



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

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1959 · 50 · 2009

SECOND SECTION

**CASE OF ÜMİT GÜL v. TURKEY**

*(Application no. 7880/02)*

JUDGMENT

STRASBOURG

29 September 2009

**FINAL**

***29/12/2009***

*This judgment may be subject to editorial revision.*



**In the case of Ümit Gül v. Turkey,**

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 8 September 2009,

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

## PROCEDURE

1. The case originated in an application (no. 7880/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national of Kurdish origin, Mr Ümit Gül (“the applicant”), on 17 January 2002.

2. The applicant, who had been granted legal aid, was represented by Messrs Hüseyin Aygün and Özgür Ulaş Kaptan, lawyers practising in Tunceli, Turkey. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that while he was in police custody he had been subjected to ill-treatment amounting to torture and that the criminal proceedings brought against him at the end of that period of custody had not been fair.

4. On 10 May 2007 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

## THE FACTS

### THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1982 and lives in Dusseldorf, Germany.

6. On 14 January 2001 police officers from the anti-terrorist branch of the Tunceli police headquarters arrested the applicant on suspicion of having written slogans on a wall in support of TKP/ML-TMLGB, namely, the Communist Party of Turkey/Marxist Leninist - Marxist Leninist Youth Union of Turkey (*Türkiye Komünist Partisi/Marksist Leninist - Türkiye Marksist Leninist Gençlik Birliği*), an illegal organisation. He was placed in police custody. According to the arrest report of 14 January 2001, the applicant did not ask for a lawyer.

7. The applicant alleged that while in police custody he had been subjected to physical and psychological ill-treatment amounting to torture. The ill-treatment consisted of, *inter alia*, being hosed with pressurised cold water and suspended by the arms, electric shocks and beatings.

8. According to four medical reports drawn up on 14, 16, 17 and 19 January 2001 by a doctor at Tunceli State Hospital, apparently at the request of the police headquarters where the applicant was being detained, there were no marks of ill-treatment on the applicant's body. It was stated in the reports that the applicant "did not have any complaints, appeared well and was conscious" and that there were "no injuries on his body".

9. On 17 January 2001, while he was in police custody, police officers questioned the applicant and recorded his statement. In the nine-page statement the applicant was reported as having stated that he did not want the assistance of a lawyer and went on to detail the activities he had carried out on behalf of the above-mentioned illegal organisation. These activities included distributing copies of a left-wing newspaper, writing slogans on walls and taking part in meetings with other members of the organisation.

10. On 19 January 2001 the applicant was brought before the Tunceli prosecutor and subsequently before the Tunceli Magistrates' Court (*Tunceli Sulh Ceza Mahkemesi*), where he was questioned further. The applicant confirmed the accuracy of the contents of the statement he had made in police custody on 17 January 2001. The Magistrates' Court ordered the applicant's detention pending the outcome of the criminal proceedings. The applicant was detained in Malatya Prison.

*1. The investigation into the applicant's allegations of ill-treatment*

11. On 22 January 2001 the applicant submitted a petition to the Malatya State Security Court, requesting his release. In his petition the applicant stated that, in the course of his detention in police custody he had been subjected to intensive physical and psychological torture in order to force him to sign a statement. Furthermore, he had not been allowed to sleep for three days preceding his appearance before the prosecutor and, as a result, had not been fully conscious when questioned. The applicant's request for release was rejected the following day.

12. On 8 February 2001 the applicant asked, in writing, for the Malatya public prosecutor to refer him to a hospital so that the marks left on his

shoulders by the ill-treatment could be documented. On 14 February 2001 the Malatya prosecutor decided that the alleged ill-treatment had not taken place in his area of jurisdiction and forwarded the applicant's letter to the Tunceli prosecutor.

13. Following a request apparently made by the director of the Malatya Prison on 27 February 2001, the applicant was examined on 28 February 2001 by the director of the Malatya branch of the Forensic Medicine Directorate, who is also a medical consultant. According to the report drawn up by that doctor, there were four scars, measuring between two and three centimetres by one centimetre, on the front and back of the applicant's shoulders. It also appears from the report that the applicant had complained to the doctor about pain and restriction of movement in his arms. The doctor recommended that the applicant be sent to a fully equipped hospital for further diagnosis of his injuries and complaints.

14. On 22 March 2001, and subsequently on 10 April 2001, the applicant made two statements before a prosecutor and set out in detail the ill-treatment to which he had been subjected by six or seven police officers while in custody. According to these statements, the ill-treatment included being stripped naked and wrapped in a damp blanket before being beaten with truncheons and suspended by the arms, which caused the ligaments in his shoulders to tear. The police officers had also threatened to harm his relatives and get his father dismissed from his job as a neighbourhood security guard if he denied the allegations against him. The applicant told the prosecutor that the contents of the medical report drawn up by the Malatya branch of the Forensic Medicine Directorate were correct and informed the prosecutor that he would be able to recognise the police officers responsible for the ill-treatment if he ever saw them again. He asked the prosecutor to prosecute them.

15. The applicant was examined by a consultant orthopaedist and a consultant neurologist at Malatya State Hospital on 13 April 2001. The orthopaedist noted a number of scars on the applicant's shoulders, compatible with the findings of the medical report of 28 February 2001 (see paragraph 13 above). The neurologist recommended the applicant's referral to a specialist hospital.

16. On 14 April 2001 the Tunceli prosecutor requested authorisation from the Tunceli governor to prosecute the police officers allegedly responsible for the applicant's ill-treatment. This request was made pursuant to Law No. 4483 on the Trial of State Employees and other Public Servants.

17. The applicant was released on bail on 24 April 2001.

18. On 7 and 11 May 2001 police chief Y.K., who was entrusted with the duty of investigating the applicant's allegations, questioned two police officers, Z.G. and İ.Ç., who had apparently questioned the applicant and taken down his statement on 17 January 2001. Both officers denied ill-

treating the applicant and stated that “members of terrorist organisations made such allegations in order to lower the morale of the police”.

19. On 10 May 2001 the Tunceli prosecutor referred the applicant to Fırat Research Hospital in the city of Elazığ (hereinafter “Elazığ Hospital”) in order to establish whether the applicant’s injuries had caused any permanent damage. A medical examination was scheduled to take place on 15 June 2001.

20. On 15 May 2001 the police chief Y.K. recommended to the Tunceli governor that permission for the prosecution of the two police officers should not be granted.

21. The Tunceli prosecutor’s request for authorisation to prosecute was refused by the Tunceli governor on 21 May 2001. The governor considered, on the basis of a report prepared by the police chief Y.K., that, other than the applicant’s own allegations, there was no evidence to prove that the injuries detailed in the medical reports had been caused in detention.

22. On 31 May 2001 the applicant lodged an objection against the Tunceli governor’s decision of 21 May 2001 and argued that the decision, which had been taken before his examination at Elazığ Hospital was due, had failed to establish the truth and should be annulled.

23. In its decision of 13 June 2001, the Malatya Regional Administrative Court annulled the decision of the Tunceli governor on the ground that it was based on an incomplete investigation. In particular, the governor’s decision had been taken before a detailed medical report from Elazığ Hospital had become available. Furthermore, the decision was based on a report prepared by an investigator who had not interviewed the applicant. Finally, the authorisation to prosecute had been rejected solely on the basis of the statements taken from those allegedly responsible for the ill-treatment and the medical reports drawn up while the applicant was in detention.

24. On 21 June Elazığ Hospital sent a letter to the Tunceli prosecutor informing him that the applicant “did not have his EMG examination done”.

25. The same police chief Y.K. was entrusted with the duty of carrying out the new investigation. When he questioned the applicant on 6 July 2001 the applicant told him that when he had been brought before the doctor while in police custody he had been very scared and therefore had not been able to tell the doctor anything about the ill-treatment. In any event, the doctor had not examined him properly. When he had finally been referred to Elazığ Hospital he had been asked to pay the costs of the medical examination but had been unable to afford it. As a result, the doctors at the hospital had refused to examine him. The applicant told the police chief that he wanted those responsible for his ill-treatment to be prosecuted.

26. The police chief Y.K. prepared his report on 17 July 2001 and stated that in his opinion permission for the prosecution of the police officers should not be granted.

27. On 27 July 2001 the Tunceli governor again refused authorisation to prosecute the police officers. The governor noted the applicant's claim that he had not been examined at Elazığ Hospital as he had been unable to pay the cost (approximately 30 euros) for an electromyography test (an EMG). The Tunceli governor considered that the defects highlighted in the Regional Administrative Court's decision of 13 June 2001 had been eliminated and that there was no evidence that the applicant had been subjected to ill-treatment. The report of 28 February 2001, showing injuries on the applicant's body, had been obtained thirty-nine days after his release from police custody.

28. According to the applicant, the Tunceli governor's decision was not communicated to him, as in the meantime he had fled Turkey and settled in Germany as a result of harassment to which police officers had subjected him. He did not, therefore, lodge an objection against this decision. According to a document submitted to the Court by the Government, however, the applicant was served with the decision on 5 August 2001.

29. An automatic appeal was lodged against the Tunceli governor's decision with the Malatya Regional Administrative Court, which, however, remitted it to the governor's office as only the applicant or the prosecutor could have lodged the appeal. The Regional Court observed that the decision in question had become final as no appeal had been lodged.

30. On the basis of the Tunceli governor's decision of 27 July 2001, on 16 October 2001 the Tunceli prosecutor rendered a decision not to prosecute the police officers allegedly responsible for the ill-treatment. The applicant lodged an objection, through his legal representative, against that decision and pointed to the failure to remedy the defects identified in the Malatya Regional Administrative Court's decision of 13 June 2001.

31. On 8 November 2001 the applicant's objection was rejected by the Erzincan Assize Court on the basis of the Tunceli governor's above-mentioned decision of 27 July 2001.

## *2. The applicant's trial and conviction*

32. In the meantime, on 20 February 2001 the prosecutor at the Malatya State Security Court filed an indictment charging the applicant with the offences of membership of an illegal organisation and aiding and abetting members of that organisation. In his indictment the prosecutor quoted extensive paragraphs from the statements taken from the applicant by police officers on 17 January 2001 and then by the prosecutor and the Magistrates' Court on 19 January 2001.

33. Criminal proceedings commenced before the 2<sup>nd</sup> Chamber of the Malatya State Security Court (hereinafter "the trial court"). In the course of the proceedings the applicant was represented by a lawyer. The applicant told the trial court that his statement had been extracted under torture while he was in police custody. He repudiated the statement and maintained his

innocence. The trial court had regard to the Tunceli prosecutor's decision of 16 October 2001 not to prosecute the police officers.

34. On 9 April 2002 the applicant was found guilty of the offence of aiding and abetting an illegal organisation, contrary to Article 169 of the Criminal Code, and sentenced to three years and nine months' imprisonment. In convicting the applicant the trial court had regard to the statements taken from the applicant by the police on 17 January 2001 and by the prosecutor and the Magistrates' Court on 19 January 2001 (see, respectively, paragraphs 9-10 above).

35. The applicant's conviction was upheld by the Court of Cassation on 12 November 2002.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

36. The applicant complained under Article 3 of the Convention that while in police custody he had been subjected to ill-treatment amounting to torture. He further complained that the authorities had failed to carry out a serious and impartial investigation into his allegations of ill-treatment and that they had thus deprived him of an effective remedy within the meaning of Article 13 of the Convention.

37. The Court considers that these complaints should be examined solely from the standpoint of Article 3 of the Convention, which reads as follows:

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

38. The Government contested the applicant's arguments.

#### A. Admissibility

39. The Government argued that the applicant had failed to exhaust the domestic remedies available to him, within the meaning of Article 35 § 1 of the Convention. In this connection they submitted that the applicant had failed to lodge an objection against the Tunceli governor's decision of 27 July 2001, which, contrary to the applicant's suggestion, had been communicated to him on 5 August 2001 (see paragraph 28 above).

40. The Government further submitted that there were various civil and administrative remedies provided by domestic law in respect of persons claiming to be the victims of ill-treatment in police custody and that the

applicant could have sought reparation for the harm he had allegedly suffered.

41. Regarding the Government's reference to civil and administrative remedies, the Court reiterates that it has already examined and rejected similar preliminary objections made in similar cases (see, in particular, *Atalay v. Turkey*, no. 1249/03, § 28, 18 September 2008 and the case cited therein). The Court reaffirms its earlier conclusions that the remedies referred to by the Government cannot be regarded as sufficient for a Contracting State's obligations under Article 3 of the Convention as they are aimed at awarding damages rather than identifying and punishing those responsible. The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned case. It therefore rejects the Government's preliminary objection in respect of civil and administrative remedies.

42. Concerning the Government's reliance on the applicant's failure to lodge an objection against the Tunceli governor's decision of 27 July 2001 (see paragraph 39 above), the Court considers that this issue is closely linked to the substance of the applicant's complaint concerning the effectiveness of the investigation into his allegations of ill-treatment and, as such, should be joined to the merits.

43. The Court considers, in the light of the parties' submissions, that the applicant's complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It concludes therefore that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

## **B. Merits**

44. The applicant alleged that by subjecting him to ill-treatment in police custody the agents of the respondent Government had acted in complete disregard of the prohibition of ill-treatment. He further alleged that the investigation carried out by the authorities had not been effective or impartial.

45. The Government were of the opinion that the applicant had failed to prove his allegations of ill-treatment beyond reasonable doubt. None of the medical reports drawn up on 14, 16, 17 and 19 January 2001, which were compatible with the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), showed any signs of ill-treatment on the applicant's body. Moreover, by medically examining the applicant every twenty-four hours the authorities had acted in a diligent manner. The medical reports detailing the injuries, on the other hand, had not been obtained until 28 February and 13

April 2001 and were not, therefore, credible when compared with the previous medical reports.

46. The Government considered that the purpose of seeking authorisation to prosecute the police officers was not to afford them any immunity; such authorisations were required in order to protect civil servants against false allegations. The authorities had acted diligently and investigated the applicant's claims adequately. Contrary to what was suggested by the applicant, the reason he had not been examined at Elazığ Hospital was not because he had been asked to pay the costs of his examination, but because he had failed to go there. In the Government's opinion, this was evident from Elazığ Hospital's letter of 21 June 2001.

47. The Court considers at the outset that, contrary to what was suggested by the Government, the medical reports of 14, 16, 17 and 19 January 2001 (see paragraph 8 above) lack detail and fall significantly short of both the standards recommended by the CPT, which are regularly taken into account by the Court in its examination of cases concerning ill-treatment (see, *inter alia*, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X), and the guidelines set out in the Istanbul Protocol (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 100, ECHR 2004-IV (extracts)). As such, the Court considers that these medical reports cannot be relied on as evidence for proving or disproving that the applicant was ill-treated.

48. As for the reports pertaining to the medical examinations carried out on 28 February and 13 April 2001 (see paragraphs 13 and 15 above), which, in the opinion of the Government, were not credible, the Court considers that the applicant cannot be reproached for the delays in obtaining those reports. Although the applicant informed the prosecutor as early as 22 January 2001 about the alleged ill-treatment (see paragraph 11 above) – that is three days after his release from police custody – he was not taken to the doctor for an additional period of thirty-seven days. The Court considers that ensuring a much more prompt medical examination would have been a straightforward matter for the authorities but they nevertheless failed to do so, partly because of the lengthy communications between prosecutors in determining in whose area of jurisdiction the applicant was being detained (see paragraph 12 above). The Court considers it highly regrettably that the authorities' own delays in obtaining these reports were then used against the applicant when dismissing his allegations of ill-treatment (see paragraph 27 above).

49. As for the evidential value of the medical reports drawn up on 28 February and 13 April 2001, the Court observes that they pertain to medical examinations conducted by a consultant doctor specialising in forensic medicine, a consultant orthopaedist and a consultant neurologist. They include not only the medical findings, but also the details of the applicant's allegations of ill-treatment. Although these consultants

recommended the applicant's referral to specialised medical institutions for further examinations, the Court notes with regret that this was not done. In this connection the Court cannot but remark on the Government's challenge to the truth of the applicant's allegation that the reason for the failure to examine him at Elazığ Hospital had been due to his inability to pay the costs. In the Government's opinion, the letter drawn up by Elazığ Hospital on 21 June 2001 showed that the applicant had failed to go there. Nevertheless, the Court notes that the letter referred to by the Government makes no mention of any failure on the part of the applicant to go to the hospital, but merely states that the applicant "did not have his EMG examination done" (see paragraph 24 above). In any event, the Court observes that the applicant did inform the domestic investigation authorities of his inability to afford the medical examination (see paragraph 27 above), but nothing was done by those authorities.

50. Concerning the nature and the extent of the medical findings detailed in the reports of 28 February and 13 April 2001, the Court observes that the applicant's injuries are consistent with his version of the ill-treatment, including being suspended by the arms (see paragraphs 7 and 14 above). Furthermore, having regard to the fact that the applicant's injuries were still visible some weeks after the ill-treatment had taken place, and having regard, further, to the fact that the forensic expert and medical consultants recommended the applicant's referral to a specialised hospital (see paragraphs 13 and 15 above), the Court considers that the applicant was subjected to ill-treatment which was sufficiently serious to fall within the scope of Article 3 of the Convention.

51. Furthermore, the fact that the applicant was not released after his police custody but was transferred to a prison, and the fact that the medical reports were drawn up while the applicant was being detained there, are sufficient for the Court to conclude that the injuries detailed in those reports had been caused while the applicant was in the hands of agents of the State. In this connection the Court notes that the Government, who bear the burden of providing a plausible explanation for those injuries (see, in this connection, *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII), have not put forward such an explanation.

52. As for the applicant's complaints concerning the effectiveness of the investigation, the Court reiterates the requirements of an effective investigation into allegations of ill-treatment which are set out in its judgment in the above-mentioned case of *Batı and Others* (§§ 133-37).

53. The Court observes in this connection that the investigation in the present case was largely conducted by a police chief who was the superior in rank of the police officers implicated in the applicant's ill-treatment. Furthermore, the decision not to grant authorisation for the prosecution was given by a governor, who, in turn, is the hierarchical superior of the local police force. In a number of its judgments the Court has considered that

investigations conducted by such entities, which are not independent of the persons implicated in the events, cannot be compatible with the independence and impartiality requirement of an effective investigation (ibid, § 135; see also *Güleç v. Turkey*, 27 July 1998, §§ 80-82, *Reports of Judgments and Decisions* 1998-IV; *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III).

54. The Court reaches the same conclusion in the present case and disagrees with the Government's suggestion that the purpose of such investigations was to protect civil servants against false allegations. In the Court's opinion, independent judicial authorities are better placed to establish the accuracy of allegations of ill-treatment, while providing the necessary safeguards for those accused of such allegations.

55. Indeed, the Court notes that the requirement for prosecutors to obtain authorisation under Law No. 4483 (see paragraph 16 above) before they can bring a prosecution against civil servants accused of offences related to ill-treatment was abolished in 2003 with the entry into force of Law No. 4778.

56. The conclusion that the investigation into the applicant's allegations of ill-treatment was not carried out by an impartial and independent body is sufficient for the Court to conclude that the authorities have failed to carry out an effective investigation, contrary to the positive obligation inherent in Article 3 of the Convention. The Court thus deems it unnecessary to examine the remaining features of the investigation.

57. In the light of the foregoing the Court considers that the administrative procedure by which the prosecutor sought authorisation to prosecute the police officers cannot be regarded as an effective remedy for the purposes of Article 35 § 1 of the Convention and that the applicant did not, therefore, fail to comply with the requirement to exhaust domestic remedies by not lodging an objection against the Tunceli governor's decision of 27 July 2001. It notes that the applicant did subsequently lodge an objection against the Tunceli prosecutor's decision not to prosecute and introduced his application within six months from the date of the rejection of that objection by the Erzincan Assize Court (see paragraph 31 above). The Court accordingly dismisses the Government's preliminary objection in this respect (see paragraphs 39 and 42 above) and holds that there has been a violation of Article 3 of the Convention under both its substantive (see paragraph 51 above) and procedural (see paragraph 56 above) limbs.

## II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

58. The applicant submitted that he had been detained in police custody for six days and had not, therefore, been brought promptly before a judge within the meaning of Article 5 § 3 of the Convention, which, in so far as relevant, provides as follows:

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power...”.

59. The Government contested that argument.

60. The Court observes that the applicant’s police custody ended on 19 January 2001 (see paragraph 10 above), when he was brought before the prosecutor and the Magistrates’ Court. However, he did not lodge his application with the Court until 17 January 2002. He thereby failed to observe the six-month rule laid down in Article 35 § 1 of the Convention in respect of this complaint. This aspect of the case must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

61. The applicant further complained that his right to a fair trial, guaranteed by Article 6 of the Convention, had been breached on account of his inability to consult his lawyer while in police custody. Article 6 of the Convention, in so far as relevant, provides as follows:

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

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

62. The Government were of the opinion that the applicant could not claim to be a victim within the meaning of Article 34 of the Convention because he had not asked for a lawyer while in police custody.

63. The Court deems it more appropriate to examine the Government’s preliminary objection when examining the merits of the complaint. It considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

64. The Government further argued that throughout the criminal proceedings against him the applicant had been represented by a lawyer. Moreover, the applicant’s conviction had not been based solely on the statements taken from him in the absence of a lawyer and during his police custody, where he claimed to have been ill-treated, but also on other evidence adduced in the file in the course of the proceedings.

65. The Court notes at the outset that, notwithstanding the statement taken from the applicant in police custody according to which he allegedly did not want the assistance of a lawyer (see paragraph 9 above), at the time of the applicant’s police custody systemic restrictions were imposed on the right of access to a lawyer under section 31 of Law no. 3842 on persons

arrested in connection with an offence falling within the jurisdiction of the State Security Courts (see *Çimen v. Turkey*, no. 19582/02, § 21, 3 February 2009). It would therefore have been futile for the applicant to request the assistance of a lawyer while in police custody. The Court thus rejects the Government's challenge to the applicant's victim status (see paragraph 62 above).

66. The Court reiterates the basic principles laid down in its judgment in the case of *Salduz v. Turkey* [GC] (no. 36391/02, §§ 50-55, 27 November 2008). It will examine the present case in the light of those principles.

67. The Court considers that, even though the applicant denied the accuracy of the contents of the statements taken from him in the absence of legal assistance (see paragraph 33 above), the Malatya State Security Court relied on those statement when convicting him (see paragraph 34 above). Moreover, the Court has already found that the applicant was subjected to ill-treatment in breach of Article 3 of the Convention while he was in the custody of the police who took his statement (see paragraphs 51 and 57 above). In this connection the Court reiterates that the use of evidence obtained in violation of Article 3 in criminal proceedings infringes the fairness of such proceedings even if the admission of such evidence was not decisive in securing the conviction (see *Hacı Özen v. Turkey*, no. 46286/99, § 101, 12 April 2007, and the cases cited therein).

68. Thus, the applicant in the present case was undoubtedly affected by the restrictions on his access to a lawyer in the course of his police custody, during which he was also ill-treated. Therefore, neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred earlier.

69. In sum, the Court finds that the absence of a lawyer at the initial stages of the investigation irretrievably affected the applicant's defence rights.

70. There has therefore been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1.

#### IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

71. Lastly, invoking Article 14 of the Convention, the applicant alleged that he had been subjected to ill-treatment on account of his Kurdish origins and political opinions.

72. The Government contested that argument.

73. 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. It therefore follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. Article 41 of the Convention provides:

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

### A. Damage

75. The applicant claimed a total of 11,000 euros (EUR) in respect of non-pecuniary damage.

76. In the Government’s opinion, the sum claimed by the applicant was excessive.

77. The Court considers the sum claimed to be reasonable and it thus awards it in full in respect of non-pecuniary damage.

78. Furthermore, where the Court finds that an applicant has been convicted in criminal proceedings which were found to be in breach of Article 6 § 1 of the Convention, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant be put, as far as possible, in the position in which he would have been had this provision not been disregarded (see *Şirin v. Turkey*, no. 47328/99, § 30, 15 March 2005). The Court therefore considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 § 1 of the Convention, should the applicant so request (see, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003, and *Salduz*, cited above, § 72).

### B. Costs and expenses

79. The applicant also claimed 9,700 Turkish liras (approximately EUR 6,200) in respect of the fees of his legal representatives for representing him in the proceedings before the Court and EUR 1,350 for various postal and translation expenses. In respect of the fees of his legal representatives, the applicant submitted to the Court a time sheet showing that the legal representatives had spent a total of twenty-one hours on the case. No documentary evidence was submitted in respect of the postal and translation expenses.

80. The Government considered the sums claimed to be exaggerated and unsubstantiated.

81. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its

possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads, less the EUR 850 which the applicant received in legal aid from the Council of Europe (see paragraph 2 above).

### C. Default interest

82. 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. *Declares* the complaints under Articles 3 and 6 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of both the substantive and procedural aspects of Article 3 of the Convention;
3. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1;
4. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 11,000 (eleven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 2,000 (two thousand euros) in respect of costs and expenses, less EUR 850 (eight hundred and fifty euros) granted by way of legal aid, plus any tax that may be chargeable to the applicant, to be converted into Turkish liras at the rate applicable at the date of settlement;
  - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 September, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos  
Deputy Registrar

Françoise Tulkens  
President