



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

THIRD SECTION

CASE OF HULKİ GÜNEŞ v. TURKEY

(Application no. 28490/95)

JUDGMENT
[Extracts]

STRASBOURG

19 June 2003

FINAL

19/09/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hulki Güneş v. Turkey,

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

Mr I. CABRAL BARRETO, *President*,

Mr P. KŪRIS,

Mr B. ZUPANČIČ,

Mr J. HEDIGAN,

Mrs H.S. GREVE,

Mr K. TRAJA, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr M. VILLIGER, *Deputy Section Registrar*,

Having deliberated in private on 27 May 2003,

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

PROCEDURE

1. The case originated in an application (no. 28490/95) 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 a Turkish national, Mr Hulki Güneş (“the applicant”), on 29 May 1995.

2. The applicant was represented before the Court by Mr M.S. Tanrikulu, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the proceedings before the Court.

3. The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 3 and Article 6 §§ 1 and 3 (d) of the Convention.

4. The application was referred to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third 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. By a decision of 9 October 2001 the Chamber declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

8. The applicant and the Government each filed written observations on the merits of the case (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, a Turkish citizen born in 1964, is currently serving a life sentence in Diyarbakır Prison.

A. The applicant's arrest and the medical certificates drawn up after his time in police custody

10. On 19 June 1992 the applicant was arrested by the security forces in the village of Çayçatı, in the district of Varto (province of Muş). A handwritten and partly illegible report drawn up on the same day includes the following passage:

“Following an investigation, Mr Güneş, [suspected of having] taken part in an armed clash with gendarmes in the district of Varto on 14 June 1992, ... was arrested, unarmed, while hiding in the house of one N.Ö., in the course of a gendarmerie operation on 19 June 1992.”

11. On the same day, the gendarmes who had arrested the applicant drew up a further report in which they identified him as one of the terrorists who had taken part in an armed attack on 14 June 1992 in which one soldier had died and two others had been injured.

...

13. According to a report drawn up on 29 June 1992, a confrontation was held between the applicant and the gendarmes who had taken part in the armed clash of 14 June 1992. Three of them identified the applicant. The report was not signed by him.

14. On an unspecified date the applicant was transferred to the Muş provincial gendarmerie headquarters for questioning. However, the circumstances in which he was questioned cannot be established from the evidence adduced by the parties.

...

18. On the same day the applicant was brought before the Police Court, composed of a single judge, who ordered his detention pending trial. Before the judge, the applicant denied all the accusations against him. He stated

that he had not taken part in any armed attack. He also denied that a confrontation had been held on 29 June 1992 (see paragraph 13 above) and asserted that on the day of his arrest he had been shown to a soldier, who had been unable to identify him. Lastly, he stated that he had been ill-treated while being detained at the Muş provincial gendarmerie headquarters.

...

C. The criminal proceedings against the applicant

42. In an indictment preferred on 20 July 1992 the public prosecutor at the Diyarbakır National Security Court instituted proceedings against the applicant, charging him with separatism and with undermining the integrity of the State, capital offences under Article 125 of the Criminal Code. He accused him of having taken part in two armed attacks on 12 October 1991 and 14 June 1992 and, in particular, of having fired, together with other terrorists, at the security forces, causing the death of one soldier and injuring two others.

43. In connection with the criminal proceedings against the applicant, a Mr Erdal was also accused of having taken part in the armed attack of 14 June 1992. He was therefore tried in the same proceedings.

44. At a hearing on 28 August 1992 the National Security Court read out statements by the gendarmes (Z.K., Z.Ko. and T.E.) who had identified the applicant during the investigation (see paragraph 11 above). The applicant disputed the statements and denied all the charges. The court decided to summon the three gendarmes as witnesses.

45. At a hearing on 2 October 1992 counsel for the applicant contested the record of the confrontation of 19 June 1992 (see paragraph 13 above) and argued that the statements by the gendarmes alleged to have identified his client were contradictory.

46. At a hearing on 30 October 1992 the court, as requested by the public prosecutor, decided, on "road-safety grounds", to have evidence from the three gendarmes taken on commission. Accordingly, two photographs of the applicant, one from the side and the other from the front, were sent together with the reports concerning the case to the court delegated to examine the witnesses. The applicant challenged the court's decision and asked it to hold a confrontation itself.

47. At a hearing on 15 January 1993 Mr Erdal, the applicant's co-defendant, gave evidence, as requested by counsel for the applicant. He stated that he had never seen the applicant. He also maintained that the applicant had not been present during the armed attack on 14 June 1992, in which he himself had taken part.

48. At a hearing on 12 February 1993 counsel for the applicant again criticised the method by which the court had decided to take evidence from

the witnesses in question, arguing that it could not be considered compatible with the rules of procedure.

49. At a hearing on 19 March 1993 it was noted that the depositions of the witnesses who had been examined on commission, with the exception of that of Z.K., had been added to the case file.

50. At a hearing on 18 June 1993 the applicant pleaded not guilty. He again challenged the manner in which the depositions of the witnesses in question had been taken and argued that they could not be admitted in evidence against him, since he had been identified from photographs and hence without a confrontation. He also rejected the statements he had given under duress at the investigation stage.

51. At a hearing on 3 September 1993 it was noted that the deposition of Z.K., likewise taken on commission, had been added to the case file. Counsel for the applicant contested it, arguing that, like the other depositions, it could not be admitted as evidence for the prosecution.

At the same hearing the public prosecutor made submissions in which he sought the applicant's acquittal. He stated, in particular:

“Criminal proceedings were instituted against the defendant Hulki Güneş, who was suspected of having taken part in an armed clash with soldiers on 14 June 1992... The witnesses Z.K. and Z.Ko. stated that they had seen the defendant with his face uncovered during the clash, whereas the other members of the organisation had their faces covered. [However, firstly,] it was not mentioned in the incident report of 14 June 1992 that a member of the organisation had been observed with his face uncovered. [Secondly,] in the statements they gave after the incident, the soldiers did not say that they had seen one of the members of the organisation with his face uncovered. [In addition,] Mr Güneş was not arrested during the incident in question [and] Mr Erdal, the co-defendant, a 'confessor' [former member of an illegal organisation turned informer] who admitted having taken part in the shooting, stated that Mr Güneş had not been present at the time and that he did not know him. [Lastly,] there are also contradictions, indeed a blatant discrepancy, regarding the names of those who took part in the shooting, between Mr Güneş's statements [obtained while he was in police custody] and those of his co-defendant. [Accordingly], it should be concluded that there is insufficient evidence for Mr Güneş to be found guilty...”

52. At hearings on 1 October and 5 and 26 November 1993 the public prosecutor reiterated his submissions of 3 September and sought the release of the applicant, but his recommendations were not followed.

53. At a hearing on 24 December 1993 statements by the applicant's brother, who had been arrested for being a member of the PKK, and by his sister were added to the case file. Both attested that the applicant was a member of the organisation in question. The applicant was given additional time to file his observations on this new evidence against him.

54. At a hearing on 30 December 1993 the public prosecutor made further submissions in which he sought the applicant's conviction under Article 125 of the Criminal Code.

55. At a hearing on 11 March 1994 the applicant submitted his defence. Referring to the pleadings he had lodged during the trial and to the public prosecutor's initial submissions, he asked to be acquitted.

56. In a judgment of 11 March 1994 the National Security Court, composed of three judges, one of whom was a member of the Military Legal Service, found the applicant guilty as charged and sentenced him to death, commuted to life imprisonment, under Article 125 of the Criminal Code. In support of its decision, the court took into account the depositions of the gendarmes concerned, the statement which the applicant had given to the security forces and the reports in the investigation file. It held, *inter alia*:

“With regard to the defendant Hulki Güneş:

In the record of his statement, the defendant asserted that in 1989, while staying illegally in France, he had begun to support the organisation's ideas. On returning to Turkey, he had contacted the organisation. He stated that, on its behalf, he had

- (i) set up a committee, collected funds and disseminated propaganda;
- (ii) taken part on 12 October 1991 in an armed attack in the district of Varto; and
- (iii) taken part on 14 June 1992 in an ambush against a patrol from the security forces, in which a member of the patrol had been killed and two others injured.

He stated that after that incident he had gone to hide in the village of Çayçatı, where he was arrested by the security forces. He also stated that his code name as a member of the organisation had been Ceymiş.

Before the public prosecutor and the Police Court he denied all the offences of which he was accused. He stated that he had gone to the village of Çayçatı to do building work in N.Ö's house. He maintained that he had hidden under the bed when the soldiers had arrived purely because he did not have any identity papers. He denied all the charges against him.

In his defence submissions before the court he again denied the charges.

In his submissions the public prosecutor sought the defendant's conviction under Article 125 of the Criminal Code.

It appears from the reports and documents in the file that on 14 June 1992, at about 12.30 p.m., members of the security forces attached to the Omcali gendarmerie command were attacked by a group of armed terrorists while on patrol in the province of Muş, in the district of Varto, near Omcali, on Sarımsa Hill. In the course of the shooting, the gendarme M. Aslan was killed and the gendarmes Ş. Demircan and H. Akkurtlu were injured. After additional security forces had arrived as reinforcements, the clash went on until 8 p.m. Statements by the gendarmes T.E., Z.K. and Z.Ko., who were involved in the skirmish, were added to the case file.

The members of the security forces present at the scene after the shooting were informed that there was a terrorist hiding in N.Ö's house in the village of Çayçatı, which is part of the district of Varto. After taking the necessary security measures, the

security forces went to the house and rang the doorbell. About 15 to 20 minutes later, after several rings, someone opened the door. With the owner's agreement, they were able to go in. Inside, they asked N.Ö. if a Hulki Güneş was staying with him. N.Ö. replied 'no'. All the family were together in the same room. They were asked if anyone else was in the house. They replied 'no'. However, the soldiers discovered a person in pyjamas hiding under a bed. When the person was shown to the members of the household, they said that they did not know him or what he was doing there. It was established that the person was Hulki Güneş and that he was related to the members of the household. On his arrest, T.E., Z.K. and Z.Ko., members of the security forces who had been present at the shooting on 14 June 1992, immediately recognised him as having been involved in the shooting. That much is apparent from the relevant report.

A confrontation was held between these members of the security forces and the defendant. All three members of the security forces recognised the defendant as having taken part in the shooting.

The court sent a photograph of the defendant for identification by the gendarmes claiming to recognise him.

In the deposition taken from him on commission, the witness Z.K. said that he could not be certain whether the person in the photograph had been among those taking part in the shooting, as the terrorists who had attacked them had had their faces covered. However, he stated that the defendant had been one of the terrorists who had organised the ambush and that his face had not been covered. During the shooting there had been a distance of only 15-20 metres between them, so he had had a clear view of the person's face. He accordingly maintained that the person in the photograph was the same person he had seen during the shooting. He added that he had recognised him as soon as he had arrested him. He attested that the arrest report was consistent with his statements and that the defendant was the person who had taken part in the shooting.

The statement by T.E. was also taken on commission. He stated that the person in the photograph was the same person he had seen at the scene of the shooting and that the reports read out to him were consistent with what had happened.

The witness Z.Ko., who also gave evidence on commission, confirmed the content of the reports. He stated that on 14 June 1992 there had been an outbreak of shooting with an armed terrorist group. He added that the shooting had carried on for a long time, with the result that at nightfall he and his colleagues had hidden in the bushes to escape the terrorists' shots. As the terrorists had left the scene, he had had a clear view of one of them 15-20 metres away. He added that shortly after the defendant's arrest, he had been able to identify him as the person he had seen. He maintained that that person was the one in the photograph.

It is apparent from the arrest report that the defendant was immediately identified by the witnesses. They identified him without hesitation on being shown his photograph. Furthermore, the defendant's sister stated that he was a member of the PKK terrorist organisation. It follows from these witness statements and declarations that the confessions made by the defendant in the statement he gave reflect the truth.

The arrest report appears consistent with the evidence given by the defendant in his statement as to the circumstances of his arrest. That factual element tends to corroborate the confessions made by the defendant in his initial statement.

Although the indictment states that the defendant took part in the shooting on 12 October 1991 in the capital of the district of Varto, his confessions on the subject are not corroborated by any documents in the file or any other related item of evidence. It has therefore not been established that the defendant took part in that operation.

...

On 20 July 1992 the public prosecutor at the National Security Court instituted proceedings against the defendant. He accused him of having begun to support the organisation's ideas in 1989, while staying illegally in France, and, on returning to Turkey, having participated in the organisation's activities, then taken part in an armed attack in the capital of the district of Varto on 12 October 1991 and, lastly, having taken part in an ambush against a patrol from the security forces on 14 June 1992, in which a member of the patrol had been killed and two others injured..."

Having regard to the foregoing and to the fact that the public prosecutor had sought the application of Article 125 of the Criminal Code, the National Security Court found it established that the defendant, a member of the PKK, had taken part in the shooting on 14 June 1992 but not in the shooting on 12 October 1991. Holding that the armed attack of 14 June 1992 had occurred in the context of the PKK's terrorist activities aimed at removing part of the national territory from the State's control, the court held that the defendant should be convicted under Article 125 of the Criminal Code.

57. On 11 March 1994 the applicant appealed against that judgment to the Court of Cassation and requested a hearing.

58. Following a hearing on 10 November 1994 the Court of Cassation upheld the judgment appealed against. Its judgment was delivered on 16 November 1994 with neither the applicant nor his counsel present.

On 8 December 1994 the full text of the Court of Cassation's judgment was added to the case file kept at the registry of the National Security Court and thus made available to the parties.

II. RELEVANT DOMESTIC LAW

59. Article 125 of the Criminal Code provided:

"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."

60. Section 20(7) of the National Security Courts (Establishment and Rules of Procedure) Act (Law no. 2845) provides:

"The National Security Court may have witnesses and experts examined by delegated judges even where the requirements of Article 216 of the Code of Criminal Procedure are not satisfied."

61. Article 216 of the Code of Criminal Procedure provides:

“Where a witness or expert is for a long or indefinite period unable to attend a hearing on account of illness, invalidity or another reason, the court may decide to have him examined by a delegated judge or on commission...

This provision shall also apply to the examination of witnesses or experts who would have difficulty in attending the hearing on account of the distance from their place of residence.”

62. From the principles established by the Turkish courts when applying the criminal law, it is clear that the questioning of a suspect is a means of enabling him to defend himself that should work to his advantage and not a measure designed to obtain evidence against him. While statements made during questioning may be taken into consideration by the judge in his assessment of the facts of a case, they must nonetheless be made voluntarily, and statements obtained through the use of pressure or force are not admissible in evidence. By Article 247 of the Code of Criminal Procedure, as interpreted by the Court of Cassation, any confessions made to the police or the public prosecutor's office must be repeated before the judge if the record of the questioning containing them is to be admissible as evidence for the prosecution. If the confessions are not repeated, the records in question are not allowed to be read out as evidence in court and consequently cannot be relied on to support a conviction. Even a confession repeated in court cannot on its own be regarded as a decisive piece of evidence but must be supported by additional evidence.

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

...

B. Fairness of the proceedings in the National Security Court

81. The applicant complained that he had been convicted on the basis of statements by Z.K., T.E. and Z.Ko., the gendarmes who had identified him as one of the terrorists who had taken part in an armed attack on 14 June 1992, without having the opportunity to examine them or have them examined. He relied 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 and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

82. The Government observed that the depositions of the witnesses in question had been taken on commission, a measure justified by the concern to safeguard their physical integrity in view of the poor level of road safety. They further noted that domestic law had made clear provision for that method of examining witnesses and that the applicant had been perfectly entitled to apply to the courts delegated to take evidence in order to attend the examination of witnesses and to be confronted with them (see paragraphs 61 and 62 above). They added that the trial court had also taken other evidence into consideration in establishing the applicant's guilt.

83. The applicant contended that, although the depositions of the three gendarmes Z.K., T.E. and Z.Ko. had formed the main basis for his conviction, the defence had not had the possibility of a confrontation with those witnesses either during the preliminary investigation or at the trial. He pointed out, moreover, that he had not signed the record of the confrontation alleged to have taken place on 29 June 1992 (see paragraph 13 above). Arguing that there were indirect links by air between the towns where the witnesses lived and Diyarbakır, he also disputed the argument that the poor level of road safety had precluded the gendarmes in question from appearing in the trial court. In his submission, the fact that those witnesses had not appeared at the trial had, firstly, prevented his counsel and himself from examining them and having them examined and, secondly, prevented the trial court from observing their demeanour and hence forming its own impression of their reliability.

84. The Court notes at the outset 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 complaints regarding the fairness of the proceedings before that court (see, among other authorities, *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VII, p. 3074, §§ 44-45).

85. Having regard, nonetheless, to the particular circumstances of the case, in particular the severity of the applicant's sentence (the death penalty, commuted to life imprisonment), to the fact that the main evidence which led the court to impose that sentence was disputed by the applicant, and to the conclusion it has reached under Article 3 of the Convention, the Court considers in the instant case that it must proceed with its assessment of the

applicant's complaint that his trial was unfair for reasons unrelated to the question of the status of members of the national security courts. Only in this way will it be able to examine the substance of the applicant's main allegation that the charges against him (in particular, that of having taken part in an armed attack on 14 June 1992) could not have been found to have been made out if he had had a fair trial (see, *mutatis mutandis*, *Sadak and Others v. Turkey* (no. 1), nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 42, ECHR 2001-VIII).

86. The Court reiterates that the taking of evidence is governed primarily by the rules of domestic law and that it is in principle for the national courts to assess the evidence before them. The Court's task under the Convention is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, among other authorities, *Edwards v. the United Kingdom*, judgment of 6 December 1992, Series A no. 247-B, pp. 34-35, § 34). All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 12, § 34, and *Lucà v. Italy*, no. 33354/96, §§ 40-43, ECHR 2001-II). The corollary of that 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, among other authorities, *Sadak and Others*, cited above, § 65).

87. As this is the fundamental point in issue and as the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together.

88. The Court notes, firstly, that the National Security Court initially intended to summon as witnesses the gendarmes who had identified the applicant (see paragraph 44 above). However, at the public prosecutor's request it decided, on road-safety grounds, to take evidence from them on commission. Accordingly, two photographs of the applicant, one from the side and the other from the front, were sent, together with the relevant reports, to the court delegated to record the depositions of the witnesses in question (see paragraph 46 above).

89. The Court observes that in finding the applicant guilty under Article 125 of the Criminal Code, the National Security Court attached decisive weight to the depositions of the witnesses who, according to the record (disputed by the applicant) of the confrontation of 29 June 1992, had identified him before the trial and who had also stated before the court delegated to take down the depositions that they recognised him from the two photographs as one of the persons who had taken part in an armed attack on 14 June 1992 (see paragraph 56 above). Yet neither during the investigation nor during the trial was the applicant able to examine those witnesses or have them examined, or to be confronted with them.

90. The National Security Court held that certain offences admitted by the applicant while in police custody, such as his participation in an armed attack on 12 October 1991, could not be considered to have been made out, seeing that “his confessions on the subject [were] not corroborated by any documents in the file or any other related item of evidence”. However, on the basis of the statements taken from the applicant before the trial, which were said to be corroborated by other evidence, such as the confrontation that had supposedly also taken place before the trial and the depositions taken from the gendarmes on commission, the trial court found it established that the applicant had taken part in the armed attack on 14 June 1992 (see paragraph 56 above).

91. The Court notes that it has held that the conditions in which the applicant was kept in police custody breached Article 3 of the Convention. It would observe in that connection that Turkish legislation does not appear to attach to confessions obtained during questioning but denied in court any consequences that are decisive for the prospects of the defence (see paragraph 62 above, and *Dikme v. Turkey*, no. 20869/92, § 111, ECHR 2000-VIII). Although it is not its task to examine in the abstract the issue of the admissibility of evidence in criminal law, the Court finds it regrettable that in the instant case the National Security Court did not determine that issue before going on to examine the merits of the case. Such a preliminary investigation would clearly have given the national courts an opportunity to condemn any unlawful methods used to obtain evidence for the prosecution.

92. The Court further points out that the applicant was not assisted by a lawyer during the investigation, at which stage the main evidence was obtained, such as the record of the confrontation and his confessions. It was of crucial importance in that connection that the prosecution witnesses should be examined by the trial court, as that court alone could have made an effective assessment at close quarters of their demeanour and of the reliability of their versions of events.

93. The Court is, moreover, unable to accept the Government's argument that the applicant's conviction was based on a whole range of evidence. It observes, in particular, that in his submissions of 3 September 1993 (see paragraph 51 above) the public prosecutor sought the applicant's acquittal

on the charge of taking part in the armed attack on 14 June 1992, submitting that the evidence adduced by the prosecution before the trial court was manifestly insufficient to establish with any certainty that the applicant was guilty of that offence. The public prosecutor's submissions were based, among other things, on the inconsistency between the incident reports, the gendarmes' statements and the declaration by Mr Erdal, the applicant's co-defendant, that the applicant had not been involved in the shooting on 14 June 1992, in which he himself had taken part.

On 30 December 1993, however, the same public prosecutor sought the applicant's conviction, even though no fresh evidence at all had been adduced to show that the applicant had taken part in the armed attack (see paragraph 54 above). The statements by the applicant's brother, who had been arrested for being a member of the PKK, and by his sister could possibly be regarded as evidence against him. However, it does not appear from the file that they shed any light on the incident of 14 June 1992 (see paragraphs 53 and 56 above).

94. Having regard to the foregoing and to the reasoning of the National Security Court in applying Article 125 of the Criminal Code (see paragraph 56 above), the Court is in no doubt that the applicant's conviction was based on the statements of the gendarmes who had identified him, obtained at two stages of the proceedings – during the investigation and on commission – with neither the applicant nor his lawyer present.

95. As to whether the applicant or his lawyer could have applied to the courts delegated to take evidence for permission to attend the examination of the witnesses in question and whether the defendant could have been confronted with them, the Court reiterates, firstly, that the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner (see, among other authorities, *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 26). It further notes that although the applicant repeatedly and clearly asked for the confrontation to take place before the trial court (see paragraphs 48, 50 and 51 above), it does not appear from the file that that court took the necessary steps to ensure that the witnesses in question could be examined or could appear before it (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain*, judgment of 6 December 1988, Series A no. 146, p. 33, § 78). Furthermore, a request to the courts delegated to take evidence might also have been refused on road-safety grounds.

In any event, as the witnesses in question did not appear before the trial court, the judges were unable to observe their demeanour under questioning and thus form their own impression of their reliability (see *Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A no. 166, p. 20, § 43). Admittedly, they undertook a careful examination of the statements taken from the witnesses on commission and gave the applicant an

opportunity to contest them, but this can scarcely be regarded as a proper substitute for direct examination and attendance.

96. Accordingly, the statements in issue formed the fundamental basis for the conviction, yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation before the trial court deprived him in certain respects of a fair trial. The Court is fully aware of the undeniable difficulties of combating terrorism – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by this problem, but considers that such factors cannot justify restricting to this extent the rights of the defence of any person charged with a criminal offence. In short, there has been a violation of Article 6 §§ 1 and 3 (d).

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention in that the applicant did not have the opportunity to examine or have examined witnesses against him;

...

Done in French, and notified in writing on 19 June 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mark VILLIGER
Deputy Registrar

Ireneu CABRAL BARRETO
President