CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41993/98
by İsmail ÇELİK and Hanım ÇELİK
against Turkey

The European Court of Human Rights (Fourth Section), sitting on 6 May 2003 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs E. PALM,
Mr R. TÜRMEN,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 27 April 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr İsmail Çelik and Mrs Hanım Çelik are husband and wife. They are Turkish nationals, who were both born in 1944 and live in

Yuvalı village located in the administrative jurisdiction of the district of Doğanşehir within the province of the city of Malatya. They are represented by Messrs İrfan Gündüz and Önder Şahiner, lawyers practising in Malatya.

A. The circumstances of the case

The facts, as well as documents submitted by the parties, have been set out separately.

The applicants

On the evening of 5 November 1996 10 PKK members came to the applicants' house. The reason for their visit was that one of the members of the PKK wanted to visit his mother who was living nearby.

On 5 November 1996 security forces under the command of gendarme non-commissioned officer İbrahim Erol were informed that a group of PKK members were hiding in the applicants' village. The security forces then carried out an operation in the applicants' village to apprehend the PKK members.

At around 11 p.m. the security forces surrounded the applicants' house and requested them to come out. The applicants and their sons Bülent, born in 1974, and Turabi, born in 1977, emerged from their house. They showed the security forces the direction in which the PKK members had fled. The security forces then fired a rocket which killed Bülent.

Following the death of his son, the applicant İsmail Çelik was arrested and detained. He told the Doğanşehir public prosecutor that his son had been killed by the security forces under the command of gendarme staff-sergeant İbrahim Erol. The applicant asked the prosecutor to prosecute those responsible for his son's death.

A preliminary investigation into the incident was commenced by the Doğanşehir public prosecutor. The prosecutor subsequently decided that he had no jurisdiction to prosecute the gendarme non-commissioned officer and transferred the case file to the Doğanşehir District Administrative Council for authorisation for prosecution to be granted.

On 31 July 1997 the Doğanşehir District Administrative Council declined the authorisation sought by the prosecutor. It found that the applicants' son had died in the course of a confrontation between PKK members and the security forces.

The applicants filed an objection with the Malatya Regional Administrative Court against the decision of 31 July 1997.

On 29 September 1997 the Regional Administrative Court dismissed the applicants' objection and upheld the Doğanşehir District Administrative Council's decision to discontinue the criminal proceedings.

The Government

On 5 November 1996 security forces, acting on intelligence received, carried out an operation around the applicants' house where approximately 10 PKK members were hiding. Amongst them was a notorious PKK member, Barış Güner. Barış Güner, who is also the first applicant's nephew, was later convicted by the Malatya State Security Court of membership of an outlawed organisation. It was believed that the PKK members had come to the house to obtain food and other equipment.

According to the testimonies given by eye-witnesses, including the first applicant, the security forces urged the PKK members to come out of the house upon which the PKK members opened fire through the windows towards the security forces. The security forces then replied by opening fire towards the house.

At this stage the security forces asked the family to come out of the house. As the first applicant and his wife, i.e. the second applicant, and their son Bülent were emerging from the house, the PKK members began to escape through a window at the southern side of the house. After the family's safety had been secured the security forces fired a rocket towards the direction from where the PKK members were firing. At the end of the confrontation the security forces realised that the rocket had exploded near the applicants' son Bülent and had killed him instantly.

The examination carried out on the body by a doctor established that the death had been caused by a large number of shrapnel wounds.

The first applicant made an official complaint to the Doğanşehir public prosecutor.

On 8 November 1996 the prosecutor heard a number of eye-witnesses, including the first applicant, Hüseyin Çelik, Sinan Kazım Çelik, Hanım Güner and Bozo Güner.

The prosecutor then took a decision of non-jurisdiction and sent the file to the District Administrative Council for authorisation for prosecution to be granted.

The Administrative Council appointed captain Şerafettin Taner as an investigator to investigate the applicants' allegations. Captain Taner heard members of the security forces who had taken part in the operation and also heard the first applicant and Turabi Çelik, the applicants' younger son.

On 1 April 1997 the applicant stated that he did not think that the security forces who had fired the rocket had deliberately aimed at his son. He was of the opinion that his son had been caught in the crossfire between the soldiers and the PKK members.

On 31 July 1997 the Administrative Council declined the authorisation sought by the prosecutor on the ground that the applicants' son had been killed during a confrontation and there was no evidence of negligence or intention on the part of the security forces.

The appeal lodged by the applicant was dismissed by the Regional Administrative Court for lack of sufficient evidence.

Documents submitted by the parties

The following information appears from the official documents submitted by the parties.

a) Documents pertaining to the operation conducted on 5 November 1996

According to a report drawn up on 5 November 1996 by staff sergeant İbrahim Erol, who is also the commander of the Doğanşehir District Gendarme Station, a person telephoned the gendarme station at 8 p.m. and said that a group of PKK members had arrived at İsmail Çelik's house in Yuvalı village. The person did not give his name.

According to four reports prepared by staff sergeant İbrahim Erol after the incident, four commando units, one "C" unit and six internal security units had taken security precautions around the village and two special police teams had surrounded the applicants' house. The PKK members in the house became aware of their presence and opened fire. The security forces then urged the PKK members to surrender but the PKK members continued to fire. Members of the two special police teams then opened fire towards the house and they also fired an RPG-7 rocket. The PKK members then started escaping through the window facing the forest and escape. The police officers intensified the firing in order to prevent the PKK members from escaping. The firing stopped at 12.30 a.m. and a search was conducted in the house. Outside the front door there were approximately 15-20 pairs of shoes. Amounts of ammunition and large quantities of food, clothes and other equipment were found during the search. There was a bullet hole in the window of the bedroom which had been caused by a bullet fired from inside the room. On the outside the house and around the main door there were bullet holes caused by the bullets fired by the security forces. The window of the room used for storing food had been broken and there were footprints on the outside of this window. Bülent Çelik's body was found at an approximate distance of 20 meters away from the house. As the area around the house was very muddy and it was dark the search had to be terminated at 2.30 a.m. After dawn on 6 November 1996 the security forces resumed their search of the area. 12 spent *Kalashnikov* bullet cases were found between the southern side of the house and the road. An examination of the footprints showed that the PKK members had escaped in three groups in three different directions. Sketches showing the applicants' house and the position of the body were drawn up by members of the security forces.

The ammunition found in the house was sent to the Doğanşehir public prosecutor's office together with a letter drawn up by Captain Şerafettin Taner. Captain Taner stated in his letter that during the operation the

security forces had fired 1821 bullets, three RPG-7 rockets, nine hand grenades and five flares.

According to the sketches drawn up by the soldiers, the PKK members had escaped from a window situated on the south-facing side of the house. The main door of the house is situated on the east facing side of the house and the body of the applicants' son was found at a location to the north east of the house and at an approximate distance of 20 meters from the main door of the house.

At 8 a.m. on 6 November 1996 the Doğanşehir public prosecutor arrived at the scene together with a doctor. The applicants' younger son Turabi Çelik officially identified the body. Turabi Çelik also stated that 10 PKK members had come to their house at around 8 p.m. the previous evening. He had recognised one of the PKK members as Barış Güner. Turabi Çelik had been unable to hear what the PKK members were talking about since they were speaking in Kurdish and Turabi did not understand Kurdish. He wanted to leave the house and call the authorities but one of the PKK members stopped him. When the PKK members became aware of the security forces surrounding the house his father had told him and his mother and younger brother Bülent to leave the house. As they got out of the door they had been told by the security forces to put their hands up and walk towards the security forces. His father walked first towards the security forces and was followed by him, his mother and Bülent. At that moment he heard the gun shots coming from the house. His brother was shot and fell to the ground. The security forces returned fire but the PKK members managed to escape. His brother was shot in the fire opened by the PKK members but he was not sure whether he was shot further when the security forces opened fire. Then a bomb fell and exploded next to his brother.

Following the taking of the statement from Turabi Çelik, the doctor proceeded to examine the body at the site. Minutes of this examination were typed by a clerk. Five shrapnel entry holes on the front of the upper abdomen were recorded in the report. The back of the trunk was completely destroyed when the shrapnel pieces had exited the body. All internal organs had also been shattered. There were no shrapnel pieces left in the body. There were no bullet wounds. Death had been caused by shrapnel. Rigor mortis had set in. The doctor decided not to carry out a full autopsy as the cause of death was clear.

The first applicant, his brother and his brother's son were arrested and detained in connection with the offence of harbouring members of a terrorist organisation.

b) Investigation carried out by the Doğansehir public prosecutor

On 8 November 1996 the Doğanşehir public prosecutor questioned the first applicant and the two other detainees. The first applicant stated that when the PKK members had realised that they were being surrounded by

the security forces they had left the house through the window at the back of the house. When he was leaving the house through the door together with his children and his wife they were told by the security forces to put their hands up. At that moment a rocket fired by the security forces landed next to his son Bülent and killed him. The applicant also stated that he had told the staff sergeant İbrahim Erol not to shoot but that Mr Erol had not listened to him. The first applicant asked the public prosecutor to prosecute members of the security forces responsible for his son's death.

On 15 November 1996 the Doğanşehir public prosecutor took a decision of non-jurisdiction and sent the file to the office of the Doğanşehir District Administrative Council. This action was taken pursuant to the Law on the Prosecution of Civil Servants *(Memurin Muhakematı Kanunu)* according to which authorisation must be sought by prosecutors to investigate the actions of the members of the security forces. In this decision İbrahim Erol and the soldier who had fired the rocket were referred to as the defendants and the offence was classified as causing death by carelessness and heedlessness.

c) Investigation conducted by the Doğanşehir District Administrative Council

On 25 November 1996 the Doğanşehir District Administrative Council appointed Captain Şerafettin Taner, the commander of the Doğanşehir District Central Gendarme Command, to investigate the first applicant's allegation that the soldiers under İbrahim Erol's command had fired a rocket and killed his son. Captain Şerafettin Taner is the commander of the Doğanşehir District Central Gendarme Command and is also staff sergeant Erol' superior.

On 12 March 1997 Captain Taner sent a letter to the Malatya Police Headquarters and asked for the names of their personnel who had participated in the operation.

On 27 March 1997 Captain Taner questioned four members of the police special teams who had participated in the operation. Ergün Kaya, the police officer who had fired the rocket, stated that the rocket had been launched towards the forest, i.e. the direction into which the PKK members had been running. The three other police officers also gave similar testimonies. They all stated that the rocket had been aimed towards the forest.

On 1 April 1997 Captain Taner questioned İbrahim Erol, the staff sergeant who had been in charge of the operation. Mr Erol stated that when they had surrounded the applicant's house he asked the people inside the house to come out. When the family came out of the door he asked them to lie down on the ground. He then asked the first applicant to approach him. The first applicant told him that there were ten PKK members in the house who had run to the back of the house. Mr Erol then instructed the security forces to open fire towards the forest. When the PKK members returned fire from a direction at the back of the house Mr Erol concluded that the PKK members had gathered at the back of the house and that they were unable to

escape because of the fire opened by the security forces. Mr Erol then instructed a member of the special police teams to fire a rocket in that direction. He stated that the rocket had not been aimed directly at any civilian person. It could well have been that the applicant's son Bülent was also running away together with the PKK members at the time when he was hit by the rocket and in order to obtain help he might have crawled towards the place where his body was later found. Mr Erol concluded that the allegations were baseless and were aimed at damaging the credibility of the security forces.

Also on 1 April 1997 Captain Taner took a statement from the first applicant. The first applicant stated that he did not think that the security forces had deliberately aimed the rocket at his son. He was of the opinion that his son had been killed during the crossfire between the PKK members and the security forces. The first applicant further stated that the soldiers had waited for them to get out of the house before they had opened fire. Had the soldiers wanted to kill his son and his family they could have done so easily.

The same day the applicants' younger son Turabi Çelik also made a statement and stated that the soldiers had begun firing after he, his family and his younger brother Bülent were lying on the ground.

Captain Taner drew up his investigation report and forwarded it to the Doğanşehir governor's office on 16 July 1997. Statements taken from the eye-witnesses and the suspects were reproduced in the nine-page report. Captain Taner stated in his report that the accusation that the staff-sergeant İbrahim Erol had ordered the rocket to be aimed at the applicants' son was baseless. Mr Erol had done his best to protect the civilians in the house. The fact that there were bullet wounds on the back of the body further indicated that the applicants' son could not have been shot by the security forces. It was more likely that Bülent had been shot by the PKK members. Captain Taner concluded that the first applicant's accusations were aimed at damaging the credibility of the security forces. He recommended to the Doğanşehir District Administrative Council to decline the authorisation sought by the prosecutor.

On 31 July 1997 the Doğanşehir District Administrative Council decided to decline authorisation for the prosecution of İbrahim Erol and other members of the security forces. It found that the applicants' son had died in the course of a confrontation between PKK members and the security forces.

On 29 August 1997 the applicants filed an objection with the Regional Administrative Court in the province of Malatya against the decision of 31 July 1997. They claimed that their deceased son was not a PKK member and that he had not been involved in a confrontation with the security forces. They further alleged that there had been no confrontation between the security forces and PKK members at the relevant time. They maintained

that the security forces had launched a rocket in the direction where their son was despite the fact that they had indicated to the security forces the direction in which the PKK members were fleeing. The rocket caused the death of their son. They asked the court to set aside the Doğanşehir District Administrative Council's decision declining authorisation for the prosecution of İbrahim Erol and the soldiers under his command.

On 29 September 1997 the Regional Administrative Court in Malatya unanimously dismissed the applicants' objection and upheld the Doğanşehir District Administrative Council's decision to discontinue the criminal proceedings. The court held that there was insufficient evidence to commit members of the security forces for trial.

This decision was communicated to the applicant on 9 December 1997 by Ümit Yeşil, a police officer.

d) The criminal proceedings brought against the applicant

On 6 November 1996 staff sergeant İbrahim Erol questioned the first applicant, as well as Bozo Güner, Hanım Güner and Sinan Kazım Çelik in relation to harbouring PKK members.

İsmail Çelik, the first applicant, stated in his testimony that Sinan Kazım Çelik, his brother Hüseyin's son, had come to his house on the evening of 4 November 1996 and told him to go to Hüseyin's house located in the same village to speak to Barış Güner. Barış Güner had arrived in Hüseyin's house together with 10 PKK members. The applicant went to Hüseyin's house and tried to persuade Barış Güner to give himself up. The applicant had to stop trying to persuade Barış when one of Barış's friends approached them. Barış had then asked the applicant to contact his mother, who was living in Doğanşehir, and tell her to come to the applicant's house the next evening so that Barış could see her. The applicant had then left the house. The applicant stated that he had been so scared that he could not contemplate informing the authorities about the PKK members in his brother's house. The applicant further stated that the next day, i.e. on 5 November 1996, he had informed Hanım Güner, mother of Barış Güner, and had brought her to his house. At around 8.30 the same evening Barış Güner and his friends had arrived. After a couple of hours, one of Barış's friends, who was standing guard outside the house, had rushed into the house and said something in Kurdish. All the men had then taken their weapons. The applicant had told his children and wife to go out of the house. As they had emerged from the front door he had heard the security forces urging those inside the house to surrender. When the PKK members opened fire the security forces returned fire and the applicant and his children and wife lay on the ground. When they stood up after the shooting had ended he realised that his son Bülent had been shot. He had not been able to see how and by whom he had been shot. The applicant rejected the allegations put to him that he had supplied the PKK members with food. He

stated that the food found in his house had been purchased by him that day and was intended for the use of his family.

Barış Güner's parents, i.e. Bozo Güner and Hanım Güner, also gave similar statements to the staff sergeant İbrahim Erol.

The applicant, his brother and his brother's son were remanded in prison.

On 26 November 1996 the public prosecutor at the Malatya State Security Court filed an indictment with the court, accusing the applicant, his brother and his brother's son of aiding and abetting the PKK.

On 27 December 1996 the defendants were released on bail pending the outcome of the criminal proceedings against them.

On 24 January 1997 a hearing took place before the Malatya State Security Court. The prosecutor asked the court to acquit the defendants on the ground that they had aided the PKK members under duress. The court acquitted the defendants.

B. Relevant domestic law and practice

1. Criminal law and procedure

The Turkish Criminal Code makes it a criminal offence to commit unintentional homicide (Articles 452 and 459), intentional homicide (Article 448) and murder (Article 450).

The authorities' obligation to conduct a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). Pursuant to Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

Any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must issue a decision of non-jurisdiction and, depending on the suspect's status, transfer the file to either the District or the Provincial Administrative Council (*İlçe* or *İl İdare Kurulu*). These councils are made up of civil servants and are chaired by the District or

Provincial Governor. They conduct the preliminary investigation and decide whether or not a prosecution should be instituted. These councils have been criticised for their lack of legal knowledge, as well as for being easily influenced by the District or Provincial Governors, who also head the security forces.

An appeal against a decision by a District Administrative Council lies with the Regional Administrative Court. If a decision not to prosecute is taken, the case is automatically referred to that court. An appeal against a decision taken by a Provincial Administrative Council lies with the Council of State (*Danıştay*). If a decision not to prosecute is taken, the case is automatically referred to the Council of State.

If a decision to prosecute has been taken, the case is referred to the public prosecutor for further action.

2. Constitutional provisions on administrative liability

Article 125 of the Turkish Constitution provides as follows:

> "All acts and decisions of the Administration are subject to judicial review ... The administration shall be liable for damage caused by its own acts and measures."

This provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the administration, whose liability is of an absolute, objective nature, based on the theory of "social risk". Thus, the administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

Under section 13 of Law No. 2577 on administrative proceedings, anyone who has sustained damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring proceedings before the administrative courts, whose proceedings are in writing.

3. Civil law provisions

Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Code of Civil Obligations (*Borçlar Kanunu*), an injured person may file a claim for compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 of the Code of Civil Obligations and non-pecuniary or moral damages awarded

under Article 47 of this Code. The civil courts are not bound by the findings of a criminal court as to a defendant's liability (Article 53).

However, under section 13 of Law No. 657 on State employees, anyone who has sustained loss as a result of the exercise of official duties by a civil servant may, in principle, only bring an action against the public authority in whose service the civil servant concerned works and not directly against the civil servant (Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Civil Obligations). If, however, the act is found to be illegal or tortious and, consequently, is no longer considered as an "administrative" act or deed, the civil courts may allow a claim for damages against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Civil Obligations).

COMPLAINTS

The applicants complain under Article 2 of the Convention that their son was deliberately killed by members of the security forces.

The applicants also submit under Article 6 of the Convention that they had no right of access to a court as the prosecution of the members of the security forces who had killed their son had been barred by the decision of the Malatya Regional Administrative Court.

THE LAW

The applicants complain of violations of Articles 2 and 6 of the Convention in connection with the killing of their son and the lack of prosecution of the perpetrators of the killing.

The Court considers that the applicants' complaint under Article 6 of the Convention is inextricably bound up with their more general complaint concerning the manner in which the investigating authorities treated the death of their son and the repercussions which this had on access to effective remedies which would help redress the grievances which they harboured as a result of the killing. It is accordingly appropriate to examine the applicants' Article 6 complaint in relation to the more general obligation on Contracting States under Article 13 of the Convention to provide an effective remedy in respect of violations of the Convention (*Kaya v. Turkey* judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, § 105).

Article 2 of the Convention provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The Government's objections to the admissibility

1. Observance of the six month rule

The Government argue that the application is inadmissible as the applicants failed to comply with the six-month rule laid down in Article 35 § 1 of the Convention because they did not introduce their application within six months of the Malatya Regional Administrative Court's decision of 29 September 1997. The final date for the introduction of the application should therefore have been 29 March 1998. In the opinion of the Government the application was introduced on 5 May 1998, that being the date featuring on the application form, even though the Court's letter in which the Government were given notice of the application stated that the case had been lodged on 27 April 1998.

The applicants contest the Government's submission and submit that the decision of the Malatya Regional Administrative Court was communicated to them on 9 December 1997 and that they introduced their application on 27 April 1998.

The Court observes that the Malatya Regional Administrative Court's decision of 29 September 1997 was communicated to İrfan Gündüz, one of the lawyers for the applicants, on 9 December 1997. As proof of this communication the applicants appended to their application form a document signed both by Mr İrfan Gündüz and by the police officer Ümit Yeşil. In these circumstances the Court accepts that the six-month period started to run on 9 December 1997.

As to the Government's submission regarding the date of introduction of the application, the Court recalls that the running of the six-month period is interrupted by the first letter from an applicant summarily setting out the object of the application, unless the letter is followed by a long delay before the application is completed (see *Buscarini and Others v. San Marino* [GC], no. 2464594, § 23, ECHR 1999-I). The Court observes that the first letter setting out the substance of the applicants' complaints was dated 27 April 1998 and was sent to the Commission by fax that same day. The Secretariat of the Commission was informed in that letter that the formal application would be submitted shortly. The application form was subsequently submitted on 5 May 1998, i.e. just eight days after the first letter. The Court therefore finds that the application was introduced on 27 April 1998, and thus in time.

For these reasons, the Court dismisses the Government's objection.

2. Exhaustion of domestic remedies

The Government submit that the applicants did not exhaust the ordinary administrative and civil remedies that were available under Turkish law and were effective. The Government further submit that in cases where the administration has exceeded its powers, it is possible to take civil proceedings in order to seek compensation. In support of their submissions the Government refer to the *Aytekin v. Turkey* judgment of 23 September 1998 (*Reports* 1998-VII, p. 2807, §§ 84-85), in which the Court upheld the Government's preliminary objection where an appeal was pending concerning the conviction of a gendarme for killing the applicant's husband.

The applicants, once again, contest the Government's submissions. They maintain that any possible action brought before the administrative courts would have failed as the decision of the Malatya Regional Administrative Court had conclusively dismissed the argument that State agents had been responsible for the death of their son.

The Court considers that the issue concerning exhaustion of domestic remedies requires a determination of the effectiveness of the investigation. As such, it is inextricably linked to the substance of the applicant's complaints under Article 2 and 13 of the Convention concerning the adequacy of the investigation. It follows that this issue should be joined to the merits of the case.

B. Merits

The Government maintain that the security forces who conducted the operation returned fire after they came under intense fire from the PKK members. The rocket fired by the security forces had not been aimed at any person but had been fired in the direction from which the security forces came under fire.

The Government further submit that the force used by the security forces had been absolutely necessary in the circumstances of the present case. In support of their submissions the Government refer to the Commission's decision in the case of *Kelly v. the United Kingdom* (no. 17579/90, Commission decision of 13.1.1993, Decisions and Reports (DR) 74, p. 139) in which the Commission upheld the domestic authorities' finding that the force used had been reasonable in the circumstances of the case. The Commission had proceeded to declare the application inadmissible as being manifestly ill-founded. The Government further argue that the present case is different from the case of *McCann and Others v. the United Kingdom* in that in the *McCann* case, as opposed to the present case, the security forces had ample time and opportunity to plan the operation. (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324).

The Government finally submit that the investigation conducted by the authorities, during which witnesses were heard and documents were examined, had been a diligent one.

The applicants maintain their allegations and submit that no confrontation as such had occurred between the security forces and the PKK members. Therefore the security forces were not in any danger from the PKK members who were escaping from the house. The applicants finally point out that their son was shot at a location opposite to the direction into which the PKK members were running.

The Court considers, in the light of the parties' submissions that this complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

Joins to the merits the question concerning the effectiveness of the criminal investigation at issue ;

Declares the application admissible, without prejudging the merits of the case.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President