



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

SECOND SECTION

CASE OF DEMİR AND BAYKARA v. TURKEY

(Application no. 34503/97)

JUDGMENT

STRASBOURG

21 November 2006

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
12/11/2008**

This judgment may be subject to editorial revision.

In the case of Demir and Baykara v. Turkey,

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

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

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŒ,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 24 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 34503/97) 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 two Turkish nationals, Mr Kemal Demir and Ms Vicdan Baykara, the latter in her capacity as president of the trade union Tüm Bel Sen, (“the applicants”), on 8 October 1996.

2. The applicants were represented by Mr Ayhan Kızılöz, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants complained, under Article 11 of the Convention taken in conjunction with Article 14, that the domestic courts had denied them the right to form a trade union and to enter into collective agreements.

4. The application was transmitted 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 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.

6. By a decision of 23 September 2004 the Chamber declared the application partly admissible.

7. The applicants and the Government each filed further written observations (Rule 59 § 1).

8. On 1 November 2004 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

9. The applicants, Kemal Demir and Vicdan Baykara, were born in 1951 and 1958 and live in Gaziantep and Istanbul respectively. The first applicant was a member of the trade union Tüm Bel Sen and the second applicant was its president.

I. THE CIRCUMSTANCES OF THE CASE

10. The trade union Tüm Bel Sen was founded in 1990 by civil servants from various localities under the Civil Servants Act (Law no. 657). Under Article 2 of its constitution its objective is to promote democratic trade unionism to further the aspirations and claims of its members. Its head office is located in Istanbul.

11. On 27 February 1993 Tüm Bel Sen entered into a collective agreement with Gaziantep Municipal Council for a period of two years from 1 January 1993. The agreement concerned all aspects of the working conditions of Gaziantep Municipal Council's employees, including salaries, allowances and welfare services.

12. As the Municipal Council had defaulted on certain of its obligations under the agreement, in particular those of a financial nature, the first applicant, as a representative of the union, brought civil proceedings against it in the Gaziantep District Court (the "District Court") on 18 June 1993.

13. In a judgment of 22 June 1994 the District Court found in favour of Tüm Bel Sen. Gaziantep Municipal Council appealed on points of law.

14. On 13 December 1994 the Court of Cassation quashed the judgment of the court below. It found that, even though there was no legal bar preventing civil servants from forming unions, they were not, as the law stood, authorised to enter into collective agreements.

15. In a judgment of 28 March 1995 the District Court confirmed its earlier judgment on the ground that, despite the fact that the domestic statute contained no express provision affording unions formed by civil servants the right to enter into collective agreements, this omission had to be remedied in the light of international treaties such as the relevant convention of the International Labour Organisation, which had already been ratified by Turkey.

16. On 6 December 1995 the Court of Cassation quashed the judgment of the court below. It ruled that, at the time the union was formed, the

applicable law did not permit civil servants to form trade unions. The union Tüm Bel Sen could not rely on the international labour conventions that dealt with such matters as they had not yet been incorporated into domestic law and no implementing legislation had been enacted. The Court of Cassation concluded that the union did not have legal personality or the capacity to enter into a collective agreement.

17. An application for rectification lodged by representatives of the union was dismissed by the Court of Cassation on 10 April 1996.

18. Following an audit of Gaziantep Municipal Council's accounts by the Audit Court, the State asked the members of the union Tüm Bel Sen to reimburse the additional income they had purportedly received as a result of the defunct collective agreement.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The Constitution of the Republic of Turkey

19. The relevant provisions of the Turkish Constitution read as follows:

Article 51
(at the material time)

“Operative workers and employers shall have the right to form trade unions and federations of unions, without prior permission, in order to safeguard and develop their economic and social rights and interests in their labour relations.

In order to form a union or a federation of unions, it shall suffice to submit the information and documents prescribed by law to the competent authority designated by law. If it finds that this information and documentation is not in conformity with the law, the competent authority shall apply to the appropriate court for the suspension of activities or the dissolution of the union or federation of unions.

Everyone shall be free to become a member of or withdraw from membership of a union.

No one shall be compelled to become a member, remain a member, or withdraw from membership of a union.

Operative workers and employers cannot hold concurrent memberships in more than one trade union.

Employment in a given workplace shall not be made conditional on membership or lack of membership of a trade union.

In order to hold a leadership position in a trade union or federation of trade unions, it is necessary to have effectively been employed as an operative worker for at least ten years.

The statutes, administration, and functioning of trade unions and federations of trade unions shall not be inconsistent with the characteristics of the Republic or with democratic principles as defined in the Constitution.”

Article 51

(as amended by Law no. 4709 of 3 October 2001)

“Employees and employers shall have the right to form trade unions and federations of unions, without prior permission, in order to safeguard and develop the economic and social rights and interests of their members in their labour relations, and to join and withdraw from such entities of their own free will. No one shall be compelled to become a member or withdraw from membership of a union.

The right to form a union may only be restricted by law and for the purposes of safeguarding national security or public order and preventing crime, and for the protection of public health or public morals and the rights and freedoms of others.

The formalities, conditions and procedures to be applied in exercising the right to form a union shall be established by law.

It is not permitted to hold membership of more than one trade union simultaneously within the same sector of employment.

The scope of the rights in this area of State employees who do not have the status of operative worker, and the exceptions and limitations applicable to them, shall be established by law in accordance with the nature of the tasks entrusted to them.

The statutes, administration and functioning of trade unions and federations of unions must not be inconsistent with the fundamental characteristics of the Republic or with democratic principles.”

Article 53

(at the material time)

“Operative workers and employers shall have the right, in the course of their bilateral relations, to enter into collective bargaining agreements in order to regulate their economic and social position and conditions of work.

Collective agreements shall be entered into in accordance with the statutory procedure.

It shall be prohibited to enter into or apply more than one collective agreement in a single workplace within the same period.”

Article 53

(as amended by Law no. 4121 of 23 July 1995)

“Workers and employers shall have the right, in the course of their bilateral relations, to enter into collective agreements in order to regulate their economic and social position and conditions of work.

Collective agreements shall be entered into in accordance with the statutory procedure.

The trade unions and federations of unions which the State employees referred to in the first paragraph of Article 128 shall be entitled to form and which do not fall within the scope of the first and second paragraphs of the present article, nor that of Article 54, may appeal to judicial authorities and may engage in collective bargaining with the administration in accordance with their aims on behalf of their members. If an agreement is reached as a result of collective bargaining, the text of the agreement shall be signed by the parties. This text shall be presented to the Council of Ministers so that administrative or judicial arrangements can be made. If no such agreement is reached through collective bargaining, the points of agreement and disagreement shall be drawn up and signed by the relevant parties and submitted for consideration by the Council of Ministers. The procedure for the implementation of this paragraph shall be set out in legislation.

It shall be prohibited to enter into or apply more than one collective agreement in a single workplace within the same period.”

Article 128

“The essential and permanent duties required by the public services that the State, State economic enterprises and other public corporate bodies are assigned to perform, in accordance with general principles of administration, shall be carried out by civil servants and other State employees.

The qualifications, appointment, duties and powers, rights and responsibilities, and salaries and allowances of civil servants and other State employees, and other matters related to their status, shall be provided for by law.

The procedure and principles governing the training of senior civil servants shall be specially provided for by law.”

B. The Civil Servants Act (Law no. 657)

20. Section 22 of the Civil Servants Act (Law no. 657) of 14 July 1965 stated that civil servants were authorised to form and join trade unions and professional organisations, in accordance with the conditions set out in special laws. Its second paragraph stated that the said professional organisations were authorised to defend the interests of their members before the competent authorities. That section was repealed by Article 5 of Legislative-Decree no. 2 of 23 December 1972. It was brought back into force by section 1 of Law no. 4275 of 12 June 1997. The text now reads:

“Civil servants shall be authorised to form trade unions and federations of trade unions and to join them.”

C. Convention No. 87 (of the International Labour Organisation – “ILO”)

21. Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention No. 87) provides:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

D. ILO Convention No. 98

22. The relevant articles of the Right to Organise and Collective Bargaining Convention, 1949 (Convention No. 98) read as follows:

Article 4

“Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

Article 5

“1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.”

Article 6

“This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.”

E. The European Social Charter (revised)

23. The relevant provisions of the European Social Charter provide as follows:

Article 5 - The right to organise

“With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.”

Article 6 – The right to bargain collectively

“With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. to promote joint consultation between workers and employers;
 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
- and recognise:
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

24. The applicants complained, under Article 11 of the Convention taken in conjunction with Article 14, that the domestic courts had denied them the right to form a trade union and to enter into collective agreements.

Article 11 provides as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

Article 14 reads as follows:

“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.”

A. The parties’ submissions

25. The applicants observed that the members of the trade union Tüm Bel Sen had been forced to reimburse pay rises that had been granted under the collective agreement between their union and the Gaziantep Municipal Council, following judicial decisions declaring that agreement null and void. They further argued that, even after changes to the legislation, civil servants were entitled to form trade unions but not to enter into collective agreements, unlike operative workers, who enjoyed the right to bargain collectively and the right to strike. They were able to engage in collective talks, under the strict supervision of various government organs. However, such talks could not be equated with collective bargaining, because they were held at national level for all civil servants in a given field of activity and the final decision was taken by the Council of Ministers.

26. The Government observed that, following the amendment of 12 June 1997 to section 22 of the Civil Servants Act (Law no. 657), civil servants were now authorised to form and join trade unions. However, at the material time, they had not been expressly empowered to form unions and the restrictions should have been regarded as prescribed by law.

27. As to the right to enter into collective agreements, the Government claimed that Article 11 of the Convention did not afford such a right. In support of their argument they referred to the cases of *Swedish Engine Drivers’ Union v. Sweden* (judgment of 6 February 1976, Series A no. 20) and *National Union of Belgian Police v. Belgium* (judgment of 27 October 1975, Series A no. 19).

B. The Court's assessment

1. *Right of municipal civil servants to engage in trade union activities*

28. As the Court has already had occasion to observe, it has not been shown before it that the absolute prohibition on forming trade unions imposed on civil servants and public-sector contract workers by Turkish law, as it applied at the material time, met a “pressing social need”. The mere fact that the “legislation did not provide for such a possibility” is not sufficient to warrant a measure as radical as the dissolution of a trade union (see *Tüm Haber Sen and Çınar v. Turkey*, no. 28602/95, §§ 36-39, ECHR 2006-...). The same finding can be made in the present case.

29. Consequently, in the absence of any concrete evidence to show that the activities of the trade union Tüm Bel Sen represented a threat to society or to the State, the Court considers that, in refusing to accord the applicants’ union legal personality, the respondent State failed, at the material time, to comply with its obligation to secure the enjoyment of the rights enshrined in Article 11 of the Convention.

2. *Annulment of the collective agreement between the trade union and the authority which had been applied for the previous two years*

a. Whether there was interference

30. In accordance with the settled case-law, Article 11 of the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible (see *National Union of Belgian Police v. Belgium*, cited above, § 39; *Swedish Engine Drivers’ Union v. Sweden*, cited above, § 40; and *Schmidt and Dahlström v. Sweden*, judgment of 6 February 1976, Series A no. 21, § 36).

31. Paragraph 1 of Article 11 secures to trade union members, for the purpose of defending their interests, the right of their trade union to be heard, but leaves each State a free choice of means to be used to that end. The Convention requires that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members’ interests (see *National Union of Belgian Police v. Belgium*, cited above, § 39; *Swedish Engine Drivers’ Union v. Sweden*, cited above, § 40; and *Schmidt and Dahlström v. Sweden*, cited above, § 36).

32. It should be pointed out that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. The

responsibility of a Contracting State would be engaged if the facts complained of resulted from a failure on its part to secure to the applicants, under domestic law, enjoyment of the rights set forth in Article 11 of the Convention (see *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V, and *Gustafsson v. Sweden*, judgment of 25 April 1996, *Reports of Judgments and Decisions* 1996-II, pp. 652-53, § 45).

33. The Court initially considered that Article 11 did not secure any particular treatment for trade unions and, in particular, did not accord them a right to enter into collective agreements (see *Swedish Engine Drivers' Union v. Sweden*, cited above, § 39). Moreover, such a right in no way constituted an element necessarily inherent in a right guaranteed by the Convention (see *Schmidt and Dahlström v. Sweden*, cited above, § 34).

34. More recently, the Court found, in the case of *Wilson, National Union of Journalists and Others* (cited above, § 44), that although collective bargaining was not indispensable for the effective enjoyment of trade union freedom, it could be one of the ways by which trade unions might be enabled to protect their members' interests. The union had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members.

35. The Court observes that its case-law does not exclude the possibility that the right to enter into a collective agreement may represent, in the particular circumstances of a case, one of the principal means – even the foremost of such means – for trade unionists to protect their interests. It notes in this connection that the organic link between freedom of association and freedom to bargain collectively has been referred to by the Social Charter's Committee of Independent Experts, according to whom, when a Contracting Party does not ensure full freedom of association for workers, under Article 5 of the Social Charter, it cannot fully ensure respect for the right to bargain collectively under Article 6 either (see Conclusions XIV-1, p. 419 [Ireland], *ibid.* p. 179 [Denmark] and p. 530 [Malta]; Turkey has not yet agreed to apply Articles 5 and 6 of the Social Charter).

36. In the light of the foregoing principles, the Court considers that, in the present case, a number of arguments militated at the material time in favour of the interpretation that maintaining the collective agreement in question constituted an integral element of the applicants' freedom of association.

37. In the first place, the trade union Tüm Bel Sen persuaded the employer, Gaziantep Municipal Council, to engage in collective bargaining over questions that it regarded as important for the interests of its members and to reach an agreement in order to determine their reciprocal obligations and duties.

38. Subsequently, following those negotiations, a collective agreement was entered into between the employer and the union Tüm Bel Sen. All the

rights and obligations of its members were provided for and protected under that agreement.

39. Moreover, the collective agreement was implemented. For a period of two years, with the exception of certain financial provisions that were in dispute between the parties, the collective agreement governed all employer-employee relations within Gaziantep Municipal Council.

40. Accordingly, the Court cannot but observe that the collective agreement that the applicants had previously entered into with their employer, in the present case, represented for the trade union Tüm Bel Sen the principal, if not the only, means of promoting and safeguarding the interests of its members. It follows that the annulment of the collective agreement between the authority and the trade union entered into two years earlier, and applied since then, constituted interference with the applicants' freedom of association within the meaning of Article 11 of the Convention.

(b) Whether the interference was justified

41. Such interference will constitute a breach of Article 11 unless it was "prescribed by law", pursued one or more legitimate aims and was "necessary in a democratic society" for the achievement of those aims.

42. The Court notes that the impugned interference was in accordance with the domestic law as interpreted by the combined civil divisions of the Court of Cassation. The Court is also satisfied that the measure in question, in so far as it sought to prevent a discrepancy between law and practice, pursued a legitimate aim, notably the prevention of disorder.

43. As to whether such interference was necessary in a democratic society, the Court reiterates that only convincing and compelling reasons can justify restrictions on freedom of association.

44. The Court notes that, at the material time, the applicants acted in good faith when they chose, as a collective action for the purpose of protecting their interests within the meaning of Article 11, the option of entering into a collective agreement, because Turkey had already ratified the International Labour Organisation Convention No. 98, which secures for all workers the right to bargain collectively and to enter into collective agreements. Article 6 of Convention No. 98 allows for exceptions only in the case of "public servants", that is to say, according to the interpretation of the ILO's Committee of Experts, officials directly employed in the administration of the State¹.

45. In fact it has not been alleged or shown by the Government that the employees of Gaziantep Municipal Council, members of the trade union Tüm Bel Sen, fell within such a category excluding them from the scope of the collective agreement. The Turkish Court of Cassation considered that it

¹ General Survey 1994, freedom of association and collective bargaining, on Conventions No. 87 and No. 98 [ILO, 1994a], § 200.

could not apply those provisions in the present case on the ground that the Turkish legislature had not yet, at the material time, provided for the implementation of Convention No. 98. The Court cannot accept that the argument based on an omission in the law – caused by a delay on the part of the legislature – was sufficient in itself to make the annulment of a collective agreement which had been applied for the past two years satisfy the conditions for any restriction of the freedom of association.

46. The Court considers that, following that judgment of the Court of Cassation, the respondent State, in declaring null and void retrospectively a collective agreement entered into nearly three years earlier and applied since then, acted unfairly in breach of its obligation to secure enjoyment of the rights protected under Article 11 of the Convention. That failing has constituted a violation of Article 11, to the detriment of both the trade union Tüm Bel Sen and the individual applicants.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

47. The applicants argued that the restrictions imposed on their freedom to form trade unions and to enter into collective agreements amounted to discrimination within the meaning of Article 14 of the Convention taken in conjunction with Article 11.

48. Having regard, however, to its findings under Article 11, the Court does not consider it necessary to examine this complaint separately.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. Article 41 of the Convention provides:

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

A. Damage

50. The first applicant, Kemal Demir, claimed that he had sustained pecuniary damage in the sum of 551 euros (EUR), in particular on account of his loss of thirteen years’ additional pay following the annulment of the collective agreement. As to non-pecuniary damage, resulting from his disappointment at being deprived of the means to assert his rights, he claimed EUR 14,880.

The second applicant, Vicdan Baykara, on behalf of the trade union that she represented and of its members, claimed compensation for non-pecuniary damage in the sum of EUR 148,810. She included in that amount

losses the trade union must have sustained through no longer being able to levy contributions at the same rate as before on account of its reduced capacity of action.

51. The Government disputed those claims and submitted that such awards would entail unjust enrichment.

52. As to the claim submitted by the applicant Kemal Demir in respect of pecuniary damage, the Court notes that no documentary evidence has been adduced in support of the claim. It considers, however, that the sum which the applicant was obliged to pay back to the State following the annulment of the relevant collective agreement must be returned to him. Making its assessment on an equitable basis, the Court awards the applicant Kemal Demir EUR 500 for all heads of damage combined.

53. As to the claim submitted in respect of non-pecuniary damage by the applicant Vicdan Baykara on behalf of the trade union she represented, the Court observes that at the material time the trade union Tüm Bel Sen was the principal union of the employees of Gaziantep Municipal Council. Its dissolution and the annulment of its collective agreement with the Council must have caused deep feelings of frustration among its members, because they were thus deprived of their sole, or at least principal, means of defending their interests.

Making its assessment on an equitable basis, the Court awards the sum of EUR 20,000 in respect of non-pecuniary damage to the members of the trade union Tüm Bel Sen. This sum is to be paid to the applicant Vicdan Baykara, who represents the trade union and who will be responsible for making this sum available to its members.

B. Costs and expenses

54. The applicants did not submit any claim for costs and expenses. The Court thus considers that there is no cause to make any award under this head.

C. Default interest

55. 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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 11 of the Convention on account of the domestic courts' refusal to recognise the legal personality

of the applicants' trade union and the annulment by those courts of the collective agreement between the trade union and its members' employer;

2. *Holds* that it is not necessary to examine separately the complaints under Article 14 of the Convention;

3. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into new Turkish liras at the rate applicable at the date of settlement:

(i) to Ms Vicdan Baykara, representing the trade union, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage, to be distributed by her to the members of the trade union Tüm Bel Sen;

(ii) to Mr Kemal Demir EUR 500 (five hundred euros) in respect of all heads of damage combined;

(iii) any tax that may be chargeable on the above amounts;

(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;

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

Done in French, and notified in writing on 21 November 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Türmen, Mrs Fura-Sandström and Mr Popović is annexed to this judgment.

J.-P.C.
S.D.

JOINT CONCURRING OPINION OF JUDGES TÜRMEŒ, FURA-SANDSTRÖM AND POPOVIĆ

We voted with the majority for finding a violation of Article 11.

Although we also basically agree with the reasoning adduced in the judgment, we would have preferred to take a broader approach to the questions of the right of public officials to form and to join trade unions under Article 11 and the right to collective bargaining.

Two separate questions of principle are involved in the present case. The first is whether the right to form and to join a trade union under Article 11 also encompasses an obligation to negotiate for the possible conclusion of an agreement. The second question is whether public officials enjoy trade union rights under Article 11 to the same extent as other employees, including the right to collective bargaining.

1. The right to collective bargaining constitutes an obligation to negotiate for the possible conclusion of an agreement. There is no obligation to reach an agreement however, as negotiations may fail and can be followed by strike action and other collective actions.

ILO Conventions nos. 87, 98 and 154 on freedom of association and freedom of collective bargaining provide that the regulation of working conditions is to be promoted by free unions and free employers in free negotiations. The Government's obligation under these ILO Conventions is to abstain from interfering with this procedure.

Article 6 of the European Social Charter bears the title: "The right to bargain collectively" and goes on to state that "with a view to ensuring the effective exercise of the right to bargain collectively" the Contracting Parties undertake to promote machinery for voluntary negotiation "between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".

In 1995 the Committee of Independent Experts set up under Article 25 of the Social Charter observed that "where a fundamental trade union prerogative such as the right to bargain collectively was restricted, this could amount to an infringement of the very nature of trade union freedom".

The EU Charter of Fundamental Rights in Article 28 mentions explicitly "the right to negotiate and conclude collective agreements".

The above-mentioned provisions indicate that there is a well-established practice of considering collective bargaining as a right and therefore of imposing an obligation upon the parties to enter into negotiations. As to Governments, they are not only under an obligation not to hinder negotiations but also have a positive obligation to promote them.

The Court has in its case-law adopted an extremely cautious attitude with regard to the right of collective bargaining. It has expressed the view that

Article 11 does not include a right for a union to be recognised for collective bargaining (*National Union of Belgian Police v. Belgium*, judgment of 27 October 1975, Series A no. 19) nor does Article 11 encompass any specific obligation on the part of the employer to enter into collective agreements with the unions (*Swedish Engine Drivers' Union v. Sweden*, judgment of 6 February 1976, Series A no. 20) and furthermore that Article 11 leaves each State a free choice of the means to be used to protect the interests of trade union members, pointing out that while a collective agreement is one of those means there are others (*Schettini and Others v. Italy* (dec.), no. 29529/95 of 9 November 2000). In recent case-law the importance of collective agreements has been upgraded, although the main thread is unchanged. In *Swedish Transport Workers Union v. Sweden* (dec.), no. 53507/99, ECHR 2004-XII (extracts), the Court holds that “collective bargaining and collective agreements are certainly among the most important of the means enabling trade unions to strive for the protection of their members’ interests”.

The judgment in *Wilson & the National Union of Journalists and Others v. the United Kingdom* (nos. 30668/96, 30671/96 and 30678/96, ECHR 2002-V) is of particular interest. The Court, in paragraph 46 of its judgment, observed as follows:

“...it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory.”

The right to form and join a trade union is inextricably linked with the right of collective bargaining and the right to strike. The main purpose of the right to form and join a trade union is, as stated in Article 11, to protect the interests of the workers. However, such protection cannot be realised fully and effectively without the right of collective bargaining and the right to strike. The “other means” referred to in a number of the Court’s judgments, such as demonstrations, can only be an auxiliary means and cannot achieve the same result. The organic link between the right to form and join a trade union and the right to collective bargaining is even stronger in cases where the State is the employer. In such cases where no private interest is involved, it is incumbent upon the State to take into account also the interest of trade union members.

In the reasoning of the present judgment we would like to have seen wording reflecting the close link between the right to form and join a trade union and the right to collective bargaining, in line with the practice in the field of international labour law.

In the present case, the Government interfered with and annulled a collective agreement concluded between Tüm Bel Sen and the municipality

of Gaziantep that had been in force for two years. Such interference constitutes a violation of Article 11.

In paragraphs 43 and 44 of the judgment the Court examines whether the interference is justified and necessary in a democratic society. However, in paragraph 46 of the judgment, it concludes that there has been a violation of Article 11 owing to the fact that the respondent State has not fulfilled its positive obligation.

We are of the opinion that the basis for finding a violation of Article 11 should have been that the interference of the State was not justified, since it was not necessary in a democratic society.

2. Do public officials enjoy trade union rights including the right to enter into collective bargaining? The last sentence of paragraph 2 of Article 11 makes it possible for the State to impose lawful restrictions on the exercise of the rights enshrined in that Article in the case of members of its armed forces, police or administration.

Therefore, the restrictions must first of all be “lawful”, i.e., prescribed by law, and should be limited to the “exercise” of these rights. They should not interfere with the essence of such a right.

Article 11 refers to three categories of persons on whom such restrictions may be imposed. While it is generally accepted that the trade union rights of members of the armed forces and the police may be restricted, it is not clear whether these restrictions may be imposed also in relation to members of “the administration of the State” or if this category of public official is different, enjoying the full scope of rights under Article 11.

Article 22 of the Covenant on Civil and Political Rights, which has similar wording to that of Article 11, only mentions members of the armed forces and the police without any reference to members of the administration of the State.

On the other hand, paragraph 2 of Article 8 of the Covenant on Economic, Social and Cultural Rights, which addresses the same subject, also includes members of the administration of the State in the possible restrictions.

Article 5 of the European Social Charter states that limitations can be imposed on the police as well as on members of the armed forces. There is no reference to members of the administration in the Article.

ILO Convention No. 98, to which Turkey is a party, provides in its Article 6 that the Convention will not apply to public servants engaged in the administration of the State. However, the ILO Committee, in its General Survey underlined the need to interpret Article 6 narrowly and made a distinction between public servants who “by their functions are directly employed in the administration of the State and other persons employed by the Government, by public enterprises or by autonomous public institutions.

The former may be excluded from the scope of the Convention, whereas the latter benefit from the guarantees provided in the Convention.”

In the present case it is clear that the members of the Tüm Bel Sen trade union, comprising officials in various localities, would fall into the second category and should therefore, in our opinion, be entitled to exercise all the rights provided for in Article 11.