CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF ÇIRAKLAR v. TURKEY

(70/1997/854/1061)

JUDGMENT

STRASBOURG

28 October 1998

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67, B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher (place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

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SUMMARY[1]

Judgment delivered by a Chamber

Turkey – independence and impartiality of a National Security Court

I. SCOPE OF CASE

Limited to complaints declared admissible by the Commission.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

Application for rectification of Court of Cassation's judgment not directly accessible to applicant – domestic remedies exhausted.

Conclusion: objection dismissed (unanimously).

III. ARTICLE 6 OF THE CONVENTION

A. Independence and impartiality

Recapitulation of case-law.

Understandable that a civilian prosecuted in a National Security Court for offences regarded *ipso facto* as directed against Turkey's territorial national integrity, the democratic order or national security should be apprehensive about being tried by a bench of three judges which included a regular army officer, who was a member of the Military Legal Service.

Status of military judges provided certain guarantees of independence and impartiality making them comparable to their civilian counterparts – on the other hand, during their term of office (which lasted four years and could be renewed) they continued to belong to the army, remained subject to military discipline and had assessment reports made on them by the army, which, together with the administrative authorities, took decisions pertaining to their appointment.

Applicant could have legitimately feared that because one of the judges of the National Security Court was a military judge, it might allow itself to be unduly influenced by considerations which had nothing to do with the case.

Conclusion: violation (seven votes to two).

B. National Security Court's refusal to hear a defence witness

Unnecessary to examine the complaint, having regard to finding that applicant's right to a fair hearing by an independent and impartial tribunal had been infringed (unanimously).

1. This summary by the registry does not bind the Court.

IV. ARTICLE 50 OF THE CONVENTION

Pecuniary damage: claim dismissed (unanimously).
Non-pecuniary damage: judgment sufficient (unanimously).

COURT'S CASE-LAW REFERRED TO

25.2.1997, Findlay v. the United Kingdom; 25.6.1997, Van Orshoven v. Belgium; 20.5.1998, Gautrin and Others v. France; 9.6.1998, Incal v. Turkey

In the case of Çıraklar v. Turkey[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr THÓR VILHJÁLMSSON, *President*,
Mr F. GÖLCÜKLÜ,
Mr C. RUSSO,
Mr N. VALTICOS,
Mr M.A. LOPES ROCHA,
Mr J. MAKARCZYK,
Mr T. PANTIRU,
Mr V. BUTKEVYCH,
Mr V. TOUMANOV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 23 June and 24 September 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 10 July 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 19601/92) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mr Cengiz Çıraklar, on 28 November 1991.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

Notes by the Registrar

1. The case is numbered 70/1997/854/1061. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated Ms S. Bilge Uslu, of the İzmir Bar, to represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 27 August 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr C. Russo, Mr N. Valticos, Mr J. Makarczyk, Mr V. Butkevych and Mr V. Toumanov (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr Ryssdal, who had died on 18 February 1998, was replaced as President of the Chamber by Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 6, second sub-paragraph); and Mr Walsh, who died on 9 March 1998, was replaced by Mr Pantiru, substitute judge (Rule 22 § 1). Later Mr Bernhardt, who was unable to take part in the further consideration of the case, was replaced as President of the Chamber by Mr Thór Vilhjálmsson (Rule 21 § 6, second sub-paragraph) and as a member of the Chamber by Mr M.A. Lopes Rocha, substitute judge (Rule 22 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, had consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission, Mrs M. Hion, on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 30 April and 1 May 1998 respectively. On 19 June 1998 the Delegate of the Commission informed the Registrar that she had no observations to make.

5. Having regard to the views expressed by the applicant, the Government and the Delegate of the Commission, and having satisfied itself that the condition for derogating from its usual procedure had been met (Rules 26 and 38), the Chamber had decided to dispense with a hearing in the case and Mr Bernhardt had given the applicant and the Government leave to make observations on the content of each other's memorials.

6. The Government's and the applicant's supplementary observations were received at the registry on 22 May and 2 June 1998 respectively.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

7. The applicant, a Turkish national born in 1966, lives in İzmir (Turkey). At the material time he was a student at the University of the Aegean.

8. On 16 March 1990 a group of students held an unauthorised demonstration in front of the buildings of the University to commemorate the deaths in 1978 of seven students from Istanbul University and the deaths of Kurds in the north of Iraq in 1988. The police intervened, dispersed the crowd and arrested the applicant together with other demonstrators and took them into police custody.

B. The proceedings against the applicant

1. In the İzmir National Security Court

9. After being questioned by the police, those arrested were brought before the prosecutor at the İzmir National Security Court, on 19 March 1990.

10. On 20 March 1990 Mr Çıraklar and his co-defendants appeared before the İzmir National Security Court. They were charged with taking part in an unauthorised demonstration, offering violent resistance to the police and disseminating separatist propaganda.

11. In a letter of 13 April 1990 the İzmir police chief informed the applicant's father that his son had been arrested following the events at the University of the Aegean, taken into police custody, brought before the İzmir National Security Court and ordered to be detained pending trial at Buca Prison.

12. In the National Security Court the applicant contested the facts as submitted by the prosecution. He also alleged, on the basis of its composition, that the court was biased and argued that his arrest had been an infringement of his freedom of thought, expression and association.

13. Relying on the evidence of the policemen who had arrested the applicant, on photos published in a daily newspaper and on a video recording, the National Security Court found that the applicant had taken part in the demonstration in question, had resisted the police and had thrown stones at them. It also noted that the video recording showed that, before

intervening and making arrests, the police had given the demonstrators a warning and had ordered them to disperse.

It held that the statements by Mr Çıraklar's friends, according to whom he had been only a spectator, did not reflect the whole truth as those witnesses claimed to have seen the policemen arrest the applicant and his girlfriend, S.D., between 11.30 a.m. and 12 noon, whereas it had been established that the demonstration had not begun until about 12.15 p.m. The court also refused to hear S.D. as a witness for the defence on the ground that she was herself a defendant in the case.

14. In a judgment of 28 December 1990 the National Security Court, composed of two civilian judges and a military judge with the rank of colonel, found Mr Çıraklar guilty of having, contrary to Law no. 2911, taken part in a demonstration on a public highway without permission and used violence against the police, and it sentenced him to two years and six months' imprisonment. Thirty of his co-defendants were convicted on the same counts.

2. In the Court of Cassation

15. On 15 February 1991 the applicant appealed on points of law against the judgment of 28 December 1990. In his pleading he challenged the version of the facts accepted by the National Security Court and the way in which it had assessed the evidence, and criticised the court's legal classification of the offences. He also submitted that his conviction contravened Articles 9, 10 and 11 of the Convention.

16. In a judgment of 28 May 1991 the Court of Cassation upheld the judgment of the trial court.

II. RELEVANT DOMESTIC LAW

17. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

> "There may be acts affecting the existence and stability of a State such that when they are committed, special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have thus been enacted in advance and that the courts have been created before the commission of any offence …, they may

not be described as courts set up to deal with this or that offence after the commission of such an offence."

18. The composition and functioning of the National Security Courts are subject to the following rules.

A. The Constitution

19. The constitutional provisions governing judicial organisation are worded as follows:

Article 138 §§ 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, … or … person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges … shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution…"

Article 143 §§ 1–5

"National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security.

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

The president, one of the regular members, one of the substitutes and the prosecutor shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

Presidents, regular members and substitute members … of National Security Courts shall be appointed for a renewable period of four years.

Appeal against decisions of National Security Courts shall lie to the Court of Cassation.

...”

Article 145 § 4

“Military legal proceedings

The personal rights and obligations of military judges … shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law…”

B. Law no. 2845 on the creation and rules of procedure of the National Security Courts

20. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts provide as follows:

Section 1

“In the capitals of the provinces of … National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State’s internal or external security.”

Section 3

“The National Security Courts shall be composed of a president, two other regular members and two substitute members.”

Section 5

“The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes … shall be civilian … judges, the other members, whether regular or substitute, military judges of the first rank…”

Section 6(2), (3) and (6)

“The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts … may not be appointed to another post or place, without their consent, within four years…

…

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or his duties themselves … may be changed in accordance with the procedure laid down in that legislation."

Section 27(1)

"The Court of Cassation shall hear appeals against the judgments of the National Security Courts."

Section 34(1) and (2)

"The rules governing the rights and obligations of … military judges appointed to the National Security Courts and their supervision …, the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties … shall be as laid down in the relevant provisions of the laws governing their profession…

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors … and the files on any investigations conducted in respect of them … shall be transmitted to the Ministry of Justice."

Section 38

"A National Security Court may be transformed into a Martial-Law Court, under the conditions set forth below, where a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court…"

C. The Military Legal Service Act (Law no. 357)

21. The relevant provisions of the Military Legal Service Act are worded as follows:

Additional section 7

"The aptitude of military judges … appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Act and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members … shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

…"

Additional section 8

"Members … of the National Security Courts belonging to the Military Legal Service … shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence…"

Section 16(1) and (3)

"Military judges … shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces…

…

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors…"

Section 18(1)

"The rules governing the salary scales, salary increases and various personal rights of military judges … shall be as laid down in the provisions relating to officers."

Section 29

"The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

…

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

…

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file…"

Section 38

"When military judges … sit in court they shall wear the special dress of their civilian counterparts…"

D. Article 112 of the Military Criminal Code

22. Article 112 of the Military Criminal Code of 22 May 1930 provides:

"It shall be an offence, punishable by up to five years' imprisonment, to abuse one's authority as a civil servant in order to influence the military courts."

E. The Law of 4 July 1972 on the Supreme Military Administrative Court

23. Under section 22 the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Çıraklar applied to the Commission on 28 November 1991. He argued that in the absence of any reasonable suspicion of his having committed an offence, his arrest had not satisfied the requirements of Article 5 § 1 (c) of the Convention, and he said that he had suffered treatment contrary to Article 3 of the Convention while he was in police custody. He also complained, under Article 5 § 3, that he had not been brought "promptly" before a judge and, under Article 5 § 4, that he had not been able to take proceedings by which he could challenge the lawfulness of his police custody. He further alleged that, owing to the composition of the İzmir National Security Court, he had not had a hearing by an independent and impartial tribunal as required by Article 6 § 1. He considered, moreover, that there had been a breach of Article 6 § 2 and Article 8 on account of the fact that İzmir police headquarters had informed his father of his arrest and the reasons for it. He went on to submit that, contrary to Article 6 § 3 (c), he had not had a lawyer while in police custody and that the National Security Court's refusal to hear certain witnesses had been contrary to Article 6 § 3 (d). Lastly, he alleged a violation of Articles 9, 10 and 11 due to his criminal conviction for having taken part in a demonstration whose purpose had been to protest against the repression of Iraq's Kurdish population.

25. On 19 January 1995 the Commission declared the application (no. 19601/92) admissible as regards the impartiality and independence of the İzmir National Security Court and the fairness of the proceedings before that court. In its report of 20 May 1997 (Article 31), it considered those complaints jointly under Article 6 § 1 and expressed the opinion by thirty votes to one that there had been a violation of that provision. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

26. In his memorial the applicant requested the Court to hold that on account of its composition the İzmir National Security Court, which had heard his case, had not been an "independent and impartial tribunal" and that there had been a violation of Article 6 § 1 of the Convention as a consequence, and that the court's refusal to hear his girlfriend as a defence witness had infringed Article 6 § 3 (d). He also submitted that there had been violations of Articles 3 and 5 of the Convention.

27. The Government asked the Court to find that the applicant had not exhausted domestic remedies and to hold that there had been no violation of the Convention.

AS TO THE LAW

I. SCOPE OF THE CASE

28. Mr Çıraklar invited the Court to examine his case under Articles 3, 5 and 6 of the Convention. The Commission declared admissible only the complaints under Article 6 concerning the impartiality and independence of the İzmir National Security Court and the fairness of the proceedings before that court (see paragraph 25 above), and the scope of the case before the Court is determined by the Commission's decision on admissibility (see, the Van Orshoven v. Belgium judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1049, § 33). It follows that the scope of the present case is limited exclusively to the above-mentioned two complaints.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

29. As they had before the Commission, the Government maintained that as Mr Çıraklar had not applied to Principal State Counsel at the Court of Cassation in order to lodge an application for rectification of the judgment of 28 May 1991, as Article 322 of the Code of Criminal Procedure entitled him to do, he could not be regarded as having exhausted domestic remedies.

30. Before the Commission the applicant relied on the ineffectiveness of that procedure.

31. In its decision on the admissibility of the application the Commission dismissed the objection on the ground that the remedy in question was not "a domestic remedy directly accessible to the applicant".

32. The Court reaches the same conclusion. Parties cannot themselves lodge such an application with the Court of Cassation; they must submit an application for that purpose to Principal State Counsel at the Court of Cassation, who decides in his discretion whether or not to apply to the court. The objection must therefore be dismissed.

III. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

33. The applicant maintained that the İzmir National Security Court was not an "independent and impartial tribunal" and that it had wrongly refused to hear his girlfriend as a defence witness. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which provide:

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

A. Independence and impartiality of the İzmir National Security Court

1. Submissions of the participants

34. According to the applicant, the İzmir National Security Court could not be regarded as an "independent and impartial tribunal" within the meaning of Article 6 § 1 in that its three members included a military judge.

35. The Government maintained that the procedure for appointing the military judges who sat as members of the National Security Courts and the safeguards they enjoyed in the performance of their judicial duties satisfied the criteria laid down on the subject by the Court.

Those judges' answerability to their commanding officers and the rules governing their professional assessment did not in any way affect their independence. Their duties as officers were limited to obeying disciplinary regulations and observing military courtesies. They were safe from any pressure from their hierarchical superiors, as attempting to bring such pressure was punishable under the Military Criminal Code. The assessment system applied only to military judges' non-judicial duties. In addition, the judges had access to their assessment reports and could even challenge the content of them in the Supreme Military Administrative Court.

In the instant case, moreover, neither the colleagues or hierarchical or disciplinary superiors of the military judge in question nor the public authorities who had appointed him had had any connection with the parties to the trial.

36. In the Commission's view, the statutory rules governing the composition and functioning of the National Security Courts raised a number of questions about their independence, particularly as regards the system for appointing and assessing the military judges who sat in them. The participation of a military judge in criminal proceedings against a civilian showed the exceptional nature of such proceedings and could be interpreted as an intervention by the armed forces in the field of civil justice. The applicant's concerns about the National Security Court's lack of impartiality were therefore objectively justified and there had been a violation of Article 6 § 1.

2. The Court's assessment

37. The Court's task is to determine whether in the instant case the independence and impartiality of the İzmir National Security Court was questionable on account of the fact that its three members included a military judge.

38. The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, the Findlay v. the United Kingdom judgment of 25 February 1997, *Reports* 1997-I, p. 281, § 73).

As to the condition of "impartiality" within the meaning of that provision, there are two tests to be applied: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. It was not contested before the Court that only the second of these tests was relevant in the instant case. When applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. As in regard to independence, appearances may be of some importance; it follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important. It is not, however, decisive; what is decisive is whether the fear can be held to be objectively justified (see, for example, the Gautrin and Others v. France judgment of 20 May 1998, *Reports* 1998-III, pp. 1030–31, § 58).

In the instant case it is difficult to dissociate impartiality from independence and the Court will accordingly consider them together (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, p. 1571, § 65).

39. It is understandable that a civilian – such as Mr Çıraklar – prosecuted in a National Security Court for offences regarded *ipso facto* as directed against Turkey's territorial or national integrity, the democratic order or national security (Article 143 of the Constitution and section 1 of Law no. 2845 – see paragraphs 19 and 20 above) should be apprehensive about being tried by a bench of three judges which includes a regular army officer, who is a member of the Military Legal Service (see the Incal judgment cited above, p. 1573, § 72). Such mistrust does not, however, suffice for it to be held that there has been a violation of Article 6 § 1; regard must be had to the safeguards afforded to the applicant by the status of the military judges who sit in National Security Courts.

It is true that this status provides certain guarantees of independence and impartiality. For example, military judges undergo the same professional training as their civilian counterparts, which gives them the status of career members of the Military Legal Service. When sitting as members of National Security Courts, military judges enjoy constitutional safeguards identical to those of civilian judges; in addition, with certain exceptions,

they may not be removed from office or made to retire early without their consent (see paragraphs 19 and 20 above); as regular members of a National Security Court they sit as individuals; according to the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties (see paragraphs 19 and 22 above).

Other aspects of their status make it questionable, however. Firstly, the judges in question are servicemen who still belong to the army, which in turn takes its orders from the executive. Secondly, they remain subject to military discipline and assessment reports are compiled on them for that purpose (see paragraphs 19 and 20 above). Decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraph 21 above). Lastly, their term of office as National Security Court judges is only four years and can be renewed.

40. It follows that the applicant could legitimately fear that because one of the judges of the İzmir National Security Court was a military judge, it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, Mr Çıraklar's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel them (see the Incal judgment cited above, p. 1573, § 72 *in fine*).

41. In short, there has been a violation of Article 6 § 1.

B. The İzmir National Security Court's refusal to hear a defence witness

42. In the applicant's submission, the İzmir National Security Court's refusal to hear his girlfriend as a defence witness on the ground that she was a defendant in the same case had infringed Article 6 § 3 (d).

43. The Government did not make any submissions.

44. The Commission was of the view that "a court whose lack of independence and impartiality has been established cannot, in any circumstances, guarantee a fair trial to the persons subject to its jurisdiction".

45. Having regard to its finding that Mr Çıraklar's right to a fair hearing by an independent and impartial tribunal has been infringed, the Court considers that it is unnecessary to examine this complaint.

IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION

46. Article 50 of the Convention provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with

> the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

47. The applicant sought 262,000 French francs (FRF) for pecuniary damage and FRF 500,000 for non-pecuniary damage.

48. The Government invited the Court to dismiss that claim.

49. As Mr Çıraklar did not specify the nature of the pecuniary damage of which he complained, the Court cannot but dismiss the relevant claim. As to the alleged non-pecuniary damage, it is sufficiently compensated by the finding of a violation of Article 6 § 1.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Holds* by seven votes to two that there has been a violation of Article 6 § 1 of the Convention in respect of the complaint concerning the independence and impartiality of the İzmir National Security Court;
3. *Holds* unanimously that it is unnecessary to examine the complaint based on Article 6 § 3 (d) of the Convention;
4. *Holds* unanimously that this judgment in itself constitutes sufficient just satisfaction as to the alleged non-pecuniary damage;
5. *Dismisses* unanimously the remainder of the applicant's claim.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1998.

Signed: THÓR VILHJÁLMSSON
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the dissenting opinions of Mr Gölcüklü and Mr Lopes Rocha are annexed to this judgment.

Initialled: Th. V.
Initialled: H. P.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

I voted against the finding of a violation of Article 6 § 1 in respect of the applicant's complaint that the National Security Court which tried him had not been an "independent and impartial" tribunal on account of the fact that a military judge had sat on it.

Here are my reasons.

Having regard to the security situation in Turkey and the participation of the armed forces in the fight against terrorism, the Turkish authorities judged it necessary to set up "special" courts, the National Security Courts. This type of *specialised* court is found in certain areas of the law in all countries, for example commercial or industrial courts.

Secondly, since they are composed of two civil judges and one *professional military judge* with a legal training, the National Security Courts are not military courts strictly speaking but *civil courts* whose judgments can be overturned by the ordinary civil Court of Cassation.

In several cases the Court has recognised that a special court whose members include "experts" can be a "tribunal" within the meaning of Article 6 § 1. The domestic legislation of the Council of Europe's member States affords many examples of courts in which there sit, alongside professional judges, specialists in a given field whose special knowledge is desirable and even necessary for trying certain cases, so long as all the members of the court afford the necessary guarantees of independence and impartiality (see the following judgments of the European Court of Human Rights: Le Compte, Van Leuven and De Meyere v. Belgium, 23 June 1981, Series A no. 43; Ettl and Others v. Austria, 23 April 1987, Series A no. 117; and Barfod v. Denmark, 22 February 1989, Series A no. 149, pp. 10–11, § 18).

As to the military judge who is a member of the National Security Court, the judgment (in paragraph 39) describes the constitutional safeguards he enjoys, but goes on to say that certain features of his status make it questionable. I am not persuaded, however, by the conclusions which the Court has drawn from those features – the fact that the military judge remains subject to military discipline and that assessment reports are compiled on him for that purpose, that the administrative authorities and the army take decisions pertaining to his appointment and that his term of office as a National Security Court judge is only four years.

In this connection, I would like to point out that it is possible for civil judges to have assessment reports compiled on them, that they are subject to disciplinary rules, that the administration takes decisions pertaining to their appointment and that the Court has recognised as sufficient even terms of office of three years. To that I would add that being appointed as a military

judge of a National Security Court is not a favour and that at the end of their term of office as National Security Court judges, failing reappointment, the judges in question remain military judges for the whole of their career. In several cases the Court has held that neither a judge's term of office nor the existence of disciplinary rules are decisive factors vitiating a tribunal's independence and impartiality (see the following judgments: Campbell and Fell v. the United Kingdom, 28 June 1984, Series A no. 80, p. 40, § 80; Engel and Others v. the Netherlands, 8 June 1976, Series A no. 22, pp. 12–13, § 30).

It is possible that there should be serious doubts as to a tribunal's impartiality where one of its members has relations with parties to the case, as Mr Alkema, a member of the European Commission of Human Rights, noted in his dissenting opinion in the instant case. Indeed, in this case neither the military judge in question nor his colleagues or superiors nor the public authorities who had appointed him had any connection with the parties to the trial. The Court may be taken to have accepted that (see paragraph 35 *in fine*). Moreover, the applicant was arrested by the police, not by the armed forces, and was brought before the court by the ordinary legal procedures.

As to the argument that the court's composition might have caused the applicant to have doubts as to the impartiality and independence of the court in question, on account of the "appearances", I consider that in view of the constitutional safeguards enjoyed by the military judges, apprehensions on this score are not founded and cannot be regarded as objective.

To assert the contrary amounts to condemning the principle of having courts of mixed composition.

There is no basis for saying, as the majority do, that "the applicant could legitimately fear that because one of the judges of the İzmir National Security Court was a military judge, it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case" (see paragraph 40). By what right and on what point of fact can the Court state that the mere presence of a military judge (not a judge of the civil judiciary) necessarily has the effect that the judge in question will prompt the other two judges to reach an improper verdict? I regard that as a defamatory slur on both the two civil judges and the military judge.

DISSENTING OPINION OF JUDGE LOPES ROCHA

(*Translation*)

I voted in favour of finding that there had been no violation of the applicant's right to a hearing by an independent and impartial tribunal, for the reasons that I set out, together with several of my colleagues, in my dissenting opinion in the case of Incal v. Turkey (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV).