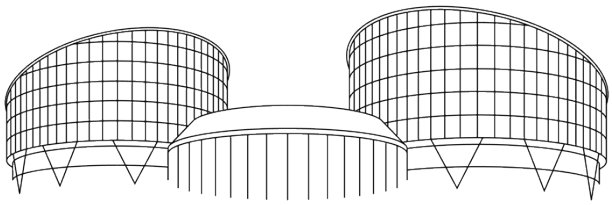

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF DESDE v. TURKEY

(Application no. 23909/03)

JUDGMENT

STRASBOURG

1 February 2011

FINAL

01/05/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Desde v. Turkey**,**

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 11 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 23909/03) 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 German national, Mr Mehmet Desde ("the applicant"), on 20 May 2003.

2. The applicant was represented by Mr Ç. Bingölbalı, a lawyer practising in Izmir. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged that he had been subjected to ill-treatment while in police custody, that the national authorities had failed to conduct an effective investigation into his complaints, and that he had been denied a fair hearing in the criminal proceedings against him. He alleged a violation of Articles 3, 5 § 2, 6 and 13 of the Convention.

4. On 14 September 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).

5. The German Government, who were invited to indicate whether they wished to exercise their right to intervene in the proceedings (Article 36 § 1 of the Convention), did not express their wish.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is a German national who was born in 1959 and lives in Berlin.

A. The arrest and alleged ill-treatment of the applicant in police custody

7. On 9 July 2002 at 2 p.m. the applicant was taken into police custody while travelling in Izmir. According to the arrest report, a search warrant had been issued by the Anti-Terrorist Branch of the Izmir Security Headquarters in respect of the car in which the applicant was travelling.

8. At 3.10 p.m. on the same day, prior to his detention in police custody, the applicant was taken to the Izmir Atatürk Eğitim Hospital. The doctor who examined the applicant noted that there was no sign of violence on the applicant's body. The applicant was then taken to the Izmir Security Headquarters by Anti-Terrorist Branch officers.

9. The applicant alleges that he was subjected to various forms of ill-treatment while in police custody. In particular, he was kept in a cell with strong light and insufficient ventilation. He was deprived of food and sleep. While being questioned he was blindfolded, stripped naked and insulted. He was also threatened with death and beaten. In particular, he received blows to his chest, back and head. The applicant was further forced to kneel down while police officers rubbed an object around his anus.

10. On 11 July 2002 the applicant was once again examined by a doctor at the Izmir Atatürk Eğitim Hospital, who noted that there was no sign of physical violence on the applicant's person.

11. On 11 July 2002 an identification parade was organised by the police. Individuals named M.Ö., H.H.T. and E.Y., who were arrested in the course of a police operation, identified the applicant as a senior member of an illegal organisation, Bolşevik Parti-Kuzey Kürdistan/Turkiye (Bolshevik Party-North Kurdistan/Turkey). They stated that the applicant used the code name “Hıdır” and was an active member of the said organisation. It is to be noted that the above-mentioned persons denied these statements before the trial court, alleging that they had been obtained under duress.

12. In a police report dated 12 July 2002 it was stated that the applicant had refused to answer questions relating to his activities within the aforementioned illegal organisation and that he wished to exercise his right to remain silent. The applicant however alleges that he had given statements under torture.

13. On 13 July 2002 the applicant was brought to the Izmir Atatürk Eğitim Hospital for the third time. According to the applicant's submissions, which were not contested by the Government, a doctor examined him and nine other persons (his co-accused) between 10.47 and 11 a.m; thus, ten people were examined in thirteen minutes. The doctor noted in the medical certificate that there was no sign of violence on the applicant.

14. On the same day, the applicant was questioned by a public prosecutor at the Izmir State Security Court. He claimed that he had not been involved in the activities of the Bolşevik Parti. The applicant was then brought before the Izmir Magistrates' Court, where he contended that he had been subjected to ill-treatment while in police custody. In particular, the police officers had sexually abused him and hit him on the back and chest. The applicant's lawyer requested the court to order that an investigation be initiated into their allegations. The Izmir Magistrates' Court held that it was in the public prosecutor's discretion to order a medical examination of the applicant. The court also remanded the applicant in custody. The applicant was subsequently transferred to Buca Prison.

15. On 15 July 2002 a psychologist and a social worker interviewed the applicant in Buca Prison. According to their report, dated 24 July 2002, they observed that the applicant was anxious and frightened during the interview and that he was suffering from an emotional disorder.

B. The criminal proceedings brought against the police officers

16. On 18 July 2002 the applicant's lawyer lodged a complaint with the public prosecutor's office in Buca Prison about the alleged ill-treatment the applicant had suffered while in police custody. The lawyer further requested that the applicant have a medical examination in a university hospital. She requested, in particular, that the applicant be examined by an internist, a psychiatrist, a neurologist and a urologist, and that a bone scintigraphy be carried out. In her submission the lawyer maintained that the applicant had not been examined by the prison doctor when he arrived at Buca Prison and that the applicant was experiencing pain in various parts of his body.

17. On 19 July 2002 the applicant's lawyer lodged an objection with the Izmir State Security Court to the order for remand in custody, and requested the release of the applicant pending trial. He noted that the applicant had been denied legal assistance during his detention in police custody and that he had been forced to sign some documents under torture while blindfolded. He further complained that he had been denied access to the investigation file and that the applicant's defence rights had been restricted. This objection was dismissed by the State Security Court on 24 July 2002 in view of the nature of the alleged crime and the date of the order for remand in custody.

18. On 22 July 2002 the public prosecutor in Buca Prison requested the prison doctor to conduct a medical examination of the applicant.

19. On the same day, the prison doctor examined the applicant and noted that there was no sign of violence on the applicant's person. The doctor considered that there was no reason to refer the applicant to the Forensic Medicine Institute for further examination.

20. On 24 July 2002 the Izmir public prosecutor took statements from the applicant relating to his lawyer's allegations of ill-treatment. The applicant confirmed the allegations of his lawyer and maintained, *inter alia*, that he had been kept blindfolded, beaten and insulted by police officers for five days in the Anti-Terrorist Branch of the Security Headquarters. He noted that he had not seen the people who ill-treated him but had heard the voice of the Anti-Terrorist Branch director among those who had beaten him.

21. On an unspecified date the applicant was transferred to Kırıklar F-type Prison.

22. On 31 July 2002 the applicant wrote a letter to his lawyer in which he described the conditions in which he was detained and stated that he had been ill-treated while in police custody. In his letter, the applicant contended that he had been informed neither of the reasons for his arrest nor of his rights. Furthermore, his lawyer and his family members had not been notified of his arrest. The applicant alleged that he had been kept in a small cell for four days under strong light and subjected to ill-treatment. The applicant finally maintained that he had begun to suffer from hypertension after his detention in police custody.

23. On 20 August 2002 the applicant's lawyer made a submission to the Izmir public prosecutor's office. Referring to the applicant's letter of 31 July 2002, the lawyer requested that the officers who had ill-treated the applicant be identified and punished.

24. On 9 September 2002 one of the public prosecutors in Izmir, C.Ç., issued a decision not to prosecute anyone in relation to the applicant's allegations of ill-treatment. The public prosecutor considered that there was insufficient evidence to press charges against police officers, in view of the medical reports dated 9, 11 and 13 July 2002. On the same day, the applicant's lawyer lodged an objection to this decision, which was dismissed by the Karşıyaka Assize Court on 25 November 2002.

25. On 16 September 2002 the applicant wrote another letter in which he maintained that he had begun to suffer from hypertension after his detention in police custody. The applicant requested a medical examination in a university hospital.

26. On 22 October 2002, upon receipt of a letter from the applicant, the German Consul in Izmir sent a letter to the Kırıklar Prison authorities requesting that the applicant be medically examined in a university hospital in relation to his allegations of ill-treatment. The Consul further noted the

applicant's allegation of isolation in the F-type prison and requested that he be given the opportunity to be in contact with other detainees.

27. On 23 October 2002 the governor of Kırıklar Prison sent a letter to the German Consulate in Izmir asserting that the applicant had contact with other detainees three days a week. The prison director further noted that the request for a medical examination should be addressed to the Izmir public prosecutor's office.

28. On 31 October 2002, at the request of the Consulate General of the Federal Republic of Germany, a second public prosecutor in Izmir, N.A., requested the public prosecutor in Kırıklar Prison to take statements from the applicant relating to his allegations of ill-treatment. She further requested the Ege University hospital to conduct a medical examination of the applicant in view of the latter's allegation that he had received blows to his ear from the police officers and that he had lost his hearing.

29. In a medical report dated 6 November 2002 the Ege University Hospital's Nose and Otolaryngology Department stated that the tympanic membranes of the applicant's ears and his hearing were normal and that there were no signs of ill-treatment on the applicant's body.

30. On 7 November 2002 the public prosecutor in Kırıklar Prison took statements from the applicant. The applicant reiterated the content of his letter of 31 July 2002 in which he had described the conditions of his detention and the details of the alleged ill-treatment.

31. On the same day, the applicant's lawyer lodged an objection against the Izmir public prosecutor's decision of 9 September 2002, which was dismissed by the Karşıyaka Assize Court on 25 November 2002.

32. On 15 November 2002 the second public prosecutor in Izmir, N.A., informed the chief public prosecutor in Izmir that the applicant had been examined by Ege University hospital doctors and that she would wait for the hospital's medical report before concluding the investigation into the applicant's allegations.

33. On 22 November 2002 the first public prosecutor in Izmir, C.Ç., issued a second decision not to prosecute regarding the applicant's allegations of ill-treatment, in view of the content of the medical reports of 9, 11 and 13 July 2002.

34. On 21 January 2003 the applicant was released pending trial.

35. On 19 February 2003 the applicant was examined by a panel of medical experts from the Izmir branch of the Turkish Medical Association *(İzmir Tabip Odası)* who diagnosed the applicant as suffering from major depression and post-traumatic stress syndrome. According to the medical report of 21 July 2003 prepared by the commission, the applicant did not bear any sign of physical violence. The doctors however noted that even if the applicant had been subjected to ill-treatment, with the passage of time it would be impossible to observe any sign of it on his body. The commission further noted that the medical examinations which the applicant had

undergone during his detention in police custody and following his release were not capable of establishing whether the applicant had actually been subjected to ill-treatment as alleged. The experts considered that these examinations were not "medically valid", as they did not comply with the standards established by the Ministry of Health. The commission thus considered that the applicant's complaints were consistent with the alleged ill-treatment, and concluded that he had been subjected to torture during his detention in police custody.

36. On 3 February 2003 the applicant's doctor in Germany prepared a medical report stating that the applicant had not been suffering from hypertension before he left Germany.

37. On 11 March 2003 the Ege University Hospital submitted a medical report to the Izmir public prosecutor's office. According to the report, the applicant had been subjected to a medical examination on 5 November 2002. The doctors observed that there was an old lesion measuring 10 cm on the left side of the applicant's abdomen. The applicant alleged that the injury had occurred when he fell from a chair in police custody. The doctors were not however able to determine when and how the injury had occurred. The medical report further stated that the psychiatric examination of the applicant had revealed that he was suffering from severe depression and post-traumatic stress syndrome.

38. In a letter dated 20 March 2003 public prosecutor N.A. requested an additional report from the Ege University Medicine Faculty's Forensic Medicine Department. She asked whether it would be possible to determine the approximate date on which the injury which had caused the lesion observed on the applicant's abdomen had occurred.

39. On 7 April 2003 the Ege University Medicine Faculty's Forensic Medicine Department informed the public prosecutor that it was impossible to determine the time when the injury had occurred.

40. In a letter dated 30 May 2003 the public prosecutor summoned the police officers who had been on duty when the applicant was being questioned in police custody.

41. On 10 June, 9 July, 5 August and 6 August 2003 the public prosecutor took statements from the police officers M.A., A.E., H.G. and the police superintendent M.Ç. in connection with the applicant's allegations of ill-treatment. The police officers denied the allegations and claimed that they had not inflicted any physical or psychological ill-treatment on the applicant, as the medical reports showed.

42. On 19 June 2003 a psychiatric expert delivered a report after meeting the applicant on four occasions, on 27 February, 12 March, 16 May and 18 June 2003. He concluded that the applicant was suffering from chronic post-traumatic disorder and severe depression, which had certainly been caused by the treatment he had suffered during his detention in police custody and his solitary confinement in a cell for four months.

43. On 6 August 2003 public prosecutor N.A. filed a bill of indictment with the Izmir Assize Court, charging three police officers from the Anti-Terrorist Branch of the Izmir Security Headquarters as well as the former director of the Anti-Terrorist Branch with inflicting torture with the aim of obtaining a confession (Article 243 § 1 of the former Criminal Code). She noted that the applicant had been subjected to various forms of ill-treatment in order to extract confessions during his detention in the custody of the anti-terrorist police. In particular, he had been kept blindfolded, deprived of sleep, threatened with death and rape, insulted, hit on the head, back and chest, his testicles had been squeezed and he had been sexually abused. Relying on the medical report dated 21 July 2003, given by the Izmir branch of the Turkish Medical Association, which concluded that the applicant had been subjected to torture during his detention in police custody, the public prosecutor alleged that there was sufficient evidence to indicate that the accused had committed the offence in question.

44. On 30 September 2003 the applicant asked the Izmir Assize Court for leave to intervene in the criminal proceedings against the accused police officers.

45. On 2 October 2003 the Izmir Assize Court heard oral evidence from the applicant. He gave a detailed description of his questioning and the ill-treatment he had suffered at the hands of the police officers while he was in custody.

46. On 6 October 2003 the Izmir Assize Court asked the public prosecutor to provide the court with all the medical evidence concerning the alleged ill-treatment inflicted on the applicant prior to the hearing on 31 October 2003. This request was transmitted to the Turkish Medical Association.

47. On 10 October 2003, at the request of the Izmir Assize Court, the Aydın Assize Court heard evidence from M.Ç., who had been serving as deputy to the Provincial Security Director in Aydın. The indictment was read out to him. He claimed that he was innocent of the alleged offence and that he wished to be excused from the hearings taking place in Izmir.

48. On 22 October 2003 the Izmir branch of the Turkish Medical Association provided the Assize Court with all the relevant medical reports (such as medical opinions and X-rays).

49. At the hearing of 31 October 2003 the Izmir Assize Court granted the applicant leave to intervene in the criminal proceedings against the accused police officers. The court also heard evidence from five police officers who were accused of being involved in the alleged unlawful questioning of the applicant and the ill-treatment inflicted upon him. All the accused denied the allegations and claimed that they were innocent of the alleged offence.

50. On 16 April 2004 the Izmir Assize Court requested a detailed report from the Forensic Medical Institute, attached to the Ministry of Justice, with

a view to establishing whether the lesions found on the applicant's body had been caused by torture or whether they could have been caused by other means.

51. In its report dated 16 July 2004 the Forensic Medical Institute, having examined all previous medical reports concerning the applicant, concluded that there was nothing to indicate that the applicant had been subjected to physical trauma. Additionally, subsequent to the examination of the applicant by doctors from the Institution and experts from the Ege University Medical Faculty, no link had been established between the alleged ill-treatment and the minor hearing loss. The two medical examinations carried out on 11 March 2003 at the Forensic Department of the Ege University Medical Faculty and on 10 May 2004 at the Forensic Medical Institute had not established the cause of the lesions on the left side of the applicant's abdomen. Finally, in view of the "severe depression" and "post-traumatic stress disorder" diagnosis by the Psychiatry Department of the Ege University Medical Faculty and considering that the 4th Assessment Council [of the Forensic Medical Institute] had requested that the applicant be hospitalised for observation, the Forensic Medicine Institute recommended that an opinion be sought from the aforementioned Council with a view to determining whether the applicant had been subjected to psychological trauma.

52. At the hearing of 11 October 2004 the Izmir Assize Court decided that it was no longer necessary to obtain an additional report from the 4th Assessment Council of the Forensic Medical Institute, in view of the parties' submissions that there was already sufficient evidence to elucidate the facts.

53. On 22 December 2004 the Izmir Assize Court acquitted the accused police officers, holding that there was no sufficient and convincing evidence indicating beyond reasonable doubt that the police officers had inflicted torture on the applicant. The court noted that the applicant's examination in Ege University Hospital had not revealed any sign of physical violence. Furthermore, it was not established that the findings of the doctors from the Ege University concerning the applicant's psychiatric health had occurred as a result of the alleged ill-treatment inflicted upon the applicant during his detention in police custody.

54. On 17 February 2005 the applicant appealed. He claimed that the medical reports prepared by the Forensic Department of the Ege University Medical Faculty and the Turkish Medical Institute had clearly proved that he had suffered torture at the hands of the police officers. Moreover, the first-instance court had ignored and had not mentioned the findings in the detailed report of the Turkish Medical Institute. The court had attached greater weight to the lack of physical evidence rather than pursuing the indications of psychological effects of torture. He had given a clear description of the police officers and the treatment he had suffered at their

hands. Although he had asked for a lawyer when he was questioned while he was in custody, the police officers had refused his request, and had written in the log book that he had not asked for legal assistance. He had not signed the log book but his signature had been forged.

55. On 11 December 2006 the Court of Cassation upheld the judgment of 22 December 2004. It noted that the assessment of evidence and the judgment given by the first-instance court had complied with the procedure and law.

C. The criminal proceedings brought against the applicant

56. On 12 July 2002 the anti-terrorist police superintendent drew up a report summarising the investigation into the alleged activities of the applicant and other members of the Bolşevik Parti-Kuzey Kürdistan/Turkiye (Bolshevik Party-North Kurdistan/Turkey). He noted that the aim of the said organisation was to undermine the constitutional order and replace it with a communist regime. As regards the alleged involvement of the applicant in the activities of the organisation, he stated that prior to the arrest of the applicant a search had been carried out in the flat of a certain M.K. and that a number of documents belonging to the applicant had been found. Examination of those documents had revealed that the applicant had been acting as a person in charge of a "party cell" and that he had been involved in high-profile activities for the organisation, such as recruitment of new members and propaganda in the form of publications.

57. On 6 September 2002, the public prosecutor at the Izmir State Security Court filed a bill of indictment against the applicant, charging him with membership of an illegal organisation, Bolşevik Parti-Kuzey Kürdistan/Türkiye, under Article 168 § 2 of the former Criminal Code. He alleged that the applicant had been acting as a person responsible for the "party cell" in Izmir and that he had also been in charge of communication between the "party cell" and the organisation. He further noted that a number of documents belonging to the applicant had been found during a search of a "cell house".

58. In a report dated 24 October 2002 the Izmir State Security Court summarised the evidence found in the investigation prior to the commencement of the trial (*tensip tutanağı*). The report contained statements by the applicant that he had not been involved in the organisation known as Bolşevik Parti-Kuzey Kürdistan/Turkiye, that the alleged code name "Hıdır" was in fact a nickname given to him by his family, and that he had been subjected to ill-treatment during his detention in police custody.

59. On 24 October 2002 the applicant lodged a request with the Izmir State Security Court for release pending trial. The court dismissed this request in view of the nature of the crime, the state of evidence and the risk of absconding.

60. On 21 January 2003 the Izmir State Security Court ordered the applicant's release pending trial but banned him from leaving Turkey.

61. In his written defence submissions dated 24 July 2003 the applicant submitted that he had not been involved in the organisation known as the Bolşevik Parti-Kuzey Kürdistan/Türkiye. He noted that he had denied the allegations since the beginning of the investigation and that the statements he had made during his detention in police custody had been obtained under torture, as proven by the report of the Turkish Medical Association (*İzmir Tabip Odası*). He further claimed that there was nothing illegal in his belongings found at his friend's flat.

62. On 24 July 2003 the Izmir State Security Court convicted the applicant of membership of an unarmed terrorist organisation under Article 7 § 1 of Law no. 3713 (Law on the Prevention of Terrorism). The applicant was sentenced to four years and two months' imprisonment. Relying on evidence given by several witnesses and a significant number of documents, computers and CDs found in a flat belonging to a member of the illegal organisation, the court found it established that the applicant was a founding member and one of the leaders of the said organisation and that, in particular, he had been in charge of propaganda and recruitment of new people to the organisation.

63. On 25 July 2003 the applicant appealed against the judgment of the first-instance court, alleging, *inter alia*, that his conviction had been based on statements taken under duress.

64. On 19 December 2003 the applicant lodged a request with the Chief Public Prosecutor's office at the Court of Cassation for the ban on his leaving the country to be lifted. He noted that he lived and worked in Germany and that, given the length of the proceedings, he had been severely affected by the impugned measure. On an unspecified date, this request was refused by the Izmir State Security Court.

65. On 3 March 2004 the applicant submitted his grounds of appeal to the Court of Cassation. He submitted that the State Security Court had found it established that he had been one of the founding members of the said organisation although he had been charged with mere membership of that organisation. Furthermore, in its judgment the first-instance court had not offered evidence that he had done anything which could be qualified as a terrorist offence and could lead to the conclusion that the Bolşevik Parti-Kuzey Kürdistan/Türkiye was a terrorist organisation. Moreover, in view of the criminal proceedings brought against the police officers who had inflicted torture on him and his co-accused, the statements given by him and his co-accused whilst in police custody should be removed from the investigation file. Finally, he claimed that there was no evidence capable of proving that he had been a member of an illegal organisation.

66. On 8 April 2004 the Court of Cassation quashed the judgment of 24 July 2003, holding that the first-instance court should have taken into

account the recent amendments made to Law no. 3713 when giving its judgment. It thus upheld the applicant's reasons for appeal.

67. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, State Security Courts were abolished. The case against the applicant was transferred to the Izmir Assize Court.

68. On 16 July 2004 the Izmir Assize Court dismissed the applicant's request for the lifting of the ban on his leaving the country. It noted that the proceedings were still pending and that the final judgment must be awaited.

69. In the meantime, the public prosecutor in charge of the investigation submitted his opinion on the merits of the case and requested the acquittal of the applicant and his co-accused on the ground that the organisation which they had founded did not correspond to the definition of a terrorist organisation under Article 7 § 1 of Law no. 3713.

70. On 12 October 2004 the Izmir Assize Court convicted the applicant once again under Article 7 § 1 of Law no. 3713. The applicant appealed.

71. In November 2005 the Chief Public Prosecutor at the Court of Cassation sent the case file back to the first-instance court and requested the latter to reconsider the case in the light of the amendments made to the Code of Criminal Procedure.

72. On 5 December 2005 the applicant submitted to the Izmir Assize Court that the criminal proceedings against him had already breached his rights protected by Articles 5 § 3 and 4, 6 § 1 and 13 of the Convention. He thus requested the court to lift the ban on his leaving the country and to expedite the proceedings.

73. On 16 March 2006 the Izmir Assize Court convicted the applicant and sentenced him to two years and six months' imprisonment under Article 7 § 1 of Law no. 3713. Having considered the structure, methods, purpose and activities of the said organisation, the court concluded that it could be qualified as a terrorist organisation, contrary to the submissions of the accused and the public prosecutor in charge of the investigation. It noted that even though the members of the organisation had not resorted to physical violence, they had used “psychological duress” (*manevi cebir*), such as issuing threats, in order to achieve their aims. The court considered that the aim of the organisation was to start an uprising with a view to replacing the democratic regime with a totalitarian Marxist and Leninist regime. Having regard to the arrest and seizure report and the report based on the identification parade concerning all the accused, the documentary evidence found in the possession of the applicant and other members of the organisation, as well as the medical reports, the court found it established that the applicant was a founding and active member of the illegal organisation. It also decided that the ban imposed on the applicant's leaving the country should remain in force until the judgment became final. However, the court did not respond to the applicant's request to remove the

statements given by him and his co-accused during their detention in police custody from the investigation file.

74. On 21 March 2006 the applicant appealed against the above judgment, alleging that he had been convicted on the basis of the evidence obtained illegally and that the organisation in question did not correspond to the definition of a terrorist organisation under Articles 1 and 7 of Law no. 3713.

75. On 5 October 2006 the Chief Public Prosecutor submitted his opinion and asked the Court of Cassation to quash the first-instance court judgment on the grounds that the legal status of the applicant and other accused should be reconsidered in view of the amendments made to Article 7 of Law no. 3713 on 29 June 2006.

76. On 25 December 2006 the Court of Cassation upheld the judgment of 16 March 2006. It considered that there was no change favourable to the applicant in respect of the elements of the offence defined under Article 7 of Law no. 3713. On the contrary, the sanction to be imposed was heavier than the previous version of the provision. Accordingly, the court disagreed with the Chief Public Prosecutor's opinion. It also dismissed the applicant's objections after having heard the parties' submissions at a hearing, having examined the evidence adduced by the parties and having taken into account the first-instance court's discretion and assessment of the evidence obtained in the course of the investigation.

77. On 7 February 2007 the applicant's representative lodged an objection to the above decision and requested rectification.

II. RELEVANT DOMESTIC LAW AND PRACTICE

78. Articles 1 and 7 § 1 of Law no. 3713 provide as follows:

Article 1

"(1) Terrorism is any kind of act committed by one or more persons belonging to an organisation with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, undermining fundamental rights and freedoms or damaging the internal and external security of the State, public order or general health by means of pressure, force, violence, terror, intimidation, oppression or threat.

(2) An organisation for the purposes of this Act is constituted by two or more persons coming together for a common purpose.

(3) The "organisation" also includes groups, associations, armed associations, gangs or armed gangs as described in the Turkish Criminal Code and provisions of relevant laws."

Article 7 § 1

"Those who set up a terrorist organisation or manage or become members of such an organisation to commit crime for the purposes stated under Article 1, using force and violence, and by way of exerting pressure, fear, intimidation or threats manage or become members of such an organisation, shall be punished in accordance with the provisions of Article 314 of the Turkish Criminal Code. Those who organise the activities of the organisation shall also be punished as managers of the organisation."

THE LAW

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

79. The applicant complained that he had been subjected to various forms of ill-treatment and that there were no effective remedies for his complaints. He relied on Articles 3 and 13 of the Convention, which provide, as relevant:

Article 3

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

Article 13

"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. Admissibility

80. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

81. The applicant alleged that the treatment he had been subjected to during his detention in police custody had amounted to torture and degrading treatment within the meaning of Article 3 of the Convention. He stated that the police officers had stripped him naked, had forced him to kneel down and had rubbed an object around his anus. They had also attempted to rape him. He had then been laid on his back and his testicles squeezed, causing intense pain and shame. Furthermore, he had been kept blindfolded in a very hot place and then exposed to strong light. He had also been denied food, threatened with death, insulted and kicked.

82. The applicant maintained that the prosecuting authorities had failed to conduct a through and effective investigation into his complaints of torture. They had relied on medical reports which did not reflect the truth. In this connection, the applicant pointed out that the medical reports which stated that there were no traces of blows or violence had not been prepared in accordance with the standards established by the Ministry of Justice. As an example, the applicant noted that his examination by a doctor at the Atatürk Eğitim Hospital had lasted only one minute and thirty three seconds, since the doctor had examined nine other defendants within thirteen minutes. In his opinion, the doctor who examined him immediately after his police custody had failed to record the traces of torture. This was despite the fact that the Izmir Medical Association had established that he had been tortured.

83. As regards the Government's contention that he had refused to be hospitalised for observation with a view to obtaining a report from the 4th Assessment Council of the Forensic Medical Institute, the applicant claimed that this was not true. He had merely asked for his travel expenses to be covered, and further stated before the Izmir Assize Court that it would be impossible to identify traces of torture after two and a half years. Moreover, the public prosecutor had stated that there was no need to keep him under surveillance in view of the available evidence. In any event, the court was not bound by the parties' request and could well have ordered him to undergo another examination.

(b) The Government

84. The Government submitted that the applicant had not been subjected to torture or any other forms of ill-treatment during his detention in police custody. The medical reports certified that the applicant had not been tortured. Furthermore, the applicant's allegations contradicted the findings

contained in the report of the Turkish Medical Association, which the applicant had relied on as proof of his allegations.

85. The Government contended also that the applicant had refused to be hospitalised for further examination and surveillance by the 4th Assessment Council of the Forensic Medical Institute, which could have enabled the trial court to determine whether the applicant had been ill-treated.

86. The Government asserted that the applicant's allegations had been properly investigated by the national authorities. The fact that the outcome of the criminal proceedings was not satisfactory for the applicant did not mean that he had been denied an effective remedy. Referring to the Court's judgment in the case of *Čonka v. Belgium* (no. 51564/99, § 75, ECHR 2002-I), the Government claimed that the effectiveness of a "remedy" within the meaning of Article 13 of the Convention did not depend on the certainty of a favourable outcome. Thus, they concluded that the authorities had complied with their procedural obligations under Articles 3 and 13 of the Convention by conducting a detailed and through investigation in the circumstances of the present case.

2. The Court's assessment

a) General principles

87. The Court reiterates that Article 3 of the Convention ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. It also enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human rights requires that these provisions be interpreted and applied so as to make its safeguards practical and effective (see *Avşar v. Turkey*, no. 25657/94, § 390, ECHR 2001-VII (extracts)).

88. The Court further reiterates that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the veracity of the victim's allegations, particularly if those allegations are backed up by medical reports. Failing this, a clear issue arises under Article 3 of the Convention (see *Çolak and Filizer v. Turkey*, nos. 32578/96 and 32579/96, § 30, 8 January 2004; *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; *Aksoy v. Turkey*, 18 December 1996, § 61, Reports of Judgments and Decisions 1996-VI; and *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336).

89. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case (see, among other authorities, *McKerr v. the United*

Kingdom (dec.), no. 28883/95, 4 April 2000). However, where allegations are made under Article 3 of the Convention, the Court must conduct a particularly thorough scrutiny (see *Ülkü Ekinci v. Turkey*, no. 27602/95, § 135, 16 July 2002) and will do so on the basis of all the material submitted by the parties.

90. In assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt" (see *Orhan v. Turkey*, no. 25656/94, § 264, 18 June 2002, and *Avşar*, cited above, § 282). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ülkü Ekinci,* cited above, § 142).

91. Furthermore, where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

92. Lastly, the Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports*).

(b) Application of the above principles to the circumstances of the present case

i) Alleged ill-treatment suffered by the applicant

93. In the instant case, relying on the reports of the Turkish Medical Association and a psychiatric expert (see paragraphs 35 and 42 above), the applicant alleged that he had been subjected to various forms of ill-treatment during his detention in police custody. In response, the Government referred to the medical certificates issued by the Atatürk Eğitim Hospital, the prison doctor, the Ege University Hospital and the Forensic Medical Institute (see paragraphs 10, 13, 19, 29 and 51 above) and

claimed that the allegations were unsubstantiated. Given that the medical certificates relied on by the parties fundamentally differ from each other in respect of their findings and conclusions, the Court must first examine the evidentiary value of these documents with a view to establishing a true picture of events giving rise to the present application.

94. However, before embarking upon this exercise, the Court considers it important to reiterate the principles setting standards for the medical examination of persons in the custody of security forces. In this context, the Court refers to its findings and considerations in its judgment in the case of *Salmanoğlu and Polattaş v. Turkey* (no. 15828/03, 17 March 2009):

> "79. The Court reiterates that the medical examination of persons in police custody, together with the right of access to a lawyer and the right to inform a third party of the detention, constitutes one of the most essential safeguards against ill-treatment (see *Türkan v. Turkey*, no. 33086/04, § 42, 18 September 2008; *Algür v. Turkey*, no. 32574/96, § 44, 22 October 2002). Moreover, evidence obtained during forensic examinations plays a crucial role during investigations conducted against detainees and in cases where the latter raise allegations of ill-treatment. Therefore, in the Court's view, the system of medical examination of persons in police custody is an integral part of the judicial system. Against this background, the Court's first task is to determine whether, in the circumstances of the present case, the national authorities ensured the effective functioning of the system of medical examination of persons in police custody.
>
> 80. The Court has already reaffirmed the European Committee for the Prevention of Torture's ("CPT") standards on the medical examination of persons in police custody and the guidelines set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Istanbul Protocol", (submitted to the United Nations High Commissioner for Human Rights, 9 August 1999). The Court has held that all health professionals owe a fundamental duty of care to the people they are asked to examine or treat. They should not compromise their professional independence by contractual or other considerations but should provide impartial evidence, including making clear in their reports any evidence of ill-treatment (see *Osman Karademir v. Turkey*, no. 30009/03, § 54, 22 July 2008). The Court has further referred to the CPT's standard that all medical examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, every detained person should be examined on his or her own and the results of that examination, as well as relevant statements by the detainee and the doctor's conclusions, should be formally recorded by the doctor (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X; *Mehmet Eren v. Turkey*, no. 32347/02, § 40, 14 October 2008). Moreover, an opinion by medical experts on a possible relationship between physical findings and ill-treatment was found to be a requirement by the Court (see *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, § 29, 20 July 2004).
>
> 81. The Court notes that, according to Article 10 of the Directive on Detention, Arrest and Taking of Statements dated 1 October 1998 ("the 1998 Directive"), in force at the material time, medical examination of persons in police custody was compulsory under Turkish law. The Court observes that these provisions of Article 10 were repeatedly criticised by the CPT between 1999 and 2003 (see the following Reports of the CPT: CPT/Inf (2000) 17 § 19; CPT/Inf (2001) 25 §§ 64-66; CPT/Inf

(2002) 8 § 42; CPT/Inf (2003) 8 § 41) as they undermined confidence in and the effectiveness of the system of forensic examinations.

82. In this connection, the Court welcomes the revised Directive which came into force on 1 June 2005 following the CPT's observations and recommendations. The new Directive provides that medical examinations must take place in the absence of law enforcement officials unless the doctor requests their presence in a particular case. It also repealed the requirement to send a copy of the medical report to the detention centre (see the Report to the Turkish Government on the visit to Turkey carried out by the CPT from 7 to 14 December 2005, CPT/Inf (2006) 30, § 25).

83. Nevertheless, the Court finds no reason to diverge from the view expressed by the CPT, since it also considers that Article 10 (5) and (6) of the 1998 Directive, when in force, were capable of diminishing the very essence of the safeguard that the medical examinations constituted against ill-treatment."

95. Turning to the circumstances of the present case, the Court must first determine whether the national authorities complied with the above-cited principles pertaining to the medical examination of detainees. In this respect, it notes that the applicant underwent a number of medical examinations prior and subsequent to his detention in police custody. As is clear from the medical report dated 9 July 2002, the applicant was in good health before being placed in police custody (see paragraph 8 above). Indeed, this is not in dispute between the parties.

96. This being so, it appears that the applicant underwent three decisive medical checks in respect of his allegations of ill-treatment; the first one was two days after being taken into police custody and the two others were following his release from custody. The medical reports issued by the Atatürk Eğitim Hospital doctor on 11 and 13 July 2002 and the prison doctor on 22 July 2002 (see paragraph 19 above) stated merely that there was no sign of physical violence on the applicant's person (see paragraphs 10 and 13 above). These reports did not contain any further statements or details.

97. The Court points out that pursuant to the Ministry of Health Circulars of 1995, at the relevant time doctors designated to perform forensic tasks were requested to use standard medical forms which contained separate sections for the detainee's statements, the doctor's findings and the doctor's conclusions (see, for a copy of the standard forensic medical form, CPT/Inf (99) 3, cited above). They were to forward copies of medical reports to the police and the public prosecutor in sealed envelopes (see the Report to the Turkish Government on the visit to Turkey carried out by the CPT from 5 to 17 October 1997, CPT/Inf (99) 2, § 39). Moreover, the Prime Minister's Circular of 3 December 1997 expressly stipulated that the format of forensic reports issued in respect of persons in police custody should be that of the standard forensic medical form (see *Salmanoğlu and Polattaş*, cited above, § 86). Furthermore, according to Ministry of Health circular no. 13243 of 20 September 2000, concerning

Forensic Services and Preparation of Forensic Reports, medical reports must record full details of the examination, including the complaints of the patient and psychological symptoms, and the completion of additional forms in cases of sexual assault.

98. When examined in the light of the above regulations it appears that the three medical reports in question did not conform to the domestic law then in force, and also fell short of the above-mentioned CPT standards and the principles enunciated in the Istanbul Protocol. The Court thus regrets the superficial examinations carried out by the doctors, as demonstrated by the examination of ten people in only thirteen minutes (see paragraph 13 above), the failure to use the standard medical forms and the lack of full details of the examination. It considers that, as these examinations had taken place while the applicant was being held in police custody and immediately after his release, they could have provided crucial evidence capable of dispelling any doubts about the alleged ill-treatment inflicted upon the applicant. It therefore finds that the national authorities failed to ensure the effective functioning of the system of medical examinations of persons in police custody. Therefore, these examinations could not produce reliable evidence. Accordingly, the Court attaches no weight to the findings of the medical reports dated 11, 13 and 22 July 2002.

99. The Court will next examine the reports of the Ege University Hospital, the Izmir branch of the Turkish Medical Association, the applicant's doctor in Germany, the psychiatry expert and the Forensic Medical Institute.

100. The Court notes that the Ege University Hospital issued two medical reports after examining the applicant on 5 and 6 November 2002 (see paragraphs 29 and 37 above). However, these reports did not yield any result, because the doctors were unable to determine when and how the lesion on the applicant's abdomen had been caused and found that there was no problem in respect of the applicant's ears and his hearing. Thus, these reports cannot be relied on as conclusive evidence either.

101. As regards the applicant's German doctor's statement that the applicant was not suffering from hypertension before he left Germany, the Court considers it unlikely that the said problem is the direct consequence of the alleged ill-treatment inflicted upon the applicant (see paragraph 35).

102. As to the medical reports prepared by the Turkish Medical Association and the psychiatric expert, the Court notes that these reports concluded that the applicant was suffering from chronic post-traumatic stress disorder and severe depression (paragraphs 35 and 42 above). The doctors who examined the applicant on a number of occasions were unable to find any physical evidence of ill-treatment on the applicant's body. However, having looked at the applicant's complaints in conjunction with his mental state, they opined that the applicant had suffered ill-treatment during his detention in police custody and his solitary confinement in a cell.

103. Finally, the Forensic Medical Institute, which examined all previously issued medical reports, also considered that there was nothing to indicate that the applicant had been subjected to physical trauma. However, it considered that an additional report needed to be obtained from the 4th Assessment Council in order to determine whether the applicant had been subjected to psychological trauma.

104. In the light of the above, the Court observes that the above-mentioned reports were issued a long time after the applicant's release from police custody and that some of them had not been drafted following a direct medical examination of the applicant. Although the reports of the Turkish Medical Association and the psychiatric expert established a direct causal link between the applicant's psychological health and the alleged ill-treatment, the Court is of the opinion that other factors, such as the arrest, detention and trial of the applicant, might also have caused stress, depression and anxiety leading to the applicant's psychological disorder. Accordingly, it cannot be said that the applicant's psychological state was a direct consequence of ill-treatment inflicted upon him. The Court holds therefore that these reports cannot be relied on as evidence to prove or disprove the alleged ill-treatment inflicted upon the applicant.

105. In view of the foregoing, the Court considers that the material in the case file does not enable it to conclude to the required standard of proof that the applicant was subjected to the alleged ill-treatment during his detention in police custody.

There has therefore been no violation of Article 3 of the Convention under its substantive limb.

ii) Alleged ineffectiveness of the investigation

106. The Court observes that the applicant consistently alleged before the authorities, from the very moment of his release from custody up until the last instance, that he had been subjected to ill-treatment at the hands of the police officers.

107. In response, the prosecuting authorities and the national courts conducted a comprehensive investigation into the applicant's allegations. They heard evidence from the applicant and from the police officers who allegedly ill-treated the applicant. They also sought opinions from medical institutions with a view to determining the veracity of the applicant's allegations. However, relying on the reports indicating the lack of any sign of physical violence on the applicant's body, the national courts concluded that there was not sufficient or convincing evidence capable of establishing beyond reasonable doubt that the applicant had been subjected to ill-treatment as alleged.

108. Be that as it may, the Court notes that it was unable to establish a complete picture of the events involving the alleged ill-treatment inflicted

upon the applicant. This was largely due to the national authorities' failure to ensure the effective functioning of the system of medical examinations of persons in police custody.

109. In this connection, the Court found that the medical reports issued during the applicant's detention in police custody and following his release from custody did not conform to the domestic law then in force and that they also fell short of the CPT standards and the principles enunciated in the Istanbul Protocol (see paragraph 98 above).

110. Conversely, the national courts never questioned the lawfulness of or compliance with the domestic law of the impugned reports, despite the Turkish Medical Association's conclusion that they were medically invalid as they did not comply with the standards established by the Ministry of Health (see paragraph 35). They rather attached weight to these reports' conclusion that there was no sign of physical violence when acquitting the accused police officers of the charges of ill-treatment (see paragraph 53 above).

111. In the light of the above, the Court observes that the proceedings in question have not produced any result, because of the defects in the system of medical examination of persons in police custody. It thus concludes that the applicant's allegations of ill-treatment were not the subject of an effective investigation by the domestic authorities as required by Article 3 of the Convention.

112. There has therefore been a violation of Article 3 of the Convention under its procedural limb.

113. In view of the above finding, the Court considers that no separate issue arises under Article 13 of the Convention (see *Timur v. Turkey*, no. 29100/03, §§ 35-40, 26 June 2007).

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

114. The applicant complained that he had been denied a fair hearing as a result of the domestic courts' admission of statements obtained from him under torture and in the absence of a lawyer during his detention in police custody. The applicant maintained also that he had not been informed promptly of the nature and cause of the accusations against him and that he had not been able to secure the attendance and examination of witnesses on his behalf in the proceedings brought against him.

He relied on Article 6 §§ 1 and 3 (a), (c) and (d) of the Convention, which, in so far as relevant, reads:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...

(a) to be informed promptly ... of the nature and cause of the accusation against him;...

(c) to defend himself in person or through legal assistance of his own choosing...;

(d) ...to obtain the attendance and examination of witnesses on his behalf..."

A. Admissibility

115. The Government asked the Court to dismiss this part of the application for failure to comply with the requirement of exhaustion of domestic remedies, on the ground that the applicant had failed to raise his complaints before the domestic courts. As an alternative, the Government claimed that the applicant had failed to comply with the six-month rule because he had not lodged his application within six months of the date of his release from police custody on 13 July 2002.

116. As to the Government's plea on non-exhaustion, the Court reiterates that it has already examined and rejected the Government's preliminary objections in similar cases (see, in particular, *Pakkan v. Turkey*, no. 13017/02, § 31, 31 October 2006; *Taşçıgil v. Turkey*, no. 16943/03, §§ 31-32, 3 March 2009; and *Tamamboğa and Gül v. Turkey*, no. 1636/02, § 41, 29 November 2007). The Court finds no particular circumstances in the instant case which would require it to depart from its findings concerning the above-mentioned applications.

117. As to the objection concerning the alleged failure to observe the six-month rule, the Court notes that when examining complaints regarding the rights of the defence, it must have regard to the proceedings as a whole in order to determine whether the absence of a lawyer during police custody had an impact on the outcome of the proceedings (see *Gäfgen v. Germany* [GC], no. 22978/05, § 164, ECHR 2010-...). Thus, the Court considers that the six-month period in the instant case started running, at the earliest, from the date of the Court of Cassation decision, 25 December 2006, and that the application had been introduced prior to that date, namely on 20 May 2003.

118. Consequently, the Court rejects the Government's preliminary objections.

119. The Court considers that this part of the application 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.

B. Merits

1. The parties' submissions

(a) The Government

120. The Government submitted that the applicant's statements before the Izmir Magistrates' Court on 13 July 2002 had been taken in the presence of his legal representative. He had also been represented by a lawyer throughout the proceedings before the first-instance courts and the Court of Cassation. He had thus had the benefit of legal assistance in the course of the criminal proceedings against him.

121. As regards the applicant's complaint regarding the admission of evidence obtained allegedly obtained under torture, the Government maintained that the domestic court had assessed all of the evidence together; this contained the applicant's statements at the police department, before the public prosecutor and the judge. Moreover, the applicant's allegations of torture had not been proven.

122. Finally, the Government contended that the domestic courts had discretion in determining whether it was necessary to hear a witness.

(b) The applicant

123. The applicant maintained his allegations. He contended that the admission by the domestic courts of unlawful evidence in the case file had breached his right to a fair hearing. Despite his repeated requests for the removal of his statements obtained under torture from the case file, no response had been given by the first-instance courts and the Court of Cassation. Thus his conviction had been based on his statements obtained under torture and in the absence of legal assistance during his detention in police custody.

2. The Court's assessment

124. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140).

125. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence - for example, evidence

obtained unlawfully in terms of domestic law - may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found (see, among others, *Jalloh v. Germany* [GC], no. 54810/00, § 95, 11 July 2006).

126. The Court has already held that the use of evidence obtained in violation of Article 3 in criminal proceedings could infringe the fairness of such proceedings even if the admission of such evidence was not decisive in securing the conviction (ibid., § 99, and *Söylemez v. Turkey*, no. 46661/99, § 23, 21 September 2006). It has further held that the absence of an Article 3 complaint does not preclude the Court from taking into consideration the applicant's allegations of ill-treatment for the purpose of determining compliance with the guarantees of Article 6 (see *Örs and Others v. Turkey*, no. 46213/99, § 60, 20 June 2006, and *Kolu*, no. 35811/97, § 54, 2 August 2005).

127. Moreover, the Court reiterates that the privilege against self-incrimination and the right to remain silent are generally recognised international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities, and thus to avoid miscarriages of justice and secure the aims of Article 6 (see *John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports*). This right presupposes that the prosecution in a criminal case will seek to prove their case against the accused without resort to evidence obtained by coercion or oppression in defiance of the will of the accused (see *Jalloh*, § 100, and *Kolu*, § 51, both cited above). Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (see *Salduz v. Turkey* [GC], no. 36391/02, § 54, 27 November 2008).

128. In the light of the above principles, the Court must determine whether the domestic courts' admission of statements allegedly obtained under torture and in the absence of a lawyer during the applicant's detention in police custody impaired his right to a fair hearing.

129. The Court notes that it was unable to establish whether the applicant had indeed been subjected to ill-treatment during the custody period (see paragraph 105 above). Nonetheless, the applicant was unequivocal in his defence submissions throughout the proceedings that he had given statements under torture during his detention in police custody. The Government denied the allegations of torture and, relying on a police report dated 12 July 2002, averred that the applicant had exercised his right to remain silent and had not made any statements while in police custody (see paragraph 12 above).

130. Although it does not appear that the alleged statements given under duress by the applicant and his co-accused were decisive in securing the applicant's conviction, the Court finds it striking that, despite the seriousness of the allegations, no response was given by the domestic courts to the applicant's repeated requests for removal of the statements he had made while he was in police custody (see paragraphs 61-63, 65-66, 70-76 above). Furthermore, in convicting the applicant the Izmir Assize Court relied on statements given during an identification parade by the applicant's co-accused which were prejudicial for the outcome of the criminal proceedings against the applicant (see paragraphs 11 and 73 above). Again, the domestic courts ignored the applicant's request to have them removed from the case file and the fact that the co-accused had also retracted their statements during the trial (ibid.).

131. Finally, the Court observes that it is not in dispute between the parties that the applicant was denied legal assistance during the custody period. The restriction imposed on the applicants' right of access to a lawyer was systemic and applied to anyone held in custody in connection with an offence falling under the jurisdiction of the state security courts (see *Salduz*, cited above, § 56).

132. The applicant had access to a lawyer after being remanded in custody and during the ensuing criminal proceedings; he had the opportunity to challenge the prosecution's arguments. Nevertheless, as noted above, in convicting the applicant the domestic courts admitted to the case file the statements which the applicant and his co-accused had subsequently retracted and which had allegedly been obtained during police custody in the absence of a lawyer. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could remedy the defects which had occurred during the applicant's custody (see *Salduz,* cited above, § 58; *Amutgan v. Turkey*, no. 5138/04, § 18, 3 February 2009, and *Dayanan v. Turkey*, no. 7377/03, § 33, ECHR 2009-...).

133. In view of the foregoing, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the admission of dubious evidence to the case file and the denial of legal assistance to the applicant while he was in police custody irretrievably affected his defence rights.

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

135. In view of the above, the Court considers that it has examined the main legal questions raised under this provision. It concludes therefore that there is no need to give a separate ruling on the applicant's remaining complaints under Article 6 § 3 (a) and (d) of the Convention (see *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007; *Juhnke v. Turkey*,

no. 52515/99, § 94, 13 May 2008; and *Getiren v. Turkey*, no. 10301/03, § 132, 22 July 2008; and the cases referred to therein).

III. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

136. The applicant complained under Article 5 § 2 of the Convention that he had not been informed promptly of the reasons for his arrest.

137. The Government contested that argument.

138. The Court observes that the applicant's police custody ended on 13 July 2002 but he did not lodge his application with the Court until 20 May 2003. 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 (see, among many other authorities, *Duman v. Turkey* (dec.), no. 803/04, 11 December 2007).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

139. 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

140. The applicant claimed 6,487.82 Turkish liras (TRY) in respect of pecuniary damage and 50,000 euros (EUR) for non-pecuniary damage.

141. The Government contested these amounts.

142. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

143. As regards non-pecuniary damage, ruling on an equitable basis, the Court awards the applicant EUR 19,000.

144. Moreover, the Court further considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the requirements of Article 6 of the Convention, should the applicant so request (see *Salduz*, cited above, § 72).

B. Costs and expenses

145. The applicant also claimed TRY 1,500 (approximately EUR 750) for costs and expenses incurred before the domestic courts, and EUR 2,000

(TRY 2,000 for legal representation before the Court and EUR 1,011 for translation and other costs) for those incurred before the Court.

146. The Government submitted that the claims were unsubstantiated.

147. 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 are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

148. 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 concerning the alleged infliction of torture on the applicant and the authorities' failure to carry out an effective investigation into this complaints as well as the breach of the applicant's right to a fair hearing and exercise of defence rights admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 3 of the Convention under its substantive limb;

3. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;

4. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the admission to the case file of the applicant's statements allegedly obtained under torture and the denial of legal assistance to the applicant while he was in police custody;

5. *Holds* that there is no need to examine separately the applicants' other complaints under Articles 6 § 3 (a) and (d) of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with

Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) a total sum of EUR 19,000 (nineteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, for costs and expenses;

(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;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President