently remedy. Making its assessment on an equitable basis as required by Article 41, the Court awards USD 25,000 to each of the four applicants in respect of all heads of damage taken together.

B. Costs and expenses

78. In respect of the costs and expenses relating to their legal representation, the applicants sought a documented sum of USD 3,460 for travel expenses, translation costs and the cost of communication with their

counsel. With regard to Mr Alataş's fees, they sought an additional USD 174,000, intended to cover 681 hours of work for the domestic proceedings and 189 hours for the proceedings before the Strasbourg institutions. Moreover, calculating on the basis of an equivalent number of hours, they sought USD 164,538 for Mr Özmen, who had taken part in the domestic proceedings and had also assisted Mr Alataş during the proceedings in Strasbourg.

79. The Government said these claims were manifestly excessive, particularly the amount in respect of the lawyers' fees.

80. The Court likewise considers the number of hours stated above exaggerated, even though the case was somewhat complex. In view of the work done by Mr Alataş, and making its assessment on an equitable basis in the light of the evidence in its possession, it awards the four applicants together USD 10,000, in respect of all costs and expenses.

C. Default interest

81. The Court considers it appropriate to set default interest on the sums awarded in United States dollars at an annual rate of 6%.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 of the Convention on account of the lack of independence and impartiality of the Ankara National Security Court;
2. *Holds* that there has been a violation of Article 6 § 3 (a), (b) and (d) of the Convention, taken together with paragraph 1, on account of the fact that the applicants were not notified in good time that the charges against them had been altered and that they were unable to examine or have examined the witnesses against them;
3. *Holds* that it is not necessary to examine the other complaints under Article 6 of the Convention;
4. *Holds* that it is not necessary to examine the complaints under Articles 10, 11 and 14 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months, the following amounts, plus any tax or stamp duty that may be

chargeable at the time of payment, to be converted into Turkish liras at the rate applicable on the date of settlement:

- (i) USD 25,000 (twenty-five thousand United States dollars) to each of the four applicants in respect of all heads of damage taken together, making a total of USD 100,000 (one hundred thousand United States dollars);
- (ii) USD 10,000 (ten thousand United States dollars) to all the applicants together in respect of costs and expenses;
- (b) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 17 July 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 concurring opinion of Mr Gölcüklü is annexed to this judgment.

E.P.
M.O'B.

CONCURRING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

I voted with the majority of the Court, finding that the crux of the matter in this case related to Articles 6 (violation) and 10 of the Convention. However, I consider it my duty as a judge to draw attention to an important point relating to the application of Article 41.

In a number of identical cases to the current one, in which Articles 6 § 1 (independence and impartiality of the court) and 10 of the Convention were at issue, the Court found as follows with regard to former Article 50 (now Article 41):

Incal v. Turkey judgment of 9 June 1998

“82. On the question of pecuniary damage, the Court considers in the first place that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. It further notes that there is insufficient proof of a causal connection between the breach of Article 10 it has found and the loss of professional and commercial income alleged by the applicant. Moreover, the applicant’s claims in respect of pecuniary damage are not supported by any evidence whatsoever. The Court can therefore not allow them.

With regard to non-pecuniary damage, the Court considers that the applicant suffered a certain amount of distress on account of the facts of the case. Making an assessment on an equitable basis, as required by Article 50, the Court awards him compensation in the sum of FRF 30,000 under this head [in other words, the equivalent of USD 4,000].

83. With regard to costs and expenses, the Court awards Mr Incal, on an equitable basis and according to the criteria laid down by its case-law (see, among other authorities, the Demicoli v. Malta judgment of 27 August 1991, Series A no. 210, p. 20, § 49), the overall sum of FRF 15,000.”

Çıraklar v. Turkey judgment of 28 October 1998

“47. The applicant sought 262,000 French francs (FRF) for pecuniary damage and FRF 500,000 for non-pecuniary damage.

48. The Government invited the Court to dismiss that claim.

49. As Mr Çıraklar did not specify the nature of the pecuniary damage of which he complained, the Court cannot but dismiss the relevant claim. As to the alleged non-pecuniary damage, it is sufficiently compensated by the finding of a violation of Article 6 § 1.”

Mehdi Zana v. Turkey judgment of 6 March 2001

“25. When submitting his application, the applicant claimed in general that non-pecuniary damage, costs and expenses be awarded to him. However, he did not give any particulars of these claims, as required by Rule 60 of the Rules of Court, although he was requested to do so (see, among other authorities, *Motière v. France*, judgment of 5 December 2000, unreported).

26. The Court considers that the finding of a violation constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant (see *Incal*, cited above, p. 1575, § 82, and *Çıraklar*, cited above, p. 3074, § 45).

27. As to the legal costs and expenses, in the absence of any quantified claim, the Court makes no award.”