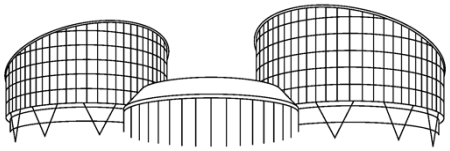

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF CEVAT SOYSAL v. TURKEY

(Application no. 17362/03)

JUDGMENT

STRASBOURG

23 September 2014

FINAL

23/12/2014

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

In the case of Cevat Soysal v. Turkey,

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

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Abel Campos, *Deputy Section Registrar*,

Having deliberated in private on 2 September 2014,

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

PROCEDURE

1. The case originated in an application (no. 17362/03) 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 Turkish national, Mr Cevat Soysal ("the applicant"), on 1 May 2003.

2. The applicant was represented by Mr L. Kanat, a lawyer practising in Turkey, as well as Mr J. Walsh and Ms C. S. Hoste, lawyers practising in the United Kingdom. The Turkish Government ("the Government") were represented by their Agent.

3. On 2 December 2003 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1962 and lives in Germany.

A. The applicant's arrest

5. On 7 July 1999 the Ankara Magistrates' Court ordered the applicant's arrest *in absentia* on suspicion of membership of the PKK, an illegal organisation.

6. On 13 July 1999 the applicant was captured in Chisinau, Moldova, and taken to Turkey on the same day. He was interrogated by MIT (the National Intelligence Organisation of Turkey) agents until 21 July 1999.

7. In July 1999, shortly after being taken to Turkey, the applicant was described by a number of media outlets as the "second man of the PKK", the "European representative of the PKK", "a terrorist" and "a traitor to the country". According to an article published in Turkish Daily News of 22 July 1999, the National Intelligence Agency of Turkey (*MIT*) issued a press statement in which it stated that the applicant had worked to increase terrorist activities and incited the PKK supporters in Turkey to use violence.

8. On 21 July 1999 the applicant was handed over to the Ankara Security Directorate for further questioning. At the time of transfer, a hand-written delivery report was produced. It is not known who drafted the report.

9. On 23 July 1999 the applicant was brought first before the public prosecutor at the Ankara State Security Court and subsequently before a judge at the Ankara State Security Court, who ordered that the applicant be remanded in custody.

B. Criminal proceedings against the applicant

10. On 9 August 1999 the public prosecutor at the Ankara State Security Court filed a bill of indictment against the applicant and two other persons. The applicant was charged with being a leading member of the PKK, whose aim was to bring about the secession of part of the national territory. The charges against the applicant were brought under Article 125 of the former Criminal Code.

11. The public prosecutor accused the applicant of being one of the leaders of the PKK in Europe and of having been involved in the training of PKK members in Romania. According to the indictment, the applicant had been in contact with Mr Abdullah Öcalan, the leader of the PKK, and had provided him with information about the persons who had been trained. The public prosecutor further noted that when he had questioned Mr Öcalan on 22 February 1999, the latter had maintained that he had given instructions to the applicant regarding that training. Moreover, the leader of the PKK had confirmed the veracity of that statement during his trial on 1 June 1999.

12. The public prosecutor at the Ankara State Security Court further claimed that during telephone conversations with a number of people in Turkey, the applicant had issued instructions to perpetrate acts of violence following the arrest of Mr Öcalan. In the indictment, the public prosecutor quoted the transcripts of eight of the applicant's alleged telephone conversations dated 4, 18 and 22 February 1999 and 1, 5, 7, 15 and 19 March 1999. The public prosecutor also noted that the applicant had referred to the State of Turkey as "the enemy" in his conversations.

Furthermore, according to the indictment, a number of PKK members – A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş. and A.Y. – had maintained in their statements that the applicant had been involved in the activities mentioned in the indictment. As a result, the public prosecutor alleged that the applicant had issued instructions for hundreds of bombings, fires, hunger strikes, suicide attacks and massacres, including the killing of thirteen people as a result of an attack on Mavi Çarşı, a shopping centre, on 13 March 1999 and that he had trained members of the PKK in his capacity as one of the leaders of the organisation.

13. On 16 September 1999 the Ankara State Security Court held the first hearing on the merits of the case. At the end of the hearing, the court decided to enquire whether the persons who had made statements regarding the accused had been prosecuted and, if so, to request copies of all the statements given during the criminal proceedings against them.

14. During the second hearing on 14 October 1999 the applicant's lawyer asked the court, *inter alia*, to remove the transcripts of the applicant's alleged telephone conversations from the case file. The public prosecutor demanded that the request be refused, and the court duly dismissed it.

15. On an unspecified date the police sent the prosecution a document containing the statement of an alleged member of the PKK, C.P., taken by the police. During the hearing of 11 November 1999 the statement was read out in court. According to the document, C.P. had testified against the applicant. The applicant denied the veracity of the statement, claiming that he did not know C.P. At the end of the hearing, the court decided to enquire whether criminal proceedings had been instituted against C.P. and, if so, to request all of his statements given during those criminal proceedings.

16. During the fourth hearing in the case, held on 9 December 1999, the applicant's lawyer maintained that only the indictments concerning A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş., A.Y. and C.P. had been included in the file and asked the court to include all the statements they had given during the criminal proceedings against them. The court postponed its decision on the request of the applicant's lawyer to a forthcoming hearing.

17. On 18 January 2000, at the end of the fifth hearing, the Ankara State Security Court decided to request a copy of the case file in the proceedings against C.P.

18. The Ankara State Security Court repeated its request seven times between 8 February and 27 June 2000, as it had not received the aforementioned case file. During the same period the court also asked a number of other courts to send a copy of the statements made by A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş. and A.Y. during the criminal proceedings against them.

19. At the eleventh hearing in the case, on 27 June 2000, the applicant's lawyer asked the Ankara State Security Court to summon everyone who had

allegedly made statements against the applicant to testify before the court. The court did not respond to his request.

20. Six more hearings were held between 27 June and 21 November 2000. During that period the Ankara State Security Court received the documents that it had requested from the other courts. In the course of the hearings, the applicant's lawyer maintained before the court that the statements of the persons who had allegedly testified against the applicant did not contain any reference to the applicant. At the end of the hearing on 21 November 2000, the court instructed the public prosecutor to prepare his observations on the merits of the case.

21. On 12 December 2000 the public prosecutor's observations on the merits of the case were read out before the court.

22. At the hearing of 21 December 2000, the applicant's lawyer filed a petition with the first-instance court in response to the public prosecutor's observations. In his petition, the applicant's lawyer contended that the public prosecutor's observations had referred to recordings of telephone conversations which were in the case file. He submitted that he had already asked the court to remove the transcripts of the recordings from the case file as they could not be used as evidence. He further noted that the applicant had denied that he was the person whose conversations had been recorded. The lawyer requested the court to order a comparative voice analysis and to enquire whether the phone tapping had been conducted in accordance with the legal procedure and on the basis of a court order. He also asked the court to find out the identities of the persons with whom the applicant had allegedly spoken (designated as "X" in the documents in the case file) and to take statements from them about those conversations.

23. On the same day the Ankara State Security Court accepted the request for a comparative voice analysis and dismissed the remaining requests without providing any reasons.

24. At the next hearing, on 6 February 2001, the applicant's lawyer complained that two police officers had been assigned to conduct the voice analysis. He argued that police officers could not be impartial given the involvement of the police in the case. He therefore asked the court to appoint impartial experts. The court allowed his request and asked TRT (Radio and Television Corporation of Turkey), the national public broadcaster, to assign impartial experts to conduct the analysis and to prepare a report.

25. In April 2001 TRT informed the first-instance court that no appropriate expert could be found. Following receipt of that information, the applicant's lawyer filed a petition with the first-instance court on 26 April 2011 repeating his requests contained in the petition of 21 December 2000. In his petition, the applicant's lawyer also requested that a copy of the audiotapes be provided to him and his client.

26. At the hearing of 26 April 2001 the Ankara State Security Court decided to ask the criminal departments of the gendarmerie and the police to assign appropriate experts for the voice analysis. The court dismissed the applicant's requests in the petition of the same date, holding that it had already ruled on them.

27. On 22 May 2001 the applicant's lawyer filed a further petition with the court repeating the requests contained in his petitions of 21 December 2000 and 26 April 2001. He further maintained that any experts assigned in the case should be impartial. At the hearing held on the same date, the first-instance court once again dismissed the requests of the applicant's lawyer. The court noted that the objection to the experts was groundless and that it had already dismissed the other requests.

28. On 29 May 2001 the applicant's lawyer filed a petition with the court objecting to the court dismissing his requests. No decision was taken in respect of this petition.

29. On 19 June 2001 the applicant's lawyer filed a further petition repeating his previous requests. At the hearing held on the same day, the first-instance court dismissed those requests without providing any reason. The court also decided to deliver the audiotapes to the designated expert, Mr L.B., a police officer from the criminal laboratory at the General Security Directorate.

30. On 3 July 2001 the expert submitted the transcripts of the recordings of the telephone conversations to the first-instance court.

31. On 10 July 2001 the applicant's lawyer made written submissions to the court in which he maintained his objections to the expert's work. He further contended that the defence did not know whether all the conversations had been transcribed, since the court had refused to deliver a copy of the audiotapes to the applicant and his lawyer. The lawyer claimed that the court's refusal to do so was in violation of Article 6 of the Convention. In his petition, the applicant's lawyer once again asked the court to conduct an inquiry into the legal procedure concerning the phone tapping, to give a copy of the recordings to the defence, to designate an independent and impartial expert to conduct a comparative voice analysis, and to find out the identities of the persons with whom the applicant had allegedly spoken. Lastly, he asked the court to request a copy of the case file of the criminal proceedings concerning the bombing of Mavi Çarşı.

32. On 10 July 2001, at the twenty-fourth hearing in the case, the first-instance court asked the applicant's lawyer whether his client would provide a vocal sample for the voice identification analysis. The applicant's lawyer replied that he and his client would inform the court of their position on that point once the court had responded to their requests contained in his petition submitted on that day. At the end of the hearing, the court dismissed the requests of the applicant's lawyer, holding that those requests had already been refused. It designated a judge and two police officers, Mr L.B. and

Mr C.Y., as experts to conduct the comparative voice analysis on the same day and invited the applicant to participate in the voice identification process if he so wished.

33. On the same date as the voice identification process started in the presence of the applicant, the applicant's lawyer maintained that his client would not provide a voice sample until the discrepancies between the transcripts prepared by the public prosecutor's office and those prepared by Mr L.B. had been resolved. He further contended that as Mr L.B. had already been involved in the preparation of the transcripts, another expert should have been designated. The public prosecutor submitted, in reply, that there was no reason to believe that officers from the criminal laboratory at the General Security Directorate were partial and that the applicant's behaviour had been unlawful. The judge decided to end the examination in view of the applicant's unwillingness to participate.

34. In a petition dated 23 July 2001, the applicant's lawyer asked the first-instance court to accept the withdrawal of their request for a comparative voice analysis. The lawyer contended that the applicant had not made those telephone conversations and that it was the defence who had asked for that examination in the first place. However, in view of the court's refusal of their other requests, he believed that it was not possible to have a fair trial in the applicant's case.

35. At the end of the hearing held on 21 August 2001 the Ankara State Security Court decided to consider the applicant's request contained in the petition dated 23 July 2001 at the same time as it considered the case on the merits. On the same day the court decided to request a copy of the case file of proceedings before the Istanbul State Security Court following a request by the representative of one of the applicant's co-accused.

36. The first-instance court adjourned the hearings four times between 21 August and 30 October 2001, as the Istanbul State Security Court had not sent the documents requested.

37. At the twenty-eighth hearing held on 30 October 2001, following receipt of the aforementioned documents, the first-instance court asked the public prosecutor to submit his observations on the merits of the case.

38. At the next hearing on 27 November 2001 the public prosecutor asked the court to take his observations of 12 December 2000 into consideration.

39. In a petition dated 27 December 2001 filed with the first-instance court, the applicant's lawyer maintained that the refusal of his requests that the court hear the persons who had allegedly made statements against the applicant and those who had allegedly had telephone conversations with him, and of his requests for a copy of the recordings of the telephone conversations and regarding the designation of the experts, had been in breach of Article 6 §§ 1 and 3(d) of the Convention. He further contended that the statements that State officials had made to the press referring to the

applicant as a "terrorist" had been in violation of Article 6 § 2 of the Convention. No decision was taken in respect of that petition.

40. During the thirty-first and thirty-second hearings held on 24 January and 5 February 2002 the applicant and his co-accused responded to the public prosecutor's observations on the merits of the case.

41. On 5 March 2002 the Ankara State Security Court decided to ask the Diyarbakır courts for another judgment rendered by the Diyarbakır Military Court in the 1980's, convicting the applicant of membership of an illegal organisation. Between 5 March and 23 May 2002 the court adjourned three hearings awaiting a copy of the aforementioned judgment.

42. At the thirty-sixth hearing on 23 May 2002 the court received the judgment that it had requested on 5 March 2002 and decided to adjourn the trial pending examination of the case file.

43. On 30 May 2002 the first-instance court asked the applicant to make additional defence submissions given that he might be convicted of membership of an illegal organisation under Article 168 of the former Criminal Code, instead of Article 125 of the same Code.

44. On 20 June 2002 the applicant's lawyer filed a petition with the court, requesting that the latter take into account their previous submissions, in the context of the application of Article 168 of the former Criminal Code. The applicant's lawyer also repeated his previous requests.

45. At the thirty-eighth and thirty-ninth hearings held on 11 and 20 June 2002, the first-instance court decided to adjourn the trial as the composition of the court had changed and there was a new president.

46. On 25 June 2002 the Ankara State Security Court rendered its judgment in the case. The applicant was convicted of membership of the PKK under Article 168 § 1 of the former Criminal Code and sentenced to eighteen years and nine months' imprisonment.

47. In its judgment, the first-instance court cited the following evidence contained in the case file: the statements that A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş., A.Y., C.P. and V.T. had made to the police within the context of the proceedings against them; the indictments in the cases against the aforementioned persons; the statements made by Abdullah Öcalan to the police, the public prosecutor and during his own trial; a document prepared by the anti-terrorism branch of the General Security Directorate regarding the acts of terrorism that had occurred between 1 January and 4 August 1999; and the transcripts, prepared by experts, of the telephone conversations between the applicant and a number of persons designated as "X".

48. The first-instance court noted that A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş., A.Y., C.P. and V.T. had asserted in their statements that the applicant was a member of the PKK and the leader of the organisation in Europe. As to the content of the transcripts, the court noted that it documented that the

applicant had given instructions and orders on the carrying out of the acts of violence that had occurred following the arrest of Mr Öcalan.

49. In the light of the aforementioned evidence, the Ankara State Security Court found it established that the applicant was a member of the PKK and the leader of the organisation in Europe. Its judgment stated that he had been involved in the training of PKK members in Romania and had been in contact with Mr Öcalan. In this connection, the court quoted Mr Öcalan's statements to the public prosecutor after his arrest, in which he claimed that the applicant had trained PKK members in Romania.

50. The court further quoted the transcripts of eight telephone conversations and concluded that in the course of those conversations the applicant had issued instructions for the carrying out of acts of terrorism in Turkey. It noted, however, that the applicant had not been directly involved in those acts. The court also noted that the applicant's instructions had been of a general nature. As a result, according to the court, a direct link between the acts of terrorism, in particular the attack on Mavi Çarşı on 13 March 1999, and the applicant's instructions could not be established. The Ankara State Security Court therefore did not convict the applicant under Article 125 of the former Criminal Code. Nevertheless, noting that the PKK had given the applicant the specific task of inciting violent acts in Turkey after the arrest of Mr Öcalan, the court convicted the applicant of membership of the PKK under Article 168 of the former Criminal Code.

51. Both the prosecution and the applicant appealed against the decision.

52. In his petitions dated 18 October and 19 November 2002, the applicant's lawyer objected to the court's having cited as evidence the statements of Mr Öcalan, A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş., A.Y., C.P. and V.T. and the transcripts of the applicant's alleged telephone conversations. He submitted in particular that all those persons had denied the veracity of the statements taken from them by the police and that M.Ş., A.Y. and Ş.Ö. had been acquitted of the charges brought against them. Moreover, the investigation against K.O. had been concluded with a decision not to prosecute. The applicant's lawyer noted that the first-instance court had not cited the accusations against the applicant contained in their statements in the reasoning of its judgment, which demonstrated that there had been no reason to convict his client. He complained, *inter alia*, that the first-instance court had failed to investigate whether a court order had been issued prior to the recording of the telephone conversations used as evidence in the trial. The court had also failed to provide the defence with a copy of the audiotapes and to hear those individuals designated as "X" in the transcripts of the telephone conversations. The applicant's lawyer submitted that those deficiencies in the proceedings constituted a violation of Article 6 of the Convention.

53. The Chief Public Prosecutor at the Court of Cassation submitted his opinion on the merits of both parties' appeals. In his written opinion

(*tebliğname*) to the 9th Chamber of the Court of Cassation for Criminal Law Matters, the Chief Public Prosecutor advised that the appeals be rejected and that the first-instance judgment be upheld, as it was in compliance with procedural rules and law. That opinion was not submitted to the applicant, despite the fact that in his petition of 19 November 2002 he had asked to be notified. According to the applicant's submissions, his lawyer was not aware of the written opinion until it was read out during the hearing before the Court of Cassation.

54. On 12 December 2002 the Court of Cassation upheld the judgment of the Ankara State Security Court. The Chief Public Prosecutor at the Court of Cassation applied for an exceptional appeal procedure before the Joint Criminal Chambers of the Court of Cassation, requesting that the applicant be sentenced under Article 125 of the former Criminal Code. His request was dismissed.

55. On 30 November 2008 the applicant was released from prison on probation and returned to Germany, where his family were living.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

56. The applicant complained, under Article 6 § 1 of the Convention, that the use of unlawfully obtained evidence by the Ankara State Security Court in convicting him had violated his right to a fair trial. He further complained, under the same head, that the refusal by the same court to provide him with a copy of the audiotapes of his alleged telephone conversations had been in breach of the principle of equality of arms.

The relevant parts of Article 6 § 1 of the Convention provide as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

57. The Government contested the applicant's assertions.

A. Admissibility

58. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

59. The applicant maintained that the phone tapping had not been authorised by a court order and that he had not had any meaningful opportunity to challenge the evidence presented by the prosecution. He contended that as a result of the court's refusal to provide him with a copy of the audiotapes, he had been prevented from obtaining forensic evidence in their regard.

60. The Government submitted that the Ankara State Security Court had not based its final judgment on the transcripts of the telephone conversations in question since Article 254 of the former Code on Criminal Procedure had not allowed the courts to use unlawfully obtained evidence. They further contended that the applicant had refused to give vocal samples for a comparative voice analysis during the trial. Lastly, they noted that all the requests submitted by the applicant during his trial had been accepted by the Ankara State Security Court.

61. The Court reiterates that it is not its role to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible. The Court has already found in the particular circumstances of a given case, that the fact that the domestic courts used as sole evidence transcripts of unlawfully obtained telephone conversations did not conflict with the requirements of fairness enshrined in Article 6 of the Convention (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V, *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX and *Bykov v. Russia* [GC], no. 4378/02, § 89, 10 March 2009). Therefore, the question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Heglas v. the Czech Republic*, no. 5935/02, § 85, 1 March 2007).

62. In the present case, the Court notes in the first place that at the time of the facts giving rise to the present application there was no domestic law regulating telephone tapping and recording (see *Ağaoğlu v. Turkey*, no. 27310/95, §§ 54-55, 6 December 2005, and *Satık v. Turkey (no. 2)*, no. 60999/00, § 57, 8 July 2008). The lack of a legal basis for such interference leads the Court to conclude that the telephone recordings in question constituted unlawfully obtained evidence in the circumstances of the case. In any event, in their submissions to the Court, the Government also acknowledged that the evidence in question had not been obtained in accordance with the law (see paragraph 60 above). The Court further observes that the Ankara State Security Court cited the transcripts of the telephone conversations as evidence in its judgment. Although in its final judgment the court could not establish a causal link between those conversations and the terrorist acts committed in Turkey between February and August 1999 and therefore did not convict the applicant under

Article 125 of the former Criminal Code, it nevertheless took those transcripts into consideration when convicting the applicant under Article 168 of the same Code. The Court therefore cannot accept the Government's submissions that the first-instance court had not used the transcripts as evidence.

63. Nonetheless, the Court cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of this kind may be admissible (see *Satık*, cited above, § 58 and the case cited therein). The Court must therefore ascertain whether the proceedings as a whole were fair, bearing in mind whether the rights of the defence were respected.

64. In this connection, the Court reiterates that it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and to comment on the observations filed and the evidence adduced by the other party. In addition, Article 6 § 1 requires that the prosecution authorities disclose to the defence all the material evidence in their possession for or against the accused (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II, and *Natunen v. Finland*, no. 21022/04, § 39, 31 March 2009).

65. However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep police methods of investigation of crime secret, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 of the Convention. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Rowe and Davis*, cited above, § 61, *Natunen*, cited above, § 40, and *Leas v. Estonia*, no. 59577/08, § 78, 6 March 2012).

66. Turning to the particular circumstances of the present case, the Court observes that the recordings played an important role in the body of evidence assessed by the first-instance court. In fact, of the three pages of reasoning in the judgment, an entire page consisted of the transcripts of the telephone conversations. Having taken account of the content of those transcripts, the court found it established that the applicant had issued instructions to members of the PKK to perpetrate acts of violence in Turkey

(see paragraphs 48 and 50 above). Therefore, the transcripts of the audiotapes constituted decisive evidence against the applicant.

67. The Court further observes that the applicant attempted to challenge the lawfulness of the phone tapping, the authenticity of the audiotapes and the reliability of the transcripts in the case file before the Ankara State Security Court. To this end, on at least ten occasions his lawyer filed petitions and made oral submissions to the trial court (see paragraphs 14, 22, 25, 27, 28, 29, 31, 34, 39 and 44). The first-instance court allowed the request for a comparative voice analysis and dismissed all the other requests on each occasion. Subsequently, however, the applicant refused to take part in the comparative voice analysis. The Court does not consider it necessary to examine whether the applicant's reluctance to provide a vocal sample was legitimate. In the Court's view, given the applicant's reluctance, it was understandable that the first-instance court accepted that the transcripts in the case file contained conversations between the applicant and a number of persons designated as "X". However, an examination of the question as to whether the transcripts included in the case file by the public prosecutor and those prepared by Mr L.B., the expert, were consistent with the content of the audiotapes was not carried out (see paragraphs 31, 32, 33 and 39 above). Besides, the applicant was not provided an opportunity to get of hold of all the elements that would have enabled him to challenge the reliability of the transcripts. In this connection, the Court observes that the first-instance court either dismissed the applicant's requests to obtain a copy of the audiotapes without providing any reason (see paragraphs 14, 23, 26, 27, 29 and 32 above) or failed to issue a ruling in respect of them (see paragraphs 28, 35, 39 and 45 above). In addition, the court did not play the audiotapes at the hearings in the presence of the applicant or his lawyer. As a result, the applicant's inability to have access to the originals of those audiotapes prevented him from effectively challenging the reliability of the transcripts. Moreover, as the applicant was not informed of the reason why the court considered it necessary to restrict his rights, he had no opportunity to argue against any such considerations. Lastly, the Court notes that the Court of Cassation also failed to consider the applicant's arguments concerning his inability to have access to evidence which had been used to secure his conviction.

68. In the light of the foregoing, the Court concludes that the decision-making procedure applied in the present case failed to comply with the requirements of adversarial proceedings and equality of arms, or to incorporate adequate safeguards to protect the interests of the applicant.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

69. The applicant complained under Article 6 § 3 (d) of the Convention that, despite his persistent requests, the Ankara State Security Court had refused to call as witnesses the persons whose statements to the police had been cited as evidence against him, as well as the persons who were designated as "X" in the transcripts of the telephone conversations.

The Court considers that these complaints should be examined under Article 6 § 1 of the Convention taken together with Article § 3 (d) of the Convention, the relevant parts of which provide as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

70. The Government contested that argument.

A. Admissibility

71. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

72. The applicant maintained that his inability to question the witnesses whose statements had been used in securing his conviction had breached his right to a fair trial.

73. The Government submitted that during the trial the Ankara State Security Court had accepted all the applicant's procedural requests. They asked the Court to dismiss his complaints under that head as manifestly ill-founded.

74. The Court reiterates that Article 6 §1, taken together with Article 6 § 3 (d) of the Convention, enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an

adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011, and also *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II and *Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 57, ECHR 2001-X).

75. In the context of absent witnesses, the Court has set out two considerations in determining whether the admission of statements was compatible with the right to a fair trial. First, there had to be a good reason for the non-attendance of the witness. Secondly, where a conviction was based solely or to a decisive extent on statements made by a person whom the accused had had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence might be restricted to an extent incompatible with the guarantees of Article 6. Accordingly, where a conviction was based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards (see *Al-Khawaja and Tahery*, cited above, §§ 119 and 147).

76. In the present case, the Court observes at the outset that the indictment filed by the public prosecutor was based on two sets of evidence: first, the statements made to the police by a number of persons accused of membership of the PKK, namely A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş., A.Y., C.P. and V.T., and the statements made to the police and to the public prosecutor by Mr Abdullah Öcalan in the context of proceedings against him; and secondly, the transcripts of telephone conversations allegedly between the applicant and a number of persons designated as "X". The Court further observes that the applicant and his lawyer persistently asked the first-instance court to summon the aforementioned persons with a view to hearing them at the trial (see paragraphs 19, 22, 25, 27, 31 and 39 above). The Ankara State Security Court, however, either dismissed those requests or failed to render a decision in respect of them (see paragraphs 19, 23, 26, 27, 32 and 39 above). The court also included in the case file all the items of evidence submitted by the public prosecutor and cited them as evidence in its judgment convicting the applicant. It also referred to the statements of Mr Öcalan and the transcripts of the telephone conversations in the reasoning of its judgment (see paragraphs 49 and 50 above).

77. The Court has already held, in its judgment in the case of *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, § 713, 25 July 2013) that if the prosecution decides that a particular person is a relevant source of information and relies on his or her testimony at the trial and if the testimony of that witness is used by the court to support a guilty

verdict, it must be presumed that the personal appearance and questioning of that witness are necessary, unless his or her testimony is manifestly irrelevant or redundant. Given that the statements of A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş., A.Y., C.P., V.T. and Mr Öcalan, as well as the transcripts of the applicant's alleged telephone conversations were virtually the only evidence used in convicting the applicant (see paragraphs 47-50 above), the Court must examine whether the first-instance court provided good reasons for the non-attendance of those witnesses at the trial.

78. In this connection, the Court observes that the domestic courts did not give any reason for refusing the applicant's requests, let alone a good reason. Besides, the Government did not refer to any justification preventing A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş., A.Y., C.P., V.T. and Abdullah Öcalan as well as the persons designated as "X", from testifying before the trial court, such as a fear of reprisal from the applicant or the need to keep police crime investigation methods secret (see *Al-Khawaja and Tahery*, cited above, § 122, and *Khodorkovskiy and Lebedev*, cited above, § 715).

79. Having regard to the elements discussed above, the Court concludes that the refusal of the first-instance court to hear A.G., K.O., Ş.Ö., H.K., N.Y., M.Ş., A.Y., C.P., V.T. and Abdullah Öcalan in person at the trial and to identify and summon the persons designated as "X" to testify before it, without providing any reason for its decision, was contrary to the requirements of a fair trial.

There has accordingly been a violation of Article 6 § 1 taken together with Article § 3 (d) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

80. The applicant complained under Article 6 § 2 of the Convention that his right to be presumed innocent had been violated, since, following his arrest, State officials had given statements to the media in which he had been described as guilty of the offence of which he had been charged.

81. The Government submitted that the applicant had failed to exhaust the domestic remedies available to him as he had not lodged a complaint in relation to this complaint with the national authorities.

82. In reply, the applicant submitted that he had raised his complaint under Article 6 § 2 before the trial court.

83. The Court observes at the outset that, in a number of news articles published in July 1999, the applicant was referred as the "second man of the PKK", the "European representative of the PKK", "a terrorist" and "a traitor to the country", as alleged by the applicant. However, in many of those articles, the aforementioned expressions were used by the journalists or columnists. Only one article, published in the Turkish Daily News on 22 July 1999, cited the content of a press statement purportedly made by the

National Intelligence Agency. According to that article, the National Intelligence Agency described the applicant as the person who incited PKK supporters to commit acts of violence in Turkey. However, there is nothing in the case file demonstrating that the National Intelligence Agency had actually made that statement and declared the applicant guilty for the offences in respect of which he had been arrested. The Court has therefore doubts as to the well-foundedness of this complaint (see *Karakaş and Yeşilırmak v. Turkey*, no. 43925/985, § 53, 28 June 2005; (see *Basar v. Turkey* (dec.), no. 17880/07, 5 April 2011).

84. The Court further considers that, even assuming that the National Intelligence Agency or State officials declared the applicant guilty or otherwise prejudged the assessment of the facts by the competent judicial authorities, the applicant was still required to use the legal remedies available in domestic law in order to afford the respondent State the possibility of putting right the alleged violation of Article 6 § 2 (see, *mutatis mutandis*, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I). In this connection, the Court observes that the applicant raised his concerns about these news articles before the trial court as a part of his defence submissions. He however failed to lodge a criminal complaint or a separate case for compensation against the National Intelligence Agency or State officials responsible for the alleged breach of his right to presumption of innocence. Besides, he neither demanded the newspapers in question to publish a refutation in respect of the expressions used for him nor filed criminal complaints against those media outlets. Nor did the applicant bring any case against the newspapers claiming compensation for pecuniary or non-pecuniary damage that he allegedly suffered due to these publications.

85. In these circumstances, the Court is led to conclude that the applicant failed to avail himself of domestic remedies in respect of his allegations under this head.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

86. The applicant complained, under Article 6 § 1 of the Convention, that both the Ankara State Security Court and the public prosecutor who had brought the charges against him had not been impartial and had infringed a number of procedural requirements of a fair trial. He also submitted under the same head that the criminal proceedings against him had not been concluded within a reasonable time. Lastly, the applicant alleged, under Article 6 § 3 (b) of the Convention, that the Chief Public Prosecutor's submissions to the Court of Cassation had never been served on him, thus depriving him of the opportunity to put forward any counter-arguments.

87. The Court considers that these complaints may be declared admissible. However, having regard to the facts of the case, the submissions of the parties and its finding of a violation of Articles 6 § 1 and 6 §§ 3 (d) of the Convention above (see paragraphs 68 and 79 above), the Court considers that it has examined the main legal questions raised under Article 6 in the present case. It concludes, therefore, that there is no need to make a separate ruling on the applicant's remaining complaints under this provision (see *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007, *Getiren v. Turkey*, no. 10301/03, § 132, 22 July 2008, *Güveç v. Turkey*, no. 70337/01, § 135, 20 January 2009, and *Böke and Kandemir v. Turkey*, nos. 71912/01, 26968/02 and 36397/03, § 73, 10 March 2009).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. 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

89. The applicant claimed 216,000 euros (EUR) and EUR 100,000 in respect of pecuniary and non-pecuniary damage respectively.

90. The Government contested those claims, submitting that the requested amounts were unsubstantiated and excessive.

91. The Court observes that the applicant did not submit any relevant documents to substantiate his claim for pecuniary damage. It therefore rejects that claim. The Court however finds that he must have suffered pain and distress which cannot be compensated for solely by the Court's finding of a violation. Having regard to the nature of the violations found, the Court finds it appropriate to award him EUR 7,500 in respect of non-pecuniary damage.

92. 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 he so request (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

B. Costs and expenses

93. The applicant also claimed EUR 15,630 for the costs and expenses incurred before the domestic courts and before the Court. The applicant submitted a breakdown of Mr L. Kanat's work, which included thirty hours

of interviews, the completion of the petitions at domestic level and of the application form, as well as administrative costs.

94. The Government contested that claim.

95. 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 considers it reasonable to award the sum of EUR 2,500 covering costs under all heads.

C. Default interest

96. The Court considers it appropriate that the default interest rate 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 complaint under Article 6 § 2 of the Convention inadmissible and the remainder of the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention;

4. *Holds* that there is no need to examine the remaining complaints under Article 6 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of 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;

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

Done in English, and notified in writing on 23 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Deputy Registrar	Guido Raimondi President