



A civilian tried by military courts for an ordinary criminal offence did not have a fair trial

In today's **Chamber** judgment¹ in the case of [Mustafa v. Bulgaria](#) (application no. 1230/17) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights

Mr Mustafa, a civilian who had no links to the army, was tried and convicted by military courts for an ordinary offence because one of the other defendants in the case was serving in the army at the time it was committed. Mr Mustafa argued that those courts were neither independent nor impartial.

The Court found in particular that Mr Mustafa's doubts about the independence and impartiality of the military courts could be regarded as objectively justified.

First, factors such as the military judges being subject to military discipline, their formal incorporation into the army, and the status of the jurors of the military court, who were by definition army officers, indicated that military courts under Bulgarian law could not be regarded as equivalent to the ordinary courts.

Secondly, Bulgarian law provided for the military courts having exclusive jurisdiction over offences committed jointly by military personnel and civilians, even outside the context of military activities. The abstract allocation by national legislation of certain categories of offences to the military courts was not sufficient; it was necessary to demonstrate the existence of "compelling reasons" in each case.

Principal facts

The applicant, Hyusein Ahmed Mustafa, is a Bulgarian national who was born in 1976. He lives in Burgas (Bulgaria).

In 2011 Mr Mustafa was charged with the organisation and leadership of a criminal group whose aim was to obtain various financial benefits, and with illegal trafficking in high-value goods and objects for commercial purposes. On account of the connection between the charges against the presumed members of the group and the fact that one of them had been in the armed forces at the time, all the defendants were tried by a military court.

In 2015 the court, made up of a military judge and two jurors, sentenced Mr Mustafa to five years' imprisonment and fined him about 10,226 euros (EUR). The judgment was upheld by the Military Court of Appeal, on which three military judges sat. Mr Mustafa appealed on points of law, challenging, among his other arguments, the independence and impartiality of the military courts.

In 2016 the Supreme Court of Cassation upheld Mr Mustafa's conviction for illegal cross-border trafficking and acquitted him of the charges of organising and leading a criminal group. The sentence was reduced to three years' imprisonment and the amount of the fine remained the same.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In addition, the Supreme Court of Cassation took the view that the status of the military judges afforded sufficient safeguards to preserve their independence and impartiality; and in particular that they enjoyed the same constitutional safeguards as those applying to civil judges and were subject to the same rules on pay, discipline and promotion. It added that, even though they had military ranks, they were not career officers and their ranks had been given to them by the administrative head of the court to which they had been appointed.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), Mr Mustafa complained that he had been tried, as a civilian, by military courts, which in his submission were neither independent nor impartial.

The application was lodged with the European Court of Human Rights on 21 December 2016.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
Yonko **Grozev** (Bulgaria),
Mārtiņš **Mits** (Latvia),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 6 § 1 (right to a fair trial)

The Court noted that military judges followed the same professional training as their civilian counterparts and enjoyed the same constitutional safeguards, since they were appointed by the High Council of the Judiciary, enjoying tenure and stability of employment.

However, certain characteristics of military courts were likely to raise doubts as to their independence and impartiality. Military judges were subject to military discipline. Once appointed, they were incorporated into the army and given a rank. Even though the same procedural rules applied to cases before military courts and to cases before ordinary criminal courts, factors such as the judges being subject to military discipline, their formal incorporation into the army, and the status of the jurors of the military court, who were by definition army officers, indicated that military courts under Bulgarian law could not be regarded as equivalent to the ordinary courts.

Moreover, under Bulgarian law, cases concerning criminal groups fell, in principle, within the jurisdiction of the Specialised Criminal Court. However, in the present case, the only reason why the case was examined by the military courts was that one of the accused had been serving in the armed forces, because Article 411a of the Code of Criminal Procedure provided that the jurisdiction of the military courts prevailed over the jurisdiction of the Specialised Criminal Court.

The Court referred to its case-law to the effect that the authority of military criminal justice should be extended to civilians only if there were compelling reasons to do so. This principle was in line with the trend internationally to exclude criminal matters from the jurisdiction of military courts when it came to trying civilians. The existence of “compelling reasons” had to be demonstrated in each individual case. The abstract allocation by national legislation of certain categories of offences to military courts was thus not sufficient. The provisions of the Bulgarian Code of Criminal Procedure

provided for the *de facto* exclusive jurisdiction of military courts to deal with offences committed jointly by military personnel and civilians, even outside the context of military activities.

Mr Mustafa had been committed to stand trial before the military courts under the legal provisions concerning the jurisdiction of those courts, in the absence of any assessment of the individual circumstances other than the fact that one of the accused was in the army at the time.

However, other factors should have been taken into consideration, such as the fact that no offence against the armed forces or misappropriation of army property was involved. Thus the need for the case to be heard by a military court could not be considered absolute. In certain cases the committal of all defendants to stand trial before a civilian court could be envisaged. Consequently, the Court did not find any “compelling reasons” to justify the trial of a civilian by a military criminal court in the present case. It also noted that the Supreme Court of Cassation did not have full jurisdiction to review the case. As the exclusive jurisdiction of the military courts derived directly from the provisions of the law, Mr Mustafa’s appeal to that court could not change the procedure.

The Court therefore found that Mr Mustafa’s doubts about the independence and impartiality of the military courts could be regarded as objectively justified. There had thus been a violation of Article 6 § 1 de la Convention.

Just satisfaction (Article 41)

The Court held that Bulgaria was to pay Mr Mustafa 2,500 euros (EUR) in respect of non-pecuniary damage and EUR 1,500 in respect of costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.