



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

SECOND SECTION

CASE OF HASAN İLHAN v. TURKEY

(Application no. 22494/93)

JUDGMENT

STRASBOURG

9 November 2004

FINAL

09/02/2005

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 Hasan İlhan v. Turkey,

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr L. LOUCAIDES,

Mr C. BİRSAN,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 19 October 2004,

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

PROCEDURE

1. The case originated in an application (no. 22494/93) 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, Hasan İlhan (“the applicant”), on 23 July 1993. On 15 August 1995 the applicant's legal representatives informed the Commission of the death of the applicant in June 1994 and asked the Commission to allow Abdülmecit İlhan, the son of the applicant, to continue the application. On 20 January 1996 the Commission allowed Abdülmecit İlhan to continue the application on behalf of his deceased father. For practical reasons, Mr Hasan İlhan will continue to be called “the applicant” although Mr Abdülmecit İlhan is now to be regarded as such.

2. The applicant, who had been granted legal aid, was represented by Professor Kevin Boyle and Professor Françoise Hampson, lawyers practising in the United Kingdom. The Turkish Government (“the Government”) did not designate an agent for the purposes of the proceedings before the Convention institutions.

3. The applicant alleged, in particular, that his home and its contents, vineyards and orchards had been burned down and destroyed by members of the security forces in Kaynak hamlet, near the village of Yardere and within the administrative province of Mardin, south-east Turkey. He invoked Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 to the Convention. In his observations submitted to the Commission on 12 July 1996, the applicant withdrew his complaint under Article 5 of the Convention.

4. On 30 August 1994 the Commission rejected the Government's preliminary objection to the validity of the application and subsequently the application was declared admissible by the Commission on 17 October 1994 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Second 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 Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr Feyyaz Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, a Turkish citizen of Kurdish origin, was born in 1921. He and his family were living in Kaynak hamlet at the time of the events giving rise to the present application.

A. Introduction

9. The facts of the case, particularly concerning events which took place on or about 21 April 1992 and on or about 30 June 1992, are disputed by the parties.

10. The facts as presented by the applicant are set out in Section B below (paragraphs 12-20). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 21-23). Documentary evidence submitted by the applicant and the Government are summarised in Sections D and E respectively.

11. The Commission, in order to establish the facts disputed by the parties, conducted an investigation with the assistance of the parties,

pursuant to former Article 28 § 1 (a) of the Convention. It appointed three delegates (Mr G. Jörundsson, Mrs J. Liddy and Mr G. Ress), who took evidence in Ankara from 17 April 1996 to 19 April 1996. They heard the applicant's son as well as the following 10 witnesses: Hikmet İlhan, Halit Çirik, Mehmet Göçmen, Akın Yılmaz, Duran Kuşçu, Levent Değirmenci, Halim Çalışkan, Celal Göl, Davut Başer and finally Cemil Dinler. A summary of the oral evidence given by these witnesses may be found in Section F below.

A further witness, Mr Kürşat Kayral, the chief public prosecutor in Mardin who had questioned the applicant, was also summoned but did not appear before the Commission's delegates. A letter written by Mr Kayral, explaining his failure to give evidence before the delegates, was read out during the fact-finding hearing. Mr Kayral stated that his involvement in the case was limited to his having taken a statement from the applicant and therefore he did not have any further information to offer.

B. The applicant's submissions on the facts

12. Kaynak was a small hamlet where approximately 10 families lived. The village of Ahmetli, where 20-25 families lived, was about one kilometre away from the hamlet of Kaynak. As both places were very small they were joined so as to form one single village. Ahmetli was the centre and Kaynak the hamlet. It was built on a hillside and from there the nearby villages of Yardere and Aytepe, both of which were located at a lower altitude and within a one and a half kilometre radius, could be seen. To the west of the hamlet was the village of Konaklı where there was a gendarme station. It was one and a half kilometres away and located at a higher altitude than the hamlet. The villages of Oğuzköy, located six to seven kilometres to the south of the hamlet, and the village of Akıncılar, 17 kilometres away from the village of Konaklı, also had gendarme stations.

13. The applicant owned vineyards, almond, cherry, fig and oak trees which were located to the west of Kaynak hamlet. He also owned plum, peach and apricot trees which were located in the valley between his hamlet and the village of Yardere, located to the south-east of the hamlet. These trees were irrigated by a river which had its source in the village of Aytepe and flowed to Syria. The applicant owned land in the valley where he used to grow cotton and tobacco. He also kept sheep and goats.

14. On or about 21 April 1992 military units attached to the Gendarme Headquarters at Mardin searched the applicant's hamlet. No military operation was taking place in the area at the time. The soldiers rounded up the villagers, threatened them and told them that they would be killed if they did not leave the hamlet. The soldiers then burned and destroyed some of the houses and barns using hand grenades, inflammable material and pickaxes. They also killed a number of animals.

15. The villagers whose houses had been destroyed left the hamlet and went to the nearby village of Yardere to take shelter. On the way to Yardere an elderly woman and two-day old twin brothers lost their lives.

16. The soldiers returned a few days later, burned the remaining houses in the hamlet and forced the remaining villagers to leave.

17. Some time later, the villagers returned to their hamlet to tend their vineyards and orchards. They made tents in which to live and erected them in their vineyards and orchards.

18. On or about 30 June 1992 members of the security forces returned to the hamlet and destroyed what was left of the houses. When the soldiers saw that the villagers would not be separated from their village, the soldiers set fire to the earth in which the vineyards and orchards were planted. The ground, crops and trees were burned using petrol, paraffin and other similar inflammable material and sometimes a powder. In the vineyard and orchard owned by the applicant, 5,000 vines, 120 peach trees, 700 fig trees, 500 almond trees, 700 apricot trees, 460 prune trees and ten thousand oak trees were burned down. The applicant owned 10 hectares of land.

19. After having left his hamlet and taken shelter in an empty house in the village of Yardere, the applicant sent petitions to a number of authorities, including the office of the Prime Minister, the Ministry of the Interior and the Ministry of Defence and asked for his damages to be compensated. On 19 August 1992 he received a reply from the Prime Minister's office, stating that the application for compensation had been passed to the relevant authority and that he would be informed of the outcome by that authority in due course. No compensation was ever paid to the applicant or his family.

20. In the early weeks of March 1993 the applicant was on his way from Mardin to the hamlet. He was stopped and searched at Akıncılar Military Post. When the replies he had received from the Government and party leaders were found on him, the applicant was thrown into the station, beaten up and abused. The soldiers burned the documents.

C. The Government's submissions on the facts

21. On 21 April 1992 military units attached to the Mardin Gendarmerie Headquarters carried out an operation in the village of Ahmetli with the aim of taking precautionary measures to protect the lives and property of the inhabitants of the village from the PKK. The allegations made by the applicant concerning the destruction of his house, its contents and orchards and finally the allegation that the applicant had been ill-treated at Akıncılar gendarmerie station were completely baseless.

22. One member of the İlhan family living in Kaynak hamlet had a hideout in the village in which weapons were found. These weapons had been used in a number of killings. The discovery of the hideout revealed the

cooperation between that family and the terrorist organisation. This revelation made it difficult for the family to stay in the hamlet, probably because of fear of reprisals from the PKK for having surrendered the weapons. It was much safer to live in a bigger village like Yardere.

23. According to the registry office responsible for the keeping of title deeds, the applicant owned a total of 7,932 square metres (sq. m) of land which, given its size, could not have accommodated the number of trees which he claimed had been burned down.

D. Documentary evidence submitted by the applicant

1. Petition of the applicant dated 7 July 1992

24. This petition is signed by the applicant and copies of it were submitted to various domestic authorities in order to claim compensation for his damage. A copy of this letter was also sent to the Diyarbakır branch of the Human Rights Association. This petition sets out the applicant's allegations summarised in Section B above.

2. Letter sent to the applicant on 16 July 1992 by Mesut Yılmaz, General Secretary of the Motherland Party

25. In this letter Mr Mesut Yılmaz promised to pursue the matter.

3. Letter sent to the applicant on 30 July 1992 by the Ministry of Defence

26. In this letter the applicant was informed that a copy of his petition had been forwarded to the Ministry of the Interior, the body responsible for the actions of the gendarme forces.

4. Letter sent to the applicant on 19 August 1992 by the Office of the Prime Minister

27. This letter states that the petition submitted by the applicant had been passed to the relevant authority.

5. Other material

28. The applicant also submitted:

- (a) a report prepared by the Human Rights Association in Turkey containing a list of villages and settlements destroyed in south-east Turkey;

(b) a report prepared by Amnesty International entitled “Turkey: Extrajudicial Killings, EUR 44/45/90”;

(c) a report prepared on 29 May 1993 by Mr Tahir Elçi, a lawyer practising in Turkey, entitled “Why Domestic Legal Remedies are Closed in Turkey”.

E. Documentary evidence submitted by the Government

1. Report of 14 September 1992 drawn up by the gendarmerie

29. This is a one-page report drawn up by Halim Çalışkan, the commanding officer of the Konaklı gendarme station. It was also signed by gendarme NCOs Nejdet Kayan, Ahmet Kurt and Ferhat Koca. It states that the allegations submitted in a petition by the applicant to the regional governor were baseless. According to this report, commander Çalışkan had visited the Kaynak hamlet and saw that there was no damage to any of the houses and that the population had left the village of their own free will, possibly because of the pressure exerted on them by terrorists. Furthermore, there was no damage to any of the trees; and, contrary to what had been claimed by the applicant, the latter owned only very few trees and vines. Commander Çalışkan had been unable to question the applicant because he had run away from him. Commander Çalışkan concluded in his report that the allegations had been made to assist the illegal organisations in their spread of propaganda.

2. Statement taken from the applicant on 24 December 1993 by Mr Kürşat Kayral, chief public prosecutor in Mardin

30. This statement was taken from Mr İlhan pursuant to a request made by the Ministry of Justice's International Law and Foreign Relations Directorate on 9 December 1993, following the communication of the application to the Government. In his statement to the prosecutor, Mr İlhan confirmed that he had submitted the petition of 7 July 1992 to a number of authorities in Turkey in order to obtain compensation for his damage, but he stated that he did not make an application to the European Commission of Human Rights. He also largely repeated his allegations as set out in his petition of 7 July 1992.

3. Decision of non-jurisdiction taken by the Mardin public prosecutor's office on 28 December 1993

31. According to this decision the office of the Mardin prosecutor lacked jurisdiction to investigate the allegations made by the applicant as the alleged perpetrators of the incidents were members of the security forces.

The file was sent to the Mardin Provincial Administrative Council for authorisation to investigate the allegations.

4. Letter sent to the Ministry of Justice's International Law and Foreign Relations Directorate on 29 December 1993 by the Mardin chief public prosecutor

32. In this letter the chief public prosecutor informed the Directorate about the statement he had taken from the applicant on 24 December 1993. The prosecutor also wrote that an investigation which had been opened *ex officio* into the allegations was still continuing and that a decision of non-jurisdiction had been taken by his office.

5. Report of 14 November 1994 drawn up by the gendarmerie

33. This one-page report was drawn up by Celal Göl, a gendarme NCO working at the Mardin Provincial Gendarme Headquarters who had been requested to investigate the allegations made by the applicant. Mr Göl stated in his report that, according to the documents in his office, no such incidents had taken place in the applicant's hamlet and that no houses had been burned down.

6. Letter sent by the Mardin governor to the Gendarme General Command in Ankara on 19 November 1994

34. The governor stated in his letter that no operation had been carried out in Yardere village on 21 April 1992 by soldiers from the Mardin gendarme headquarters and that the allegations made by the applicant had been fabricated by those who wanted to put Turkey in a difficult position before the European Commission of Human Rights.

7. Statements taken from three villagers on 31 December 1994

35. These statements were taken by gendarme NCOs Şeref Çakmak and Celal Göl, from Cemil Dinler, the headman of Yardere village, and Abdülkadir Demir and Gazi Cıvak, who used to live in Yardere village at the time of the alleged events. According to these almost identical statements, the allegations of the applicant were untrue and, in their opinion, had been made in order to discredit the security forces. They further submitted that they had left Yardere village because of the actions of the PKK.

8. Letter sent on 25 April 1996 by the Ministry of Justice's International Law and Foreign Relations Directorate to Mardin chief public prosecutor's office

36. In their letter the Directorate informed the chief public prosecutor that during the fact-finding hearing conducted by the Commission in

Ankara, a number of documents had been requested. The Directorate asked the chief public prosecutor to clarify whether there had been any applications to his office concerning the alleged destruction of the houses in Kaynak hamlet on 21 April 1992. The Directorate also asked what action had been taken in relation to five terrorists apprehended in Kaynak village on 21 April 1992.

9. Letter sent on 22 May 1996 by the Mardin chief public prosecutor's office to the Ministry of Justice's International Law and Foreign Relations Directorate

37. The chief public prosecutor informed the Directorate about the decision of non-jurisdiction of 28 December 1993. The prosecutor also informed the Directorate that, according to the information he had obtained from the Mardin Provincial Gendarme Headquarters, there had been no incidents in Kaynak hamlet and therefore no terrorists had been apprehended.

10. Letter sent on 16 June 1996 by the Mardin Provincial Gendarme Headquarters to the Gendarme General Command in Ankara

38. This letter states that no information or documents existed concerning the operations that were conducted on or about 10 June 1992 in Kaynak hamlet. It further states that no operation took place on 21 April 1992 in Kaynak hamlet or in its vicinity.

11. Other material

39. The Government submitted copies of military reports showing that an armed attack was carried out on Konaklı gendarme station at 1 a.m. on 2 April 1992 by members of the PKK.

40. The Government also submitted copies of documents showing that an armed clash had taken place between gendarme soldiers, who had gone to Yardere village on 14 February 1992 to serve summonses on those young men who were due to be conscripted, and approximately 10-15 persons who had opened fire on the soldiers. According to these documents, six people were killed and five people injured.

41. Finally, the Government submitted a report setting out the names of villages burned down by members of the PKK between 16 June 1993 and 5 October 1994; documents showing the amounts of compensation paid between 1992 and 1993 to inhabitants of villages who had to flee due to the actions of the PKK; a report prepared by Ankara University in which it was calculated that the number of trees claimed by the applicant to have been burned down would have required a surface area of approximately 350 million sq. m; and a document drawn up by the registry office responsible for the keeping of title deeds showing that the applicant owned a

house in Kaynak made of stone and built in a garden of 684 sq. m in addition to a total of 7,255 sq. m of land.

F. Oral evidence

42. The evidence of the eleven witnesses heard by the Commission's delegates may be summarised as follows:

1. Abdülmecit İlhan, the applicant's son

43. The applicant's son was living in Kaynak hamlet at the time of the alleged events. Following the events in Yardere village in February 1992 (see paragraph 40 above), soldiers used to come to his hamlet and ask the villagers either to become village guards or to leave the hamlet.

44. Prior to 21 April 1992 he heard that there had been an incident at Konaklı gendarmerie station.

45. On 21 April 1992, when the witness and other young men saw that soldiers were approaching the hamlet they left the village and hid in the hills on the other side of the hamlet. The reason for their running away from the hamlet was that in the past soldiers who had visited the hamlet had beaten up young men on a number of occasions.

46. From their hiding place he could see the hamlet and the soldiers. The soldiers told the villagers to gather outside the village and then started to search the houses. During the search the soldiers destroyed the contents of the houses such as refrigerators, cupboards and food supplies. The soldiers then burned and destroyed some parts of the houses using hand grenades, axes and shovels. The witness was later told that before leaving the village just before evening, the soldiers had warned the villagers that they had three days to evacuate the village.

47. On the fourth day following the soldiers' first visit, the witness again ran to a hiding place in the mountains when he saw soldiers approaching the village. The villagers were given an opportunity to grab whatever they could from their houses following which the houses were set on fire and many animals were killed by the soldiers. After the soldiers left, the villagers left the hamlet and went to the neighbouring villages. The witness and his family moved to a derelict house in Yardere village.

48. The soldiers returned to the hamlet many times, including once on 30 June 1992 when they set fire to the orchards, burned the remaining parts of the houses and, on their way to and from the hamlet, set fire to the dense oak forest.

49. The witness would like to return to his village if the State stopped putting pressure on them.

2. *Hikmet İlhan*

50. Mr İlhan – son-in-law and nephew of the applicant – was living in Kaynak hamlet at the time of the alleged events. Soldiers used to come to the hamlet in the past and on one of those occasions they had told the villagers that there had been an attack on the gendarme station and asked the villagers to leave the hamlet.

51. On 21 April 1992 soldiers came to the hamlet, gathered the villagers together and asked them why they had not yet left the hamlet. The soldiers then destroyed some parts of the houses in the hamlet, using hand grenades and pickaxes. Before leaving the hamlet, they told the villagers to leave within three days. On the third day the soldiers returned to the village and burned a few more houses, including the barn and the roof of the witness' own house.

52. The witness and his family left the hamlet and went to Yardere. His two-day old twin sons lost their lives on the way. A few days later, he returned to the hamlet to visit it and saw that the applicant's house had also been burned down. After these events soldiers continued to go to the hamlet and on each of their visits they burned the remaining parts of the houses. The witness heard that approximately one year after the events, the soldiers had burned down the orchards and other trees around the village.

3. *Halit Çirik*

53. Mr Çirik was living in Yardere village at the time of the alleged events. He heard the sound of gunshots and bombs coming from the direction of Kaynak hamlet. Four or five days later villagers from Kaynak hamlet came to Yardere and told them that they were being chased by the military. These villagers were then housed in Yardere village. At a later date, the orchards and other trees were set on fire.

4. *Captain Mehmet Göçmen*

54. Captain Göçmen was an army captain and commanding officer of the Mardin Provincial Gendarme Headquarters at the time of the alleged events. His headquarters had overall responsibility for a number of villages, including that of the applicant's hamlet, within the administrative jurisdiction of Mardin.

55. He never asked any villager to become a village guard.

56. One evening in April 1992, PKK members raided Konaklı gendarme station. The following day four or five terrorists were arrested. Two of them were from Kaynak hamlet and their surname was İlhan. These two persons stated that they had a hiding place in Kaynak hamlet which they showed to Captain Göçmen on or around 21 April 1992. A number of weapons were found in this hiding place and it was destroyed by the soldiers to prevent the terrorists from using it again in the future. No houses were burned down or

demolished by the soldiers during this search. The reports and other documents pertaining to the arrests and the finding of the hiding place and weapons were prepared and submitted to the local public prosecutor.

57. He could not remember whether he had ever been questioned by the authorities in relation to the allegations made by the applicant. The reason for his inability to remember was that, in his opinion, these allegations were fabricated and therefore not serious, which was why he had not paid any attention to them.

58. The inhabitants of Kaynak hamlet were in the habit of leaving the hamlet every summer to go to Yardere village where there was more water for their animals. They would then return to the hamlet at the end of the summer. It was possible that the villagers had left the hamlet in the summer of 1992 following the discovery of the hiding place and the weapons, because they might have feared that the PKK would punish them.

5. Sergeant Akın Yılmaz

59. Sergeant Yılmaz is a gendarme NCO and was commanding officer of Konaklı Gendarme Station at the time of the alleged events.

60. A terrorist with the surname İlhan, who had been apprehended previously, told them that there was a hiding place in Kaynak hamlet. The witness and a number of other gendarme officers and soldiers visited the hamlet together with the arrested person on or around 21 April 1992 and recovered a number of weapons from a hiding place. The hiding place was then destroyed by the soldiers. The soldiers did not burn or destroy any of the houses in the hamlet. A report was prepared detailing the events of the day and a sketch indicating the location of the hiding place was drawn up. These documents would have been sent to the local prosecutor in line with the applicable procedure.

61. The villagers must have left the hamlet in July or August 1992 because of their fear of the PKK and gone to live in villages where there were gendarme stations.

62. He could not remember whether he had ever been questioned by the authorities in relation to the allegations made by the applicant.

6. Sergeant Duran Kuşçu

63. Sergeant Kuşçu is a gendarme NCO who was commanding officer of Akıncı Gendarme Station at the time of the alleged events. He had heard about the attack on the Konaklı gendarme station but did not remember any details of this attack. Similarly, he remembered having heard that an operation had been conducted following this attack but did not know any of the details. He had never been to Kaynak hamlet and had only seen it from afar. He never heard about the allegations concerning the alleged

destruction of houses in Kaynak. The applicant had never been detained at his station.

7. Levent Değirmenci

64. Mr Değirmenci is a gendarme expert sergeant who worked at Konaklı Gendarme Station until the end of June 1992. His immediate superior was Akın Yılmaz. There had been an attack on Konaklı gendarme station on 2 April 1992 and a terrorist, who had been arrested three days after this incident, was detained at the Mardin Provincial Gendarme Headquarters. On 21 April 1992 an operation was carried out in Kaynak hamlet during which the arrested terrorist showed the soldiers a hiding place in which a number of weapons were found. The hiding place was subsequently destroyed by the soldiers using pickaxes. This operation was carried out with the participation of approximately 40 gendarme officers and soldiers from the gendarme headquarters in Mardin, and the Konaklı and Akıncılar stations. Sergeant Duran Kuşçu and Ahmet Kurt, a gendarme NCO, also took part in the operation. Overall command of the operation rested with Captain Mehmet Göçmen. A report was prepared on the spot and signed by the commanders involved in the operation. During this operation no houses were burned down.

65. The witness had never been questioned by the domestic authorities about the allegations made by the applicant.

8. Sergeant Halim Çalışkan

66. Sergeant Çalışkan is a gendarme NCO who succeeded Akın Yılmaz as commanding officer of Konaklı Gendarme Station in July 1992. He was entrusted by the emergency governor with the duty to investigate the allegations made by the applicant. He visited Kaynak hamlet to question the applicant but there was no one living in the village. All the houses and vineyards were intact. During his time in office until 1995 no one lived in the hamlet. He questioned a number of villagers in Yardere about the allegations but did not remember their names. He also did not remember checking the official records at the station or questioning his predecessor to verify whether an operation had indeed been conducted in Kaynak on 21 April 1992 as alleged. Furthermore, he did not deem it necessary to append any such records to his report since he was of the view that the gendarme headquarters in Mardin would already have such reports in their files.

67. The witness heard from his colleagues and also from the villagers in Yardere that Kaynak hamlet had been visited by soldiers and a hiding place for terrorists had been found. He was not sure whether this was a relevant piece of information which he should have conveyed to the emergency governor in his investigation report.

9. *Senior Sergeant Celal Göl*

68. Sergeant Göl is a gendarme NCO who prepared the report of 14 November 1994 (see paragraph 33 above) during his time at the Mardin Provincial Gendarme Headquarters. This report was prepared at the request of the emergency governor who had instructed him to investigate the allegations made by the applicant. In the course of his investigation he visited the hamlet, examined a number of documents and questioned several villagers. When he visited the village there were no signs of any burning or demolition of houses; the houses were still standing, but the roofs of some of the houses had been destroyed due to natural causes.

69. The witness stated that there were no reports at the gendarme headquarters in Mardin concerning the operation that had taken place on 21 April 1992; had such an operation taken place there would have been reports.

10. *Davut Başer*

70. The witness was living in the village of Yardere at the time of the alleged events but did not hear the allegations about the destruction of the houses in Kaynak. He had not been to Kaynak since 1992. The applicant's family came to live in Yardere at some stage in 1992. The vineyards and trees owned by the applicant's family were still there and had not been burned. The witness and other villagers left their village in 1994 due to the intensity of the clashes between the PKK and Turkish armed forces, and went to Oğuzköy where there is a gendarme station. He should like to return to his village if the Government allowed him.

11. *Cemil Dinler*

71. The witness was living in Yardere at the time of the alleged events. He subsequently became the headman of the village in 1994.

72. The applicant's family came to Yardere village at some stage in 1992. It was a lie that soldiers burned some of the houses. He visited Kaynak hamlet one day where he, "looked at the house. That house did not have an owner; it was not maintained. It was dilapidated".

73. The witness and his family left Yardere in 1994 together with other villagers. He should like to return to his village but this required the permission of the authorities.

II. RELEVANT DOMESTIC LAW AND PRACTICE

74. A full description of the relevant domestic law may be found in *Yöyler v. Turkey* (no. 26973/95, §§ 37-49, 24 July 2003).

THE LAW

I. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. Arguments of the parties

1. The applicant

75. The applicant submitted that the facts as claimed by him relating to the events in Kaynak hamlet on or about 21 April 1992 and on or about 30 June 1992, should be considered as established in the light of the written and oral testimony before the Commission. He asked the Court to find violations of Articles 3, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 to the Convention.

2. The Government

76. The Government maintained that, although soldiers had carried out a search in the applicant's hamlet, no houses or trees had been burned down as alleged by the applicant. According to the Government, the villagers had left the hamlet because of their fear of the PKK.

B. The Court's evaluation of the facts

1. The Court's assessment of the parties' submissions and of the evidence

77. It is not in dispute between the parties that a number of soldiers came to the applicant's hamlet on or about 21 April 1992 and conducted a search. It is also not disputed that villagers left Kaynak hamlet in the summer of 1992 and have never returned there. What is disputed is whether the applicant's house, fruit and oak trees and vineyards were burned down by soldiers.

78. In a case such as the present one, in which there are contradictory and conflicting accounts of what actually occurred, the Court particularly regrets the absence of a thorough domestic judicial investigation. In this connection, the Court notes that no information or documents concerning the judicial investigation post-dating the decision of non-jurisdiction of 28 December 1993 (see paragraph 31 above) have been submitted. In these circumstances, the Court has had to base its findings on the evidence given

orally to the Commission's delegates and on a limited number of documents filed in the course of the proceedings before the Convention organs.

79. Furthermore, as regards the failure of Mr Kürşat Kayral to give evidence to the Commission's delegates (see paragraph 11 above), the Court observes that it is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. The Court reiterates that a failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (*Timurtaş v. Turkey*, no. 23531/94 §§ 66 and 70, ECHR 2000-VI).

80. However, in the present case, – and whilst regretting the absence of Mr Kayral – the Court does not consider the Government's failure to ensure the attendance of this witness to be so serious as to find the Government in contempt of their obligation under Article 38 § 1 (a) of the Convention.

81. As regards the oral evidence, the Court considers that the testimony given by the applicant's son was convincing in its detail and consistent with the allegations which the applicant had brought to the attention of a number of domestic authorities, including the chief public prosecutor of Mardin. He gave a detailed eye-witness account of how the soldiers had arrived in the village, gathered the villagers together and then proceeded to destroy parts of the houses. His version of events was largely supported by Hikmet İlhan who was also an eye-witness to these events, except that, according to the latter, the soldiers had returned on the third day, whereas, according to the applicant's son, they had returned after four days. Moreover, whereas the applicant's son claimed that the orchards and vineyards had been burned down on 30 June 1992, Mr Hikmet İlhan claimed that this had occurred a year after the events, i.e. sometime in 1993.

82. As regards these contradictions, the Court is conscious of the fact that the cultural background of the applicant's son and the witnesses make it inevitable that dates and other details (in particular, numerical details) lack precision. It does not consider that this by itself impinges upon the credibility of their testimonies (see *Selçuk and Asker v. Turkey*, judgment of 24 April 1998, *Reports* 1998-II, § 26).

83. The Court further observes that Halit Çirik, who was living in the nearby village of Yardere at the time of the alleged events, stated that the villagers from the hamlet had come to live in Yardere a few days after he heard gunshots coming from the hamlet, which corroborates the applicant's account. He also confirmed that the fruit orchards had been burned down at a later date.

84. Concerning the testimonies of the gendarme officers, the Court notes at the outset these witnesses' readiness to deny steadfastly any suggestion that the security forces would engage in burning houses. This was also the attitude of some of these gendarme witnesses when they investigated the allegations at the domestic level. The testimony of Captain Mehmet Göçmen serves as a case in point in this respect, since he told the delegates that he had not deemed the applicant's allegations sufficiently serious as to remember whether or not he had been questioned about them (see paragraph 57 above).

85. It is further worthy of note that while Sergeant Kuşçu denied any knowledge of an operation having been carried out in Kaynak hamlet on 21 April 1992 and stated that he had never been to that hamlet, Expert Sergeant Değirmenci told the delegates that Sergeant Kuşçu had participated in the operation that had taken place in the hamlet on 21 April 1992 (see paragraphs 63-64 above).

86. The Court also notes that, with the exception of Sergeant Kuşçu, all gendarme witnesses who had been working in the vicinity of the applicant's hamlet at the time of the alleged events confirmed before the delegates that they had gone to the hamlet to carry out a search on or around 21 April 1992 (see paragraphs 56, 60 and 64 above). They further maintained that reports pertaining to that search had been drawn up (see paragraphs 56, 60 and 64 above). Although the Government acknowledged in their observations that such a search had indeed taken place (see paragraph 21 above), no copies of the documents referred to by the gendarme witnesses were submitted to either the Commission or the Court. More importantly, both the Mardin Provincial Gendarme Headquarters and the Mardin chief public prosecutor denied that any incident had occurred in Kaynak at the relevant time (see paragraphs 37-38 above).

87. The Court is thus confronted with a situation where State agents have provided conflicting information relating to the facts of the case. No explanation, let alone a satisfactory one, has been given for this. It considers that such a serious contradiction directly affects the credibility of the version of the facts as presented by the Government and, moreover, justifies the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Timurtaş* judgment, cited above, § 66).

88. As regards the testimonies before the delegates of Davut Başer and Cemil Dinler, both inhabitants of Yardere village, the Court notes that both witnesses confirmed that the applicant's family came to live in Yardere in 1992 (see paragraphs 70 and 72 above). However, they also stated that they had never heard about the destruction of houses in Kaynak hamlet, Mr Dinler calling these allegations "lies". He also stated that he had visited Kaynak hamlet at some stage and had seen that the house – presumably the applicant's house – was dilapidated (see paragraph 72 above).

89. The Court is not persuaded that these testimonies are sufficiently convincing to refute the allegations of the applicant. In this context, it notes in the first place that neither Mr Başer nor Mr Dinler claimed to have been in Kaynak hamlet on or around 21 April 1992 and they thus have no direct knowledge of what may or may not have occurred there at that time. Moreover, the Court finds it somewhat surprising that Mr Dinler, in the course of his undated visit to Kaynak, would have been aware that he was looking at the house belonging to the applicant when it was also his opinion that that house did not have an owner (see paragraph 72 above).

90. The Court will next examine whether any investigation carried out by the domestic authorities led to findings capable of establishing that the applicant's allegations were unfounded.

91. It has not been disputed that the applicant submitted his petition of 7 July 1992 (see paragraph 24 above) to a number of domestic authorities and thereby informed those authorities of his allegations. It appears from the two one-page reports submitted by the Government that two investigations were conducted into these allegations by gendarme officers (see paragraphs 29 and 33 above).

92. The first report (see paragraph 29 above) was prepared at the end of a visit to Kaynak hamlet by four gendarmes on 14 September 1992. The author of this report, Sergeant Çalışkan, concluded that as the houses and trees were undamaged, the allegations of the applicant were baseless. However, it does not appear that any steps were taken to question the people living in villages located near the hamlet. No photographs of the houses, which the gendarme soldiers claimed were still standing, were taken. More importantly, the report makes no mention of the fact that a military operation had been carried out in the hamlet on 21 April 1992 despite the fact that Ahmet Kurt, one of the four gendarme soldiers who signed this report, had taken part in that operation. Furthermore, Sergeant Çalışkan stated in his testimony to the Commission's delegates that during his investigation he had not deemed it necessary to question the personnel who had been on duty at the time of the military operation in April. Similarly, he had not deemed it important to check the official reports which, according to the gendarme officers who had taken part in the operation and gave evidence to the Commission's delegates, existed.

93. The second report, dated 14 November 1994 (see paragraph 33 above), refers to documents at the Mardin Provincial Gendarme Headquarters. The report does not specify what these documents are and the Court has neither been provided with nor made aware of any documents relating to an investigation other than the above-mentioned report of 14 September 1992. Furthermore, no mention was made in the report of any person having been questioned by Sergeant Celal Göl, the author of the report, in the course of the investigation. The Court finds that this conflicts with the testimony which Sergeant Göl gave to the delegates and in which

he claimed that he had visited the hamlet and questioned a number of villagers.

94. The Court considers that these two reports show that it cannot be said that any serious and meaningful investigation was carried out into the applicant's allegations of grave misconduct on the part of the security forces. In addition, these investigations were carried out by gendarme officers. The Court has previously held that an investigation will fail to satisfy the requirement of independence if it is conducted by gendarme officers who are members of the security forces against whom the allegations under investigation were directed (see *Yöyler*, cited above, § 74).

95. In these circumstances, the Court finds that neither of these reports can be relied on in evidence.

96. The Court further observes that the first action taken by a judicial authority into the applicant's allegations was the questioning of the applicant by the Mardin chief public prosecutor on 24 December 1993, i.e. two months after the communication of the application to the respondent Government (see paragraph 30 above). However, this judicial investigation was very short-lived as the prosecutor decided on 28 December 1993 that he lacked jurisdiction to investigate and then sent the file to the administrative authorities. Despite the fact that the prosecutor informed the Ministry of Justice on 29 December 1993 that the investigation was still continuing (see paragraph 32 above), no documents have been submitted to the Court indicating that an investigation is indeed still continuing.

97. In the light of the above-mentioned analysis of the documents submitted by the Government and of the oral evidence of the witnesses proposed by the Government, the Court concludes that the Government have failed to rebut the applicant's version of events. It would appear that neither the judicial nor the administrative authorities took any significant action to investigate the very serious allegations made by the applicant in his petition of 7 July 1992 which were, moreover, repeated in the presence of a chief public prosecutor on 24 December 1993.

2. The Court's findings of fact and conclusion

98. The Court finds it established that, subsequent to the armed attack at the Konaklı gendarme station (see paragraph 39 above), gendarme soldiers went to the applicant's hamlet on or around 21 April 1992, and burned the applicant's family home and its contents as well as, subsequently, the fruit orchards and oak trees.

99. On the basis of this finding, the Court will proceed to examine the applicant's complaints under the various Articles of the Convention.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

100. The Government submitted that a valid application had not been made as the applicant told the Mardin chief public prosecutor on 24 December 1993 that he had not applied to the European Commission of Human Rights.

101. The Court notes that this preliminary objection has already been dealt with by the Commission and rejected on 30 August 1994 (see paragraph 4 above). The Court sees no reason to re-examine this issue.

102. The Government also submitted that, in the absence of any attempts by the applicant to raise his Convention grievances before a domestic authority, he could not be regarded as having exhausted domestic remedies as required by Article 35 § 1 of the Convention. The Government pointed to the availability of administrative, civil as well as criminal-law remedies in the Turkish legal system. This system had been short-circuited by the Human Rights Association, which had done nothing to encourage the applicant to have recourse to these remedies.

There were numerous cases decided by administrative courts establishing that the State would be held liable to pay compensation where its agents had destroyed property. Examples of such cases had been made available to the Court in the past (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1207, § 57) and a number of similar decisions had been submitted in the course of the present proceedings.

103. The Court notes that prior to the Commission's decision on the admissibility of the present case, the Government did not request that the application be rejected on the ground that domestic remedies had not been exhausted (see the admissibility decision of 17 October 1994). They are therefore estopped from raising objections to the admissibility of the application on this ground before the Court (see the *Loizidou v. Turkey*, judgment of 23 March 1995 (*preliminary objections*), Series A no. 310, p. 19, § 44).

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

104. The applicant, referring to the circumstances of the destruction of his home and eviction of his family from their village, maintained that there had been a breach of Article 3 of the Convention, which reads:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

105. The Government stated that there was no foundation whatsoever for this complaint.

106. The Court reiterates that Article 3 of the Convention enshrines one of the fundamental values of a democratic society. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see *Selçuk and Asker*, cited above, p. 909, §§ 75-76).

107. The Court notes that the burning of the applicant's home deprived him and his family of shelter and support and obliged them to leave the place where they and their friends had been living.

108. The Court considers that the destruction of the applicant's home and possessions, as well as the anguish and distress suffered by members of his family, must have caused him suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 (see *Selçuk and Asker*, cited above, p. 910, §§ 77-78).

109. The Court concludes that there has been a violation of Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

110. The applicant complained of the deliberate destruction of his home and property. He relied on Article 8 of the Convention, which reads:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

and on Article 1 of Protocol No. 1, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

111. The Government denied the factual basis of the applicant's complaints and averred that his allegations were unsubstantiated.

112. The Court has found it established that the security forces deliberately destroyed the applicant's house and property, obliging his

family to leave their hamlet. There is no doubt that these acts, in addition to giving rise to a violation of Article 3, constituted a grave and unjustified interference with the applicant's rights to respect for his private and family life and home, and to the peaceful enjoyment of his possessions (see *Menteş and Others v. Turkey*, judgment of 28 November 1997, *Reports* 1997-VIII, p. 2711, § 73, and *Dulaş v. Turkey*, no. 25801/94, § 60, 30 January 2001).

113. The Court therefore concludes that there has been a violation of Article 8 of the Convention and of Article 1 of Protocol No. 1.

V. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

114. The applicant complained that he had been denied an effective remedy by which to challenge the destruction of his home and possessions by the security forces, including access to a court to assert his civil rights. He relied on Article 6 § 1 of the Convention, which provides, in so far as relevant:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

and on 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.”

A. Article 6 § 1 of the Convention

115. The applicant submitted that his right to access to court to assert his civil rights had been denied on account of the failure of the authorities to conduct an effective investigation into his allegations. In his opinion, without such an investigation he had no chance of obtaining compensation in civil proceedings.

116. The Government maintained there was no violation of this Article as the applicant had failed to pursue the remedies available in domestic law.

117. The Court notes that the applicant did not bring an action before the civil courts. It is therefore impossible to determine whether the national courts would have been able to adjudicate on the applicant's claims had he initiated proceedings. In the Court's view, however, the applicant's complaints mainly pertain to the lack of an effective investigation into the deliberate destruction of his family home and possessions by the security forces which would have enabled him to exercise compensation-based remedies. It will therefore examine this complaint from the standpoint of Article 13, which imposes a more general obligation on States to provide an

effective remedy in respect of alleged violations of the Convention (see *Selçuk and Asker*, cited above, p. 912, § 92).

The Court therefore finds it unnecessary to determine whether there has been a violation of Article 6 § 1 of the Convention.

B. Article 13 of the Convention

118. The applicant submitted that he had no effective remedy in south-east Turkey in respect of his Convention grievances.

119. The Government argued that the applicant had not availed himself of the existing and effective domestic remedies.

120. The Court reiterates that Article 13 of the Convention guarantees the availability at 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 *Dulaş*, cited above, § 65).

121. Where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, 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 complainant to the investigation procedure (see *Menteş and Others*, cited above, pp. 2715-16, § 89).

122. The Court points out that it has already found that the applicant's home and possessions were destroyed in violation of Articles 3 and 8 of the Convention and Article 1 of Protocol No. 1. The applicant's complaints in this regard are therefore “arguable” for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and *Dulaş*, cited above, § 67).

123. The Court has previously held that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces disclosed particular characteristics in south-east Turkey in the first half of the 1990s and that the defects found in the investigatory system in force in that region undermined the effectiveness of criminal-law protection during this period. This practice permitted or

fostered a lack of accountability of members of the security forces for their actions which was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention (see *Bilgin v. Turkey*, no. 23819/94, § 119, 16 November 2000).

124. Turning to the particular circumstances of the case, the Court notes that the applicant, who had brought this allegation to the attention of various authorities on 7 July 1992, was first questioned by the authorities, namely by the Mardin chief public prosecutor, only on 24 December 1993. Given the seriousness of the allegations, the Court is of the opinion that the public prosecutor was under an obligation to gather and record evidence which would help to shed light on the facts of the incident. It does not appear that any attempt was made to carry out a proper on-site inspection at the scene of the incident, to establish the true version of the facts through the questioning of other villagers who might have witnessed the events, or to interview the members of the security forces who were allegedly involved in the incident. It therefore considers that these elements disclose considerable defects in the reliability and thoroughness of this part of the investigation.

125. Furthermore, the Court notes that the Mardin chief public prosecutor decided on 28 December 1993 that he lacked jurisdiction to investigate the allegations directed against the security forces and sent the file to the Mardin Provincial Administrative Council. The Government have not submitted any information on the follow-up given by the Mardin Provincial Administrative Council.

126. In the light of the foregoing, the Court concludes that the authorities failed to conduct a thorough and effective investigation into the applicant's allegations and that access to any other available remedy, including a claim for compensation, has thus also been denied to him.

127. There has therefore been a breach of Article 13 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, IN CONJUNCTION WITH ARTICLES 3, 6, 8 AND 13 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

128. The applicant maintained that, because of his Kurdish origin, he had been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 3, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1. Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

129. The applicant argued that the destruction of his family home and possessions was the result of an official policy, which constituted discrimination because of his status as a member of a national minority.

130. The Court has examined the applicant's allegation in the light of the evidence submitted to it. It considers that there is an insufficient basis in fact for grounding this allegation. There has therefore been no violation of Article 14 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

131. The applicant alleged that the interferences or restrictions complained of have been imposed for purposes incompatible with the Convention. He invoked Article 18 of the Convention, which reads:

“The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

132. Having regard to its above findings, the Court does not consider it necessary to examine this complaint separately.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

133. 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. Pecuniary damage

134. The applicant claimed a total of 309,544.35 pounds sterling (GBP) in respect of the pecuniary damage suffered by him as a result of the destruction of his house, household goods, livestock, trees, loss of income and costs incurred in having to find alternative accommodation.

135. The Government submitted that no compensation should be awarded to the applicant as the application was baseless and domestic remedies had not been exhausted. In any event, the claims were excessive and were not supported by sufficient particulars.

136. In view of its finding that the applicant's home and possessions were destroyed by the security forces, the Court considers that it is necessary to award compensation for pecuniary damage. However, as the applicant has not supported his claims as to the quantity and value of his lost property with any documentary or other evidence, the Court will make its assessment of the amounts to be awarded on an equitable basis.

1. House and outbuildings

137. The applicant claimed compensation in respect of a house, a barn and stables. The applicant valued all three properties at GBP 6,501.

138. Considering this sum to be reasonable, the Court awards the applicant EUR 9,500 in respect of the destroyed buildings.

2. Other property

139. The applicant submitted claims amounting to GBP 740.11 in respect of household goods, such as wardrobes, a refrigerator, a television and a video.

140. Considering this sum to be reasonable, the Court awards the applicant EUR 1,100 in respect of his household goods.

3. Land and orchards

141. The applicant claimed the total sum of 230,293.81 GBP in respect of the trees burned down by the soldiers. These included 371 acres of orchards; 0.23 acre of vineyards; 5,000 vines; 700 apricot trees; 120 peach trees; 500 almond trees; 460 prune trees and 700 fig trees.

142. In the absence of any independent and conclusive evidence as to the applicant's claims for the trees, and deciding on an equitable basis, the Court awards him EUR 6,000.

4. Livestock

143. The applicant claimed the total sum of GBP 2,970.13 in respect of his livestock. These included two cows; two oxen; a donkey and a mule; 10 sheep; 15 lambs; 40 goats; three kid goats; two turkeys and 20 chickens.

144. Considering this amount to be reasonable, the Court awards the applicant EUR 4,400 EUR.

5. Loss of income

145. The applicant claimed the amount of GBP 36,509.40 in compensation for loss of income from farming.

146. The Court is satisfied that the applicant must have suffered a loss of income as a result of being forced from his home and hamlet. In the absence of independent evidence of the applicant's income from his landholdings, and having regard to equitable considerations, the Court awards him EUR 6,000 under this head.

6. Alternative accommodation

147. The applicant claimed the reimbursement of GBP 32,529.58 in respect of the rent he had paid since 1993.

148. In the absence of any substantiation of this part of the applicant's claim, and having regard to equitable considerations, the Court awards the applicant EUR 6,500 for the cost of his and his surviving family's alternative housing.

7. Summary

149. Consequently, in respect of pecuniary damage the Court awards the applicant a total sum of EUR 33,500 to be converted into Turkish liras at the rate applicable at the date of settlement, and to be paid to the applicant's estate.

B. Non-pecuniary damage

150. The applicant claimed GBP 20,000 in respect of non-pecuniary damage. He also requested GBP 30,000 for the continuing violation of his Convention rights.

151. The Government, disputing that any violations had occurred, submitted that no award for non-pecuniary damage should be made.

152. The Court considers that an award should be made in respect of non-pecuniary damage, bearing in mind the seriousness of the violations which it has found in respect of Articles 3, 8 and 13 of the Convention and Article 1 of Protocol No. 1 due to the deliberate destruction of the applicant's home and property and his subsequent relocation from Kaynak hamlet.

153. It accordingly awards the applicant EUR 14,500 for non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of payment, and to be paid to the applicant's estate.

C. Costs and expenses

154. Finally, submitting a schedule of costs, the applicant claimed the total sum of GBP 9,507.30 for costs and expenses. These claims comprised:

- (a) GBP 7,535 for fees of United Kingdom-based lawyers;
- (b) GBP 900 for fees of lawyers based in Turkey;
- (c) GBP 77.30 for administrative costs incurred by the United Kingdom-based lawyers;
- (d) GBP 560 for administrative costs incurred by lawyers based in Turkey; and
- (e) GBP 435 for interpretation and translation costs.

The applicant, submitting a schedule of costs, also claimed the total sum of GBP 2,228.15 for costs and expenses incurred by the Kurdish Human Rights Project ("KHRP"). These claims comprised:

- (a) GBP 455 for administrative costs incurred by the KHRP;

- (b) GBP 1,350 for translation costs carried out by the KHRP; and
- (c) GBP 423.15 for the costs incurred by the witnesses during the fact-finding hearings.

155. The Government considered that it was inappropriate for the Court to award high fees and costs in respect of foreign lawyers in comparison to Turkish lawyers who are paid in accordance with local rates. The also asked the Court not to make any payment to the KHRP for costs and expenses.

156. The Court notes that the present case involved complex issues of fact and law requiring detailed examination, including the taking of evidence from witnesses in Ankara. However, it is not convinced that the fees and administrative costs of the KHRP were necessarily and reasonably incurred since the work carried out by this organisation, as set out in its schedule of fees and disbursements, appears to a large extent to have duplicated the activities carried out by the United Kingdom and Turkey-based lawyers. Furthermore, as regards the costs claimed by the KHRP to cover the applicants' witnesses attendance at the fact finding hearings, the Court notes that these costs have already been reimbursed by the Council of Europe.

157. Deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, the Court awards him the sum of EUR 15,000 exclusive of any value-added tax that may be chargeable, less EUR 2,652 received by way of legal aid from the Council of Europe, such sum to be converted into pounds sterling and paid into the applicant's representatives' bank account in the United Kingdom as set out in his just satisfaction claim.

D. Default interest

158. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objections;
2. Holds unanimously that there has been a violation of Article 3 of the Convention;
3. Holds unanimously that there has been a violation of Article 8 of the Convention;

4. Holds unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
5. Holds unanimously that it is unnecessary to determine whether there has been a violation of Article 6 § 1 of the Convention;
6. Holds unanimously that there has been a violation of Article 13 of the Convention;
7. Holds by five votes to two that there has been no violation of Article 14 of the Convention, in conjunction with Articles 3, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention;
8. Holds unanimously that it is not necessary to consider the complaint under Article 18 of the Convention;
9. Holds unanimously
 - (a) that the respondent State is to pay the applicant's estate, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts free of any tax that maybe payable:
 - (i) EUR 33,500 (thirty-three thousand five hundred euros) in respect of pecuniary damage to be converted into Turkish liras at the rate applicable at the date of payment and to be paid into the applicant's son's bank account in Turkey for the benefit of the applicant's estate;
 - (ii) EUR 14,500 (fourteen thousand five hundred euros) in respect of non-pecuniary damage to be converted into Turkish liras at the rate applicable at the date of payment and to be paid into the applicant's son's bank account in Turkey for the benefit of the applicant's estate;
 - (iii) EUR 15,000 (fifteen thousand euros) in respect of costs and expenses, exclusive of any value-added tax that may be chargeable, less EUR 2,652 (two thousand six hundred and fifty two euros) granted as legal aid, to be converted into pounds sterling at the rate applicable at the date of settlement and paid into the applicant's lawyer's sterling bank account in the United Kingdom;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
10. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 November 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions of Mr L. Loucaides and Mrs A. Mularoni are annexed to this judgment.

J.-P.C.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

I am unable to agree with the majority's finding that there has been no violation of Article 14 of the Convention in this case. Having gone through the facts of the case I cannot find any reason or explanation for the total destruction of the applicant's property and the eviction of his family from their village as described in the judgment other than the fact that the applicant was of Kurdish origin. The nature and extent of the military operation which resulted in the situation complained of by the applicant and amounted to breaches of Articles 3, 8 and 13 of the Convention and Article 1 of Protocol No. 1 were intrinsically connected with the policy of the respondent Government in respect of the activities of the PKK, a Kurdish organisation. The Government submitted copies of military reports showing that an armed attack was carried out on Konaklı gendarme station at 1 a.m. on 2 April 1992 by members of the PKK. The Court found it established that, subsequent to the armed attack at the Konaklı gendarme station, gendarmes went to the applicant's hamlet on or about 21 April 1992, and burned down the applicant's family home and its contents and subsequently the fruit orchards and oak trees.

The Government alleged that one member of the applicant's family living in Kaynak, the hamlet where the destruction of the applicant's property took place, had a hideout in the village in which weapons were found. According to the Government these weapons had been used in a number of killings, and the discovery of the hideout revealed the cooperation between the family and the terrorist organisation (the PKK). However the Government's allegation that this revelation made it difficult for the family to stay in the hamlet probably through fear of reprisals from the PKK for having surrendered the weapons was not accepted by the Court and in any case could not by any imagination explain why the applicant's property was destroyed by the security forces, as the Court found had been established.

In the circumstances, it is only reasonable to conclude that the reason for the destruction in question was that the applicant was a Kurd and that the destruction of his home was part of the general objective of the military operation in the village that resulted in the violations of the Convention for which the respondent Government has been found responsible. In this respect I must stress that I consider it highly relevant that this is not the first case against Turkey in which the Court has found similar violations against persons of Kurdish origin as a result of military operations by members of the security forces using the same *modus operandi* with objectives, reasons, methods and results that are strikingly similar to those in the present case

(destruction or burning of houses belonging to Kurds)¹ (c.f. *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, § 173, ECHR 2004-...).

I have also taken into account the fact that no serious and meaningful investigation was carried out into the applicant's allegations of grave misconduct on the part of the security forces and that the Government failed to rebut the applicant's version of events. Neither the judicial nor the administrative authorities took any significant action to investigate the very serious allegations made by the applicant in his petition of 7 July 1992.

As was rightly observed in the judgment of *Nachova and Others v. Bulgaria* (op. cit. § 169)

“...the Court considers that in cases where the authorities have not pursued lines of inquiry that were clearly warranted in their investigation into acts of violence by State agents and have disregarded evidence of possible discrimination, it may, when examining complaints under Article 14 of the Convention, draw negative inferences or shift the burden of proof to the respondent Government, as it has previously done in situations involving evidential difficulties (see *Salman v. Turkey* [GC], no. 21986/93, § 97, ECHR 2000-VII, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V and *Çonka v. Belgium*, no. 51564/99, § 61, ECHR 2002-I).”

In the same judgment it was also stated:

“Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute (see, *mutatis mutandis*, *Shanaghan v. the United Kingdom*, no. 37715/97, § 90, ECHR 2001-III, setting out the same standard with regard to the general obligation to investigate). The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence ... (paragraph 159)”

With regard to the required standard of proof it was stated:

“The Court has held on many occasions that the standard of proof it applies is that of 'proof beyond reasonable doubt', but it has made it clear that that standard should not be interpreted as requiring such a high degree of probability as in criminal trials. It has ruled that proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. It has been the Court's practice to allow flexibility, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. It has resisted suggestions to establish rigid evidentiary rules and has adhered to the principle of free

¹ *Akdivar v. Turkey* (no. 21893/93, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV), *Menteş v. Turkey* (no. 23186/94, judgment of 28 November 1997, *Reports* 1997-VIII), *Selçuk and Asker v. Turkey* (nos. 23184/94 and 23185/94, judgment of 24 September 1998, *Reports* 1998-II), *Bilgin v. Turkey* (no. 23819/94, 16 November 2000), *Dulaş v. Turkey* (no. 25801/94, 30 January 2001), *Orhan v. Turkey* (no. 25656/94, 18 June 2002), *Yöyler v. Turkey* (no. 26973/95, 24 July 2003), *Ayder and Others v. Turkey* (no. 23656/94, 8 January 2004), *Özkan and Others v. Turkey* (no. 21689/93, 6 April 2004), *Altun v. Turkey* (no. 24561/94, 1 June 2004).

assessment of all evidence. The Court has also acknowledged that its task is to rule on State responsibility under international law and not on guilt under criminal law. In its approach to questions of evidence and proof, it will have regard to its task under Article 19 of the Convention to “ensure the observance of the engagements undertaken by the High Contracting Parties”, but without losing sight of the fact that it is a serious matter for a Contracting State to be found to be in breach of a fundamental right (see, among others, the following judgments: *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 64-65, § 161; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 24, § 32; *Tanlı v. Turkey*, no. 26129/95, §§ 109-11, ECHR 2001-III; *Aktaş v. Turkey*, no. 24351/94, § 272, ECHR 2003-V (extracts)).(paragraph 166)”.

I take this opportunity to reiterate my own approach regarding the standard of proof required in respect of judicial proceedings for alleged violations of human rights such as those in the present case². I believe that it is important to bear in mind that the standard of proof “beyond reasonable doubt” has its origin in the context of common law criminal procedure. There the objective is to punish an individual for a criminal offence, by using an adversarial procedure in which the liberty of the accused must be protected by applying rigid standards of proof. Taking into account their object and procedure as well as the position of the parties, i.e. the “accused” being always the State, proceedings to determine human rights violations differ substantially from criminal proceedings. The Inter-American Court of Human Rights has pointed out that:

“The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of States responsible.”³

In view of the different objectives of the proceedings, it is submitted that when applying the “reasonable doubt” formula in the context of proceedings alleging violations of human rights against a State, care should be taken to disassociate such formula from the rigid concepts and considerations of criminal justice and procedure from which the formula originates. In the common law that formula of proof “beyond reasonable doubt” is also intertwined with the principle that the burden of proof is upon the prosecution and that the accused does not have to prove anything in support of his innocence: he may even remain silent and such silence cannot be interpreted as an acknowledgment of the allegations against him. In contrast, in proceeding to determine human rights violations, especially

² For a full exposition of my views on the topic of “Standards of Proof in Proceedings under the European Convention on Human Rights” see Loucaides, *Essays on the Developing Law of Human Rights*, 1995, Martinus Nijhoff Publishers, Dordrecht/Boston/London, p. 57 et seq.

³ *Velasquez Rodriguez* case, judgment of 29.7 1988, para. 134 et seq., *Human Rights Law Journal*, vol. 9, No. 2, p. 233. The position expressed in this judgment was adopted by the Commission in the *Ribitsch v. Austria* (application no. 18896/91).

under the Convention, facts can be established on the basis of the evidence presented by both parties or obtained as a result of a *proprio motu* request by the competent judicial organs. These organs do not have the power to compel witnesses to appear before them, nor to compel the state against which the relevant allegations are directed to produce any evidence. Their task is to investigate the allegations and to establish the facts, admitting any evidence they consider helpful in order to ascertain the truth, free from any rules of evidence or procedure.

Consequently, there is a substantial difference between the proof of allegations beyond “reasonable doubt” against an individual accused in a criminal case and the establishment of facts beyond “reasonable doubt” in human rights proceedings. The methods, the kind of proof and the practical application of the formula “beyond reasonable doubt” differ. More specifically, that formula cannot relate only to the evidence produced by the applicant against the respondent State, but to the facts of the case as a whole, including “the conduct of the parties”.

It is interesting to note that in the common law, especially in England, the phrase “reasonable doubt” has given rise to confusion as a result of the many attempts of the courts to define or explain its meaning. Furthermore, other expressions have been employed as an alternative to that form of direction, for instance the jury should be “satisfied” of guilt, or “satisfied so that they can feel sure” or even “reasonably satisfied”. One leading criminal jurist has suggested that the phrase is virtually indefinable⁴. It has even been recommended that it is better that the phrase “reasonable doubt” should be avoided⁵.

In the light of the above, I find it established that there has been a violation of Article 14 of the Convention, in conjunction with Articles 3, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1.

⁴ Glanville Williams. Textbook of Criminal Law, 2nd ed., p. 43

⁵ Halsbury’s Laws of England, 4th ed., Vol. 11, para. 208

PARTLY DISSENTING OPINION OF JUDGE MULARONI

I concur with my colleagues on all but one of the votes. I do not subscribe to their conclusion that there has been no violation of Article 14 of the Convention.

The applicant maintained that he was subjected to discrimination in breach of Article 14 because of his Kurdish origin. He argued that the destruction of his family home and possessions was the result of an official policy, which constituted discrimination because of his status as a member of a national minority. The majority considered that, in the light of the evidence submitted to it, there was an insufficient basis in fact for grounding this allegation and concluded that there had been no violation of Article 14.

For many years, the Court has been confronted with a great number of similar applications against Turkey in which the applicants mainly complain of violations of Articles 2, 3, 8, 14 and 1 of Protocol No. 1 and allege, in addition, that they have been discriminated against because they are members of a national minority.

All such applications were, with no exception, introduced by Turkish citizens of Kurdish origin. In most of these applications the Court found violations of Articles 2, 3, 8 and 1 of Protocol No. 1. However, it has never found a violation of Article 14 for the reason that the evidence submitted by the applicants was insufficient to support their claim that Article 14 was breached.

In brief, I could say that I share the considerations expressed by Judge Bonello in his partly dissenting opinion in the *Anguelova v. Bulgaria* case (no. 38361/97, ECHR 2002 – IV).

As has often been stated by the Court, the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective (see, among many other authorities, *Artico v. Italy*, judgment of 13 May 1980, Series A, no. 37, § 33).

I consider that as long as the Court persists in requiring in the context of Article 14 complaints of discrimination on grounds of racial or national origin a “beyond reasonable doubt” standard of proof, this will result in the removal in practice of the human rights protection guaranteed by Article 14 in areas where the highest level of protection, rather than the highest level of proof, should be the priority. There could be no more effective a tool for ensuring that the protection against discrimination on grounds of racial or national origin will become illusory and inoperative than to expect victims to submit themselves to such a high standard of proof. In reality, the application of such a high standard is tantamount to rendering it impossible for applicants to prove that there was a violation of Article 14. I would add that this high standard is not required by other leading human rights tribunals.

In the instant case – which, as I said before, is just one of many similar cases – the most effective way to achieve a new and more equitable balance between the claims of applicants and those of the State would probably be to shift the burden of proof. The Court has already adopted such an approach in other contexts. For instance, it has taken the view that death or injury during police custody raises a presumption of State responsibility with the result that the burden of providing a satisfactory explanation for what happened to the victim shifts to the State (see, among other authorities, *Selmouni v. France*, [GC], ECHR-V).

The Court has also introduced and developed the concept of a “procedural violation” of Articles 2 and 3 (see, for instance, *Tahsin Acar v. Turkey*, [GC], no. 26307/95, ECHR-... (merits), and *Assenov and others v. Bulgaria*, judgment of 28 October 1998, Reports of Judgments and Decisions, 1998-VIII) and of “positive obligations” as far as Articles 2 and 8 are concerned (see, among many authorities, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, Reports of Judgments and Decisions, 1998-III, and *Guerra and others v. Italy*, judgment of 10 February 1998, Reports of Judgments and Decisions, 1998-I), which demonstrates the Court's “creativity” in the noble goal of attaining the highest level of protection of certain rights guaranteed by the Convention. I do not see any major objections to trying to find a more satisfactory way to deal with Article 14 complaints when racial or national origin discrimination is at stake.

As I am unable to follow the approach adopted by the majority, I conclude that there has been a violation of Article 14 of the Convention in conjunction with Articles 3, 8, 13 and 1 of Protocol No. 1.