CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39465/98
by Adem PARSIL
against Turkey

The European Court of Human Rights (Third Section), sitting on 2 September 2004 as a Chamber composed of:

Mr G. RESS, *President*,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mrs A. GYULUMYAN, *judges*,
and Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 28 August 1997,

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 Court's partial decision of 18 January 2001,

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

Having deliberated, decides as follows:

THE FACTS

The applicant is a Turkish national, born in 1963 and living in Kahramanmaraş (Turkey). He is represented before the Court by Mr M.A. Erol, a lawyer practising in İstanbul.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant, who was a civil servant at the time of the events giving rise to the application, was appointed to Ölüdeniz Natural Park in 1990 as a warden in charge of sale of entry tickets.

On 29 July 1991 he was detained for selling tickets which had been fraudulently issued and crediting money to his account. In his police statement dated 29 July 1991 and in his statement to the public prosecutor on 30 July 1991, the applicant confessed that he had been involved in selling forged tickets together with two other persons.

On 30 July 1991 he was brought before the Fethiye Magistrates' Court for Criminal Matters and was placed in detention on remand.

On 20 August 1991 the public prosecutor filed an indictment with the Fethiye Assize Court charging the applicant with embezzlement under Article 202 of the Criminal Code. The hearing before the assize court started on 18 September 1991. Subsequently, the public prosecutor maintained that as the applicant's acts might constitute a breach of Article 342 of the Criminal Code regulating the offence of forgery, permission to prosecute was required from the local authority pursuant to the Act on the Procedure for the Prosecution of Civil Servants. Accordingly, on 30 December 1991 the court transferred the case file to the Fethiye District Council for investigation and ordered the suspension of the proceedings pending the decision of the administrative council. The same day the court further ordered the applicant's release from detention.

On 16 December 1992 the Fethiye District Governor, taking into account the applicant's confessions to the police and to the public prosecutor, decided that the applicant could be tried before the Fethiye Assize Court on account of the nature of charges against him.

On 18 March 1993 the Executive Committee of the Muğla Provincial Assembly upheld this decision and the case file was remitted to the Fethiye Assize Court on 22 May 1993.

On 22 December 1993 the court found the applicant guilty of forgery under Article 342 of the Criminal Code and sentenced him to one year, 11 months and 10 days' imprisonment.

On 6 December 1994 the Court of Cassation quashed the decision of the first instance court on technical grounds.

On 8 March 1995 the Fethiye Assize Court amended the procedural errors in its former judgment and handed down the same sentence against the applicant.

The applicant appealed. On 11 December 1995 the Court of Cassation, referring to the opinion of the Chief Public Prosecutor dated 20 November 1995, which had not been communicated to the applicant, ruled that the first instance court had failed to apply the legal provisions relevant to the crime in question. Consequently, it quashed the judgment of the Fethiye Assize Court and stated that the applicant's acts, which amounted to embezzlement under Turkish law, should have been examined under Article 202 of the Criminal Code.

Accordingly, the case was again remitted to the Fethiye Assize Court. In his defence submissions the applicant denied that his acts constituted a breach of Article 202 of the Criminal Code and requested the court to abide by its judgment of 8 March 1995.

On 13 March 1996 the Fethiye Assize Court found the applicant guilty of embezzlement under Article 202 of the Criminal Code. It sentenced the applicant to seven years, nine months and 10 days' imprisonment and fined him 33,333,333 Turkish liras. The applicant was also debarred from working in the civil service.

On 6 March 1997 the Court of Cassation upheld the judgment of the Fethiye Assize Court.

B. Relevant domestic law and practice

When a judgment of a first instance court is appealed the case file is first sent to the Office of the Chief Public Prosecutor at the Court of Cassation. The Chief Public Prosecutor, who is independent of the executive and of the parties, submits an opinion (*tebliğname*) on the case to the competent chamber of the Court of Cassation.

The submission of the opinion by the Chief Public Prosecutor is regulated by Article 28 § 2 of the Code of the Court of Cassation no. 2797. According to the Government, the opinion is prepared by the assistants of the Chief Public Prosecutor and is included in a short document which indicates that the file has been seen by the first instance court and advises whether the latter's judgment should be quashed or upheld. The opinion of the Chief Public Prosecutor is not binding on the chamber of the Court of Cassation which will consider the appeal.

COMPLAINTS

The applicant complains that the submission of the Chief Public Prosecutor to the Court of Cassation, which entered into account in the decision of 11 December 1995, was never served on him, depriving him of the opportunity to put forward his counter-arguments. In this respect, he alleges a breach of his defence rights, *inter alia*, the principle of equality of arms. The applicant invokes Article 6 of the Convention.

THE LAW

The applicant alleges a violation of Article 6 of the Convention which provides, insofar as relevant, as follows:

> "In the determination of ...any criminal charge against him, everyone is entitled to a fair ...hearing..."

The Government submit that following the referral of the case to the Court of Cassation, it would have been open to any party to the proceedings to obtain from the court's registry any information regarding the state of proceedings. When the applicant became aware of the advisory opinion of the Chief Public Prosecutor, he could have asked for all necessary information, filed additional observations or responded to the prosecutor's opinion.

The Government also state that the Chief Public Prosecutor's opinion is not binding on the Court of Cassation. Furthermore, the Chief Public Prosecutor, as a general rule, is not entitled to take part in the cassation proceedings.

The applicant replies that neither he nor his lawyer was informed of the opinion the Chief Public Prosecutor submitted to the Court of Cassation. Accordingly, he did not have the opportunity to respond to the prosecutor's opinion and to present his own arguments. Thus, his rights to procedural equality and of the defence were breached, with the result that he had an unfair trial.

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

For these reasons, the Court unanimously

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

Mark VILLIGER	Georg RESS
Deputy Registrar	President