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

CASE OF GÖÇ v. TURKEY

(Application no. 36590/97)

JUDGMENT

STRASBOURG

11 July 2002

In the case of Göç v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Mr GAUKUR JÖRUNDSSON,
Mr G. BONELLO,
Mrs E. PALM,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr K. JUNGWIERT,
Mr J. CASADEVALL,
Mrs W. THOMASSEN,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 6 March and 22 May 2002,

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

PROCEDURE

1. The case originated in an application (no. 36590/97) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Mehmet Göç ("the applicant"), on 28 April 1997. The application was registered on 20 June 1997.

2. The applicant, who had been granted legal aid, was represented by Mr G. Dinç, a lawyer practising in İzmir (Turkey). The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Chamber which initially examined the case. They subsequently designated Mr M. Özmen as Agent when the case was referred to the Grand Chamber (see paragraph 7 below).

3. The applicant alleged that the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 5 and 6 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 6 April 2000 the application was declared partly admissible as regards the applicant's complaints under Article 6 of the Convention by a Chamber of that Section composed of Mr G. Ress, President, Mr A. Pastor Ridruejo, Mr L. Caflisch, Mr J. Makarczyk, Mr R. Türmen, Mr V. Butkevych, Mr J. Hedigan, judges, and Mr V. Berger, Section Registrar.

6. On 9 November 2000 the Chamber delivered its judgment in which it held, unanimously, that there had been a violation of Article 6 of the Convention with respect to the applicant's lack of opportunity to respond to the submissions of the Principal Public Prosecutor at the Court of Cassation. It also held, unanimously, that it was not necessary to examine separately the applicant's complaint concerning the absence of an oral hearing in the domestic proceedings. The Chamber further held that the above finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage allegedly sustained by the applicant and that the respondent State was to pay the applicant FRF 10,000 (ten thousand French francs), in respect of costs and expenses, together with any value-added tax that might be chargeable, to be converted into Turkish liras at the rate applicable at the date of settlement, less FRF 4,100 (four thousand one hundred French francs) received by way of legal aid to be converted into Turkish liras at the rate applicable on 9 November 2000. The separate opinion of Judges Makarczyk and Türmen was annexed to the judgment.

7. On 15 January 2001 the applicant requested, pursuant to Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber, maintaining that the Chamber should have addressed the merits of his complaint regarding the absence of an oral hearing in the domestic proceedings. On 12 February 2001 the Government also filed a request for referral on the basis of the same provisions, contending that the Chamber had erred in its approach to the issue of non-communication of the Principal Public Prosecutor's opinion and should not have found a violation of Article 6.

A panel of the Grand Chamber decided to refer the case to the Grand Chamber on 5 September 2001.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant and the Government filed memorials with the Registry on 12 November 2001 and 15 January 2002, respectively.

10. A hearing before the Grand Chamber took place in public in the Human Rights Building, Strasbourg, on 6 March 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *Agent*,
Mrs D. BULUTLAR ULUSOY, *Adviser*;

(b) *for the applicant*
Mr G. DINÇ, of the İzmir Bar, *Counsel*.

The applicant was also present.

The Court heard addresses by Mr Dinç, Mr Özmen and Mrs Bulutlar Ulusoy, and also their replies to questions from its individual members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. At the material time the applicant was employed as a clerk in the İzmir 2nd Court of Taxation. On 18 July 1995 the İzmir Civil Court of General Jurisdiction forwarded the name and workplace of the applicant to the İzmir public prosecutor's office, stating that the applicant was suspected of having stolen and falsified court documents relating to a decided divorce case.

12. On 25 July 1995 the office of the public prosecutor referred the case to the İzmir Security Directorate.

13. At 5.10 p.m. on 25 July 1995 the applicant was taken into police custody and detained at the İzmir Security Directorate. He was accused of the above offences. The applicant gave a statement in which he denied that he had been involved in the incident relating to the court's case file. The applicant later claimed that he was not permitted to contact his family or consult a lawyer and that he was insulted and beaten for two hours.

14. Two other suspects were also detained and statements were taken from them. A statement was also taken from A.B., a party to the divorce proceedings.

15. On 27 July 1995 an investigation record was drawn up for the applicant and the two other suspects. At 5 p.m. on the same day the applicant was released pursuant to the decision of the public prosecutor. The two other suspects were kept in custody.

16. In the evening of 27 July 1995, following his release, the applicant went to the İzmir State Hospital. He was subsequently granted four days' sick leave by his employer. The medical report prepared at the hospital

referred to the fact that the applicant was suffering from a common skin disease caused by the inflammation of the roots of his facial hair.

17. On 31 July 1995 the office of the public prosecutor of Karşıyaka decided not to bring charges against the applicant (*takipsizlik kararı*) for lack of evidence. The decision was served on the applicant on 19 August 1995.

18. The public prosecutor took a statement from the applicant on 28 August 1995. In his statement the applicant declared that he had applied to the Ministry of Justice to have proceedings brought against the individual who had reported him to the authorities.

19. On 29 August 1995 the public prosecutor decided not to bring charges against the person named by the applicant.

20. On 5 September 1995 the applicant filed a complaint under Law no. 466 with the Karşıyaka Assize Court (*Ağır Ceza Mahkemesi*) against the Treasury requesting 200,000,000 Turkish liras (TRL) by way of compensation for his detention between "24 and 27 July 1995". In the petition, the applicant's lawyer stated, *inter alia*, that the applicant, while in detention, had been tortured and ill-treated by being beaten and insulted for two hours and deprived of his right to contact his family and a lawyer. As a result of his injuries, the applicant had had to take four days' sick leave. Furthermore, the applicant's reputation had suffered. He did not rely on any specific section of Law no. 466.

21. On 14 September 1995 the three-judge Karşıyaka Assize Court appointed one of its members (*naip hakim*) to investigate the case and draft a report. The judge designated for this purpose verified, *inter alia*, that the office of the public prosecutor of İzmir had dropped the charges against the applicant. He also obtained information about the applicant's personal, financial and social status. The judge found that the evidence obtained was sufficient to enable him to draft his report and decided in the exercise of his discretion under section 3 of Law no. 466 that it was unnecessary to hear the applicant. The public prosecutor was asked for his written observations on the applicant's claim. On 7 December 1995 the public prosecutor, as required by Law no. 466, submitted his opinion to the Karşıyaka Assize Court. The public prosecutor noted that the applicant was taken into custody on 25 July 1995, and not on 24 July 1995 as claimed, and was released on 27 July 1995. The public prosecutor recommended that the applicant be granted compensation for non-pecuniary damage in an amount to be assessed by the court. This opinion was not served on the applicant.

22. The judge stated in his report of 7 December 1995 to the President of the Karşıyaka Assize Court, *inter alia*, that the applicant had been detained for two days from 25 July to 27 July 1995 and upon his release had obtained a medical report which indicated that he had been assaulted (*darp edildiği*). The judge noted that the applicant had been given four days' sick leave by his employer. He further observed that, at the time when he was taken into

custody, the applicant had been working in the İzmir 2nd Court of Taxation, had been paying TRL 3,000,000 in rent, was divorced and had two children. The judge concluded:

> "The complainant requested that he be granted the sum of TRL 200,000,000 in compensation. In determining the amount of compensation the court should consider both the complainant's economic and social position as well as the intensity of his emotional suffering. In the light of the above facts, I propose that the court grant the amount of compensation requested by the complainant."

23. On 7 December 1995 the Karşıyaka Assize Court found that the applicant had been detained for two days and qualified for compensation. In its judgment, the court took note of all the complaints set out in the petition lodged by the applicant's lawyer as well as the content of the judge's report and the written submissions of the public prosecutor (see paragraphs 21 and 22 above). The court concluded that

> "... at the time he was taken into custody, the applicant had been working in the İzmir Tax Court, had been paying TRL 3,000,000 in rent, and was divorced with two children. The complainant requested that the court award him TRL 200,000,000, including interest, for the non-pecuniary damage suffered. The court considers that, in determining the amount of compensation, it should have regard both to the complainant's economic and social position as well as the intensity of his emotional suffering. In the light of the above facts and having considered the above criteria, the court concludes that the sum of TRL 10,000,000 should be awarded to the complainant".

The court also awarded the applicant TRL 1,500,000 for his legal costs.

24. The applicant's lawyer and the Treasury both appealed against the award. The applicant's lawyer contended on appeal that the amount of compensation was insufficient reparation for his wrongful arrest and detention. He did not challenge the dates of detention as determined by the court. The Treasury considered that the amount awarded was excessive.

According to the relevant rules governing the functioning of the Court of Cassation in litigation of this nature, the case file at the Karşıyaka Assize Court was referred to the competent division of the Court of Cassation through the intermediary of the office of the public prosecutor at the Court of Cassation. On 17 October 1996 the Principal Public Prosecutor submitted his opinion on the merits of both parties' appeals. In his written opinion (*tebliğname*) to the Sixth Criminal Division of the Court of Cassation (*Yargıtay*), the Principal Public Prosecutor stated that, having regard to the first-instance proceedings, the evidence collected, the subject matter of the claim and the discretion of the first-instance court, neither of the parties had grounds for appeal. He advised that both appeals be rejected and that the first-instance judgment be approved, being in compliance with procedural rules and law.

This opinion was not submitted to the applicant.

25. On 7 November 1996 the Sixth Criminal Division of the Court of Cassation, having regard, *inter alia*, to the opinion of the Principal Public Prosecutor, upheld the judgment of 7 December 1995.

26. According to information submitted by the Government, the applicant never applied to obtain the compensation awarded to him by the Karşıyaka Assize Court.

II. RELEVANT DOMESTIC LAW

A. Proceedings concerning compensation for unlawful detention

27. Article 19 of the Constitution provides:

> "Everyone has the right to liberty and security of person.
>
> No one shall be deprived of his liberty save in the following cases and in accordance with the formalities and conditions prescribed by law:
>
> ...
>
> The arrested or detained person must be brought before a judge within forty-eight hours at the latest or, in the case of offences committed by more than one person, within fifteen days ... These time-limits may be extended during a state of emergency ...
>
> ...
>
> A person deprived of his liberty, for whatever reason, shall have the right to take proceedings before a judicial authority which shall give a speedy ruling on his case and order his immediate release if it finds that the deprivation of liberty was unlawful.
>
> Compensation must be paid by the State, as the law shall provide, for damage sustained by persons who have been victims of treatment contrary to the above provisions."

28. Under Article 128 of the Code of Criminal Procedure, an arrested person must be brought before a judge within twenty-four hours or, where the offence has been committed by more than one person, within four days.

29. Section 1 of Law no. 466 on the payment of compensation to persons arrested or detained provides:

> "Compensation shall be paid by the State in respect of all damage sustained by persons:
>
> (1) who have been arrested or detained under conditions or in circumstances incompatible with the Constitution or statute law;
>
> (2) who have not been immediately informed of the reasons for their arrest or detention;
>
> (3) who have not been brought before a judicial officer after being arrested or detained within the time-limit laid down by statute for that purpose;
>
> (4) who have been deprived of their liberty without a court order after the statutory time-limit for being brought before a judicial officer has expired;

(5) whose close family have not been immediately informed of their arrest or detention;

(6) who, after being arrested or detained in accordance with the law, are not subsequently committed for trial..., or are acquitted or discharged after standing trial; or

(7) who have been sentenced to a period of imprisonment shorter than the period spent in detention or ordered to pay a pecuniary penalty only."

30. By virtue of section 2 of Law no. 466, a claimant must apply for compensation to the local assize court within three months, setting out the facts complained of and indicating the amount claimed. The claim is lodged against the Treasury.

31. According to section 3 of the same Law**:**

"The competent court ... shall appoint one of its members upon the submission of the petition for compensation. The appointed member shall first examine whether the request was lodged within the statutory time-limit. Where the appointed member finds that the request was lodged within the statutory time-limit he shall collect all evidence including the case file and the judgment [concerning the criminal proceedings]. If necessary, he shall take oral evidence from the claimant. The appointed member shall transfer the case file to the office of the public prosecutor for his opinion after collecting all the evidence.

Upon the receipt of the public prosecutor's written opinion, the court shall give its decision without holding a hearing.

The petitioner has the right to lodge an appeal against the court's decision within one week after he is notified of this decision."

32. A claimant is entitled to seek compensation for both pecuniary and non-pecuniary damage arising from unlawful detention. A pecuniary claim must be documented. Non-pecuniary damage is awarded on the basis of the claimant's personal, financial and social status.

B. Appeals to the Court of Cassation under the Code of Civil Procedure

33. The relevant parts of Article 438 of the Code of Civil Procedure provide:

"The Court of Cassation shall examine the appeal without holding a hearing. The Court of Cassation shall notify the parties of the date of the oral hearing**,** if either of the parties requested a hearing in their petitions, in the following cases:

...

– in actions in which the amount requested is more than 200,000,000 Turkish liras.

..."

C. The law and practice concerning the submission of the opinion of the Principal Public Prosecutor to the Court of Cassation

34. In the Turkish legal system, when a judgment of a first-instance court is appealed, the case file is first sent to the Office of the Principal Public Prosecutor at the Court of Cassation. The Principal Public Prosecutor, who is independent of the executive and of the parties, submits an opinion (*tebliğname*) on the case to the competent division of the Court of Cassation.

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

THE LAW

I. PRELIMINARY ISSUE : THE SCOPE OF THE CASE BEFORE THE COURT

35. In his memorial and at the oral hearing the applicant contested the right of the Government to reopen the Chamber's finding that there had been a violation of Article 6 of the Convention on account of the fact that the opinion of the Principal Public Prosecutor had not been communicated to him. The applicant stressed in this connection that the Government had never made any submissions on this issue at any stage of the proceedings before the Chamber. To allow the Government to do so at this juncture would, he maintained, amount to an abuse of the procedure under Article 43 of the Convention.

36. The Court does not accept the applicant's submission. As the Court has already had occasion to observe, the wording of Article 43 makes it clear that, whilst the existence of "a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance" (paragraph 2) is a prerequisite for acceptance of a party's request, the consequence of acceptance is that the whole "case" is referred to the Grand Chamber to be decided afresh by means of a new judgment (paragraph 3). This being so, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, the scope of its jurisdiction in that "case" being delimited solely by the Chamber's decision on admissibility. In sum, there is no basis for a merely partial referral of the

case to the Grand Chamber (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 139-41, ECHR 2001-VII).

37. The Court will accordingly examine both of the Article 6 complaints which were declared admissible by the Chamber and formed the subject matter of its judgment.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. As before the original Chamber, the applicant maintained that his right to a fair and public hearing was breached on two counts: firstly, he was never afforded a public hearing in the determination of his compensation claim; secondly, he was never given an opportunity to reply to the written opinion which the Principal Public Prosecutor submitted to the Court of Cassation on the merits of his appeal. He requested the Court to find that both these failings violated Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

39. The Government urged the Court to reject the applicant's submissions.

A. Applicability

40. At the oral hearing, the Government questioned the applicability of Article 6 to the proceedings instituted by the applicant at the domestic level. They contended that the award of compensation to a victim of unlawful detention is of a "statutory and *sui generis* nature" based on the objective liability of the State. Once the domestic court had confirmed that the detention had been unlawful, compensation automatically followed. Accordingly the applicant's claim under Law no. 466 could not be considered a "civil right" within the meaning of Article 6.

41. The Court notes that the Government never pleaded this argument at any stage of the proceedings before the Chamber. Obviously for this reason the Chamber observed in paragraph 30 of its judgment that "it has not been disputed that the case concerns a 'civil right' ...". In the Grand Chamber's opinion, and notwithstanding Rule 55 of the Rules of Court, the Government are not precluded from raising this issue at this juncture given that it was implicitly reserved by the Chamber to the merits stage and, accordingly, forms part of the case which has been referred to it under Article 43.

The Court does not accept however the Government's contention that there was no "civil right" at stake. According to its case-law, the concept of "civil rights and obligations" cannot be interpreted solely by reference to the

domestic law of the respondent State, but must be considered "autonomous" within the meaning of Article 6 § 1 of the Convention (see, among other authorities, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, pp. 29-30, §§ 88-89, and *Baraona v. Portugal*, judgment of 8 July 1987, Series A no. 122, pp. 17-18, § 42; for a recent confirmation of the relevant principles, see *Ferrazzini v. Italy* [GC], no. 44759/98, § 24, ECHR 2001-VII).

For the Court, regardless of the statutory nature of the compensation scheme at issue and its administration on a no-fault basis, the proceedings taken by the applicant involved a dispute with the Treasury over the amount of compensation which should be awarded to him under Law no. 466. It cannot be denied that a "right" to compensation arose in the circumstances, having regard to the clear language of the provisions of Law no. 466 and to the domestic authorities' finding that the applicant had been detained for two days before being released without charge (see paragraph 23 above). The award of compensation was not at the discretion of the domestic court once it was established that the statutory conditions had been fulfilled (see *Masson and Van Zon v. the Netherlands*, judgment of 28 September 1995, Series A no. 327-A, p. 19, § 51). Indeed, the Government have not disputed that the applicant had a right to compensation in the circumstances (see paragraph 40 above). As to whether that right was a "civil" right within the meaning of Article 6, it is sufficient, in a case of this nature involving a claim under a statutory compensation scheme, that the subject matter of the applicant's action was pecuniary and that the outcome of the domestic proceedings was decisive for his right to compensation (see, *mutatis mutandis* and as regards similar statutory compensation schemes, *Georgiadis v. Greece* judgment of 29 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 958-59, §§ 30-35, and *Werner v. Austria*, judgment of 24 November 1997, *Reports* 1997-VII, p. 2508, § 38).

42. Article 6 § 1 of the Convention is accordingly applicable in the instant case.

B. Compliance

1. Absence of an oral hearing in the domestic proceedings

43. The applicant stressed that no provision is made in Law no. 466 for an oral hearing to be held either before the assize court or, on appeal, before the Court of Cassation. However, a hearing was warranted in his case. He was unlawfully deprived of his liberty and had had to spend three days in police custody, during which time he was ill-treated. He was never given the opportunity to explain orally to a court in the context of an adversarial procedure the injustice which had been done to him and to his family. According to the applicant, had he been given the opportunity to state his

case to the domestic courts, they would have been persuaded of the reality of the suffering which he and his family endured and of the harm caused to his reputation. In the event, he was awarded a derisory amount of compensation.

In the applicant's submission, the fact that his compensation claim was decided without an adversarial and oral procedure cannot be considered conducive to the public's confidence in the administration of justice.

44. The Government contended that the applicant's claim could be dealt with expeditiously on the basis of the case file alone. The only issue before the domestic courts was the amount of compensation to be awarded to him. The facts of the case, including the length of the detention, and the legal provisions to be applied were clear. Significantly, the applicant did not on appeal seek to adduce any new evidence in his favour, simply confining himself to a request for increased compensation. In the absence of any exceptional circumstances, and the applicant had not alluded to any, an oral hearing was not required. Furthermore, had the domestic courts taken the view that the applicant's claim raised important public-interest considerations, a hearing could have been organised. Quite apart from this possibility, there was nothing to prevent the applicant under the Code of Criminal Procedure from requesting a public hearing before the Court of Cassation or from relying on Article 438 of the Code of Civil Procedure in order to request a hearing before that instance (see paragraph 33 above).

The Government stated that Law no. 466 was intended to provide a speedy means for dealing with compensation claims without the expense and delay of an oral hearing. The legislative scheme was thus consistent with the trend in European countries towards arbitration and mediation in the context of minor disputes and the move away from oral hearings. The Government endorsed the reasons given by Judges Makarczyk and Türmen in their separate opinion, reasons which, they maintained, were firmly supported by the Court's case-law in this area.

45. At the oral hearing, the applicant disagreed with the Government's assertion that he could have relied on Article 438 of the Code of Civil Procedure as a basis for a request for an oral hearing.

46. The Chamber considered that it was unnecessary to rule on the merits of this complaint since it had concluded that the facts of the case disclosed a breach of the applicant's right to an adversarial procedure. The Grand Chamber, for its part, considers that the two complaints raised by the applicant under Article 6 are distinct and thus merit separate consideration. It is true that the complaints, taken separately, each amount to a criticism of the fairness of the domestic proceedings within the meaning of paragraph 1 of that Article. However, given the fundamental nature of the right to a public hearing, of which the right to an oral hearing is one aspect, the Court is of the view that the applicant's complaint under this head cannot be taken to be absorbed by a finding that his right to an adversarial procedure was

breached. The complaint should therefore be considered separately on its merits, the more so as it was the applicant's principal complaint under Article 6.

47. According to the Court's established case-law, in proceedings before a court of first and only instance the right to a "public hearing" in the sense of Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 64; *Fredin v. Sweden (no. 2)*, judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; and *Allan Jacobsson v. Sweden (no. 2)* judgment of 19 February 1998, *Reports* 1998-I, p. 168, § 46).

48. The Court observes that the applicant's claim was examined by the Karşıyaka Assize Court and then on appeal by the competent division of the Court of Cassation. At no stage was he afforded an opportunity to state his case orally before the domestic courts. Although the Government contend that the applicant could have requested the Court of Cassation under Article 438 of the Code of Civil Procedure to hold a hearing, it is not persuaded that any such request would have had any prospects of success. The Court notes that, although the applicant's claim was civil in nature, the relevant procedure would appear to be governed by the provisions of the Code of Criminal Procedure with jurisdiction entrusted to the criminal courts. Even assuming that Article 438 of the Code of Civil Procedure could have provided the basis for a request for a hearing before the Court of Cassation, the crucial issue is whether the applicant should have been afforded an oral hearing before the Karşıyaka Assize Court, the tribunal which was responsible for establishing the facts of the case and assessing the amount of compensation to be awarded to the applicant. To the extent that the Government imply this, the applicant cannot be considered to have waived his right to an oral hearing by failing to request one before the Court of Cassation since that court did not have full jurisdiction to substitute its own view of the amount of compensation which should be awarded to the applicant for that of the first-instance court (see, *mutatis mutandis*, *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, p. 15, § 34).

49. Having regard to the above considerations, the Court will examine whether there were any exceptional circumstances which justified dispensing with an oral hearing on the applicant's compensation claim.

50. It notes that the Karşıyaka Assize Court had a discretion as to the amount of compensation to be awarded to the applicant once it had been established that his case came within one of the grounds contained in section 1 of Law no. 466 (see paragraph 29 above). The Government have not contended that the Karşıyaka Assize Court made its award with reference to a fixed scale of compensation based solely on the number of

days spent in detention before release. On the contrary, the Karşıyaka Assize Court took note of all the complaints set out in the petition lodged by the applicant's lawyer and had regard to a series of personal factors, namely the financial and social status of the applicant and, in particular, the extent of the emotional suffering which he endured during the period of his detention (see paragraph 23 above).

51. While it is true that the fact of the applicant's detention and the length of that detention as well as his financial and social status could be established on the basis of the report drawn up by the judge rapporteur and without the need to hear the applicant (see paragraph 22 above), different considerations must apply to assessment of the emotional suffering which the applicant alleged he endured. In the Court's opinion, the applicant should have been afforded an opportunity to explain orally to the Karşıyaka Assize Court the moral damage which his detention entailed for him in terms of distress and anxiety. The essentially personal nature of the applicant's experience, and the determination of the appropriate level of compensation, required that he be heard. It cannot be said that these matters are technical in nature and could have been dealt with properly on the basis of the case file alone. On the contrary, the Court considers that the administration of justice and the accountability of the State would have been better served in the applicant's case by affording him the right to explain his personal situation in a hearing before the domestic court subject to public scrutiny. In its view, this factor outweighs the considerations of speed and efficiency on which, according to the Government, Law no. 466 is based.

52. For the above reasons, the Court finds that there were no exceptional circumstances that could justify dispensing with an oral hearing and accordingly Article 6 § 1 of the Convention has been breached.

2. Non-communication of the Principal Public Prosecutor's submissions

53. The applicant insisted that the role of the Office of the Principal Public Prosecutor cannot be said to be a purely administrative one limited to the verification and technical transmission of the case file to the Court of Cassation, as claimed by the Government. The applicant maintained that the fact that the Principal Public Prosecutor's opinion was accessible to the parties before the Court of Cassation should not be given any decisive weight. In the first place, domestic law did not regulate the stage at which the opinion was to be submitted to the Court of Cassation or how long the case file rested with the first-instance court before it was transferred to the Court of Cassation for the Principal Public Prosecutor's attention. It was also impossible to discover the date on which the competent division of the Court of Cassation considered the opinion and took a decision. These factors, along with the physical distance between İzmir, where the applicant lives, and Ankara, where the court was based, undermined the accessibility argument. The applicant also pointed out that this general ambiguity in the procedure was further compounded by the fact that nothing was stated in Turkish law about the non-participation of the Principal Public Prosecutor in the deliberations of the divisions of the Court of Cassation. For the applicant, what was decisive was that the relevant division of the Court of Cassation read the opinion and rejected his appeal in accordance with the Principal Public Prosecutor's recommendation.

54. The Government stressed that the opinion of the Principal Public Prosecutor on a case appealed to the Court of Cassation was not binding on the division to which the case had been assigned and that division was free to dispose of the appeal independently of the Principal Public Prosecutor's opinion. The opinion took the form of a one-page document in which the Principal Public Prosecutor, whose office is independent of the executive and of the parties to the litigation, indicated his view on whether the first-instance decision should be quashed or upheld.

In the applicant's case, the Principal Public Prosecutor advised that the division should reject both the applicant's and the Treasury's appeals against the first-instance judgment. Accordingly, his opinion could not be said to have breached the principle of respect for equality of arms between the opposing parties. The fact that he did not advise the division to increase the award was due to his role in maintaining uniformity of awards in this area. Furthermore, the Principal Public Prosecutor was not entitled to attend the division's deliberations. Thus, he could have had no influence on the decision reached. The Government further maintained with reference to Article 320 of the Code of Criminal Procedure that the applicant could at any stage have access to the Principal Public Prosecutor's opinion since it was included in the case file before the division of the Court of Cassation. It

would have been open to the applicant to file an additional appeal petition in response to the opinion. The Government considered that their argument found support in the Court's judgment of 7 June 2001 in *Kress v. France* ([GC], no. 39594/98, ECHR 2001-VI).

55. The Court sees no reason to depart from the Chamber's finding that Article 6 § 1 was violated on account of the non-communication to the applicant of the Principal Public Prosecutor's opinion to the competent division of the Court of Cassation. In its judgment, the Chamber reasoned:

> "33. The Court observes that the role of the Principal Public Prosecutor before the Court of Cassation was to advise on the merits of the appeals brought by the applicant and the Treasury. The Principal Public Prosecutor submitted in writing his view that the award of damages made by the first-instance court should be upheld. His opinion was accordingly intended to influence the outcome of the Court of Cassation's decision.
>
> 34. In the Court's opinion, having regard to the nature of the Principal Public Prosecutor's submissions and to the fact that the applicant was not given an opportunity to make written observations in reply there has been an infringement of the applicant's right to adversarial proceedings. That right means in principle the opportunity for the parties to a civil or criminal trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, such as the Principal Public Prosecutor in the instant case, with a view to influencing the court's decision (see, among many other authorities, *J.J. v. the Netherlands*, judgment of 27 March 1998, *Reports* 1998-II, p. 613, § 43).
>
> 35. It is true that the Principal Public Prosecutor also advised in favour of the rejection of the Treasury's appeal. However, while this neutral approach may have ensured equality of arms between the parties at the appeal stage it still remained the case that the applicant disputed the amount of damages awarded by the lower court. He was therefore entitled to have full knowledge of any submissions which undermined his prospects of success before the Court of Cassation.
>
> ..."

56. In endorsing this reasoning, the Court disagrees with the Government's view that its ruling in *Kress*, cited above, taken together with their argument regarding the accessibility of the Principal Public Prosecutor's opinion should lead to a different conclusion. In *Kress* the Court reaffirmed its case-law on the scope of the right to an adversarial procedure in circumstances where the submissions of an independent legal officer in a civil or criminal case are not disclosed in advance to the parties and the latter have no possibility of replying to them. The Court referred in this judgment (ibid., §§ 64-65), among other authorities, to *J.J. v. the Netherlands* relied on by the Chamber in its reasoning. Although it is true that the Court found no violation of Article 6 § 1 on the facts in *Kress*, it must be stressed that the circumstances of the instant case are different. In *Kress*, the Court noted that the Government Commissioner made his submissions for the first time orally at the public hearing of a case before the *Conseil d'Etat* and that the parties to the proceedings, the judges and the

public all learned of their content and the recommendation made in them on that occasion (ibid., § 73). Furthermore, in *Kress* it was not contested that a lawyer who so wishes can ask the Government Commissioner, before the hearing, to indicate the general tenor of his submissions and reply to the Commissioner's submissions by means of a memorandum and in the event of the latter raising orally at the hearing a ground not raised by the parties the presiding judge would adjourn the case to enable the parties to reply (ibid., § 76). However, these safeguards were absent in the instant case given that the Court of Cassation considered the parties' grounds of appeal without holding an oral hearing.

57. As to the argument that the applicant could have consulted the case file at the Court of Cassation and obtained a copy of the Principal Public Prosecutor's opinion, the Court is of the view that this of itself is not a sufficient safeguard to ensure the applicant's right to an adversarial procedure. In its view, and as a matter of fairness, it was incumbent on the registry of the Court of Cassation to inform the applicant that the opinion had been filed and that he could, if he so wished, comment on it in writing. It appears to the Court that this requirement is not secured in domestic law. The Government have contended that the applicant's lawyer should have known that consultation of the case file was possible as a matter of practice. However, the Court considers that to require the applicant's lawyer to take the initiative and inform himself periodically on whether any new elements have been included in the case file would amount to imposing a disproportionate burden on him and would not necessarily have guaranteed a real opportunity to comment on the opinion since he was never made aware of the timetable for the processing of the appeal (see, *mutatis mutandis*, *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, pp. 27-28, § 67). It notes in this connection that the opinion was drawn up on 17 October 1996 and submitted to the competent division on 21 October 1996 along with the case file. The division reached its decision on 7 November 1996.

58. Having regard to the above considerations, the Court, like the Chamber, finds that Article 6 § 1 has been violated on account of the non-communication to the applicant of the Principal Public Prosecutor's opinion.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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

60. In the proceedings before the Chamber, the applicant claimed 50,000 French francs (FRF) (7,622.45 euros (EUR)) by way of compensation for non-pecuniary damage. The Chamber considered that a finding of a violation of Article 6 as regards the non-communication of the Principal Public Prosecutor's opinion constituted in itself sufficient just satisfaction.

61. At the hearing, the Government stated that should the Court conclude that there has been a breach of Article 6 on one or both of the grounds relied on by the applicant, that finding should in itself afford sufficient just satisfaction. In their view, the amount claimed was excessive having regard to the financial and social status of the applicant and the economic conditions in Turkey.

62. The Court has found that Article 6 of the Convention has been violated on account of the absence of an oral hearing in the domestic proceedings and the non-observance of the applicant's right to an adversarial procedure. Deciding on an equitable basis, the Court awards the applicant the sum of EUR 2,000.

B. Costs and expenses

63. In the proceedings before the Chamber, the applicant claimed the sum of FRF 13,500 (EUR 2,058.06) under this head. The Chamber awarded him FRF 10,000 (EUR 1,524.49) less the sum of FRF 4,100 (EUR 625.04) received by way of legal aid from the Council of Europe.

As regards the Article 43 proceedings, he claimed an additional FRF 25,000 (EUR 3,811.23). According to the applicant, this claim comprised FRF 20,000 (EUR 3,048.98) incurred by way of legal costs and FRF 5,000 (EUR 762.45) spent on matters such as translation and secretarial services. The applicant's legal-aid certificate continued in force for the purposes of the Article 43 proceedings and he was awarded EUR 2,012.93 to this end.

64. Deciding on an equitable basis, the Court awards the applicant the sum of EUR 4,500 less EUR 2,637.97 received by way of legal aid for the purposes of the entire Convention proceedings.

C. Default interest

65. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the applicant's argument that the Government should be considered precluded from making submissions on the issue of the non-communication of the opinion of the Principal Public Prosecutor and *reaffirms* that its jurisdiction extends to all aspects of the application previously examined by the Chamber in its judgment;

2. *Holds* by nine votes to eight that there has been a violation of Article 6 § 1 of the Convention on account of the absence of an oral hearing in the domestic proceedings;

3. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention on account of non-communication to the applicant of the opinion of the Principal Public Prosecutor;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, the following amounts plus any value-added tax that may be chargeable, to be converted into Turkish liras at the date of settlement:
      (i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 4,500 (four thousand five hundred euros) less EUR 2,637.97 (two thousand six hundred and thirty-seven euros ninety-seven cents) received by way of legal aid in respect of costs and expenses;
   (b) that simple interest at an annual rate of 4.26 % shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 July 2002.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Mr Wildhaber, Mr Costa, Mr Ress, Mr Türmen, Mr Bîrsan, Mr Jungwiert, Mr Maruste and Mr Ugrekhelidze;

(b) partly dissenting opinion of Mr Ress joined by Mr Maruste.

L.W.
P.J.M

JOINT PARTLY DISSENTING OPINION OF JUDGES WILDHABER, COSTA, RESS, TÜRMEN, BÎRSAN, JUNGWIERT, MARUSTE AND UGREKHELIDZE

(Translation)

We disagree with our colleagues on one point: we find no violation of Article 6 § 1 of the Convention on account of the lack of a hearing during the domestic proceedings, for several reasons.

In the first place, the Court's case-law has never required oral proceedings in all circumstances. In many trials a written procedure may be sufficient, for example, where a litigant has expressly or tacitly waived his entitlement to a hearing, or where the dispute does not raise any public-interest issues making oral submissions necessary, or, when there is only one level of jurisdiction – which is not the case here – in exceptional circumstances. Relevant authorities include *Håkansson and Sturesson v. Sweden* (judgment of 21 February 1990, Series A no. 171-A, pp. 20-21, § 67), which concerned a dispute over the lawfulness of a sale; *Schuler-Zgraggen v. Switzerland* (judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58), concerning an appeal to the Federal Insurance Court about an invalidity pension; *Allan Jacobsson v. Sweden (no. 2)* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 169, § 49), concerning an appeal to the Supreme Administrative Court, ruling at first and last instance, against a refusal of planning permission; and the inadmissibility decision of 25 April 2002 (Third Section) in *Lino Carlos Varela Assalino v. Portugal* (no. 64336/01), concerning an application for a will to be declared null and void and for a declaration of unworthiness to inherit.

That case-law lays down three criteria for determining whether there are "exceptional circumstances" which justify dispensing with a public hearing: there must be no factual or legal issue which requires a hearing; the questions which the court is required to answer must be limited in scope and no public interest must be at stake. In the present case these three conditions were satisfied.

Secondly, Mr Göç, who had been held in police custody for forty-eight hours, claimed compensation under Law no. 466 on the payment of compensation to persons unlawfully arrested or detained. Law no. 466, which imposes a strict-liability rule on the State, provides for compensation to be paid to the victim for the pecuniary and non-pecuniary damage resulting from his unlawful detention. The claim must be accompanied by the relevant documents and the quantum depends on the complainant's financial and social situation. There is no more to the procedure than that. Admittedly, the applicant did allege in addition before our Court that he had been the victim of ill-treatment, but that complaint was declared

inadmissible in the Chamber's decision of 9 November 2000, and in any event Law no. 466 does not constitute a legal basis for an award of compensation for ill-treatment by the Turkish authorities. Such a claim should have been submitted to the civil courts in the context of civil proceedings. Consequently, the Karşıyaka Assize Court had to settle a very simple dispute, in that it needed to do nothing more than assess the amount of compensation to be awarded to Mr Göç, on the basis of the file alone. That was a technical exercise which could be completed in the light of the sums awarded in previous cases. And there was nothing to prevent the applicant from submitting his arguments in support of his claim to the Assize Court in writing.

Thirdly, the Assize Court meticulously established the facts of the case on the basis of the reporting judge's report. It is significant that the applicant, in his appeal to the Court of Cassation, did not contest the facts as established by the Assize Court – the court of first instance – nor did he raise any point of law, restricting himself to complaining of the amount he had been awarded.

Fourthly, Mr Göç's claim was dealt with expeditiously, in keeping with the rationale of Law no. 466, which set up a fast-track procedure for settling claims of this nature. Requiring domestic courts to hold a hearing every time a claim raising no particular problems is submitted to them might practically frustrate the objective of complying with the "reasonable time" requirement in Article 6 § 1 of the Convention. Moreover, the Rules of our own Court provide that it may dispense with a hearing if it does not need one; in practice, it actually does so more often than not in Chamber cases. Otherwise, it would be in great danger of failing to rule within a reasonable time, or indeed of being paralysed, and it is not desirable for the European Court of Human Rights to require domestic courts to do what it cannot impose on itself.

Fifthly, the hearing which the reporting judge is empowered to hold by section 3 of Law no. 466 has all the characteristics of a public hearing, in that both parties, that is to say the claimant and the Treasury representative, are present and the hearing is open to the public. In the present case the reporting judge saw no reason to hold such a hearing, nor did the claimant ask for one. Seeing that no public interest made oral submissions necessary in what was a purely technical matter, and without wishing to question the applicant's good faith, we think that that implicit waiver, which was nevertheless unequivocal within the meaning of the judgments cited above, makes his complaint of the lack of a hearing somewhat artificial.

We wish to conclude with a more general observation. The case-law requirement of "exceptional circumstances", referred to in paragraph 47 of the judgment, for a decision to dispense with a hearing before a court ruling

at first and last instance, is in our opinion questionable. Such reasoning is too simple to be applied to complex legal situations. It would be more appropriate to say that the circumstances should be *typical* for certain types of procedure, like the specifically regulated compensation procedure which was at issue in the present case, in which a hearing is not *normally* required. In this typical procedure the balance between individual interests and the public interest has already been taken into account in the establishment of the procedural rules as such. It is only in more exceptional situations that the need for an oral hearing has to be shown. The method of solving legal problems by "type", that is to say by introducing, on the basis of a careful assessment of the competing interests, a specific procedure which normally does not call for a hearing, is one of the classic methods for the solution of problems of a more or less technical nature.

All in all, while understanding the reasoning of the majority, we were regretfully unable to subscribe to it.

PARTLY DISSENTING OPINION OF JUDGE RESS JOINED BY JUDGE MARUSTE

1. The reasoning in the judgment of the original Chamber was based on the idea that the violation of the right to an adversarial procedure also covers the lack of an oral hearing. The Grand Chamber nevertheless takes the view, like the two dissenting Judges Makarczyk and Türmen in the Chamber judgment, that the two complaints are distinct and therefore require separate consideration (see paragraph 46 of the judgment). In my view, it is the right to an adversarial procedure which is fundamental to a fair trial, regardless of whether this right is guaranteed by an oral hearing or a written procedure. A violation of the right to an adversarial procedure in the instant case will therefore normally cover other violations resulting from the same procedure, as was held in the original Chamber's judgment. Nevertheless, and on further reflection, I would not exclude that there may be cases where the lack of an oral hearing cannot be covered by a finding of a violation of the right to an adversarial procedure, regardless of whether or not an oral hearing in the specific case is really necessary. The Court takes the view that "given the fundamental nature of the right to a public hearing, of which the right to an oral hearing is one aspect, ... the applicant's complaint under this head cannot be taken to be absorbed by a finding that his right to an adversarial procedure was breached" (see paragraph 46 of the judgment). In my opinion, the starting-point should be the fundamental nature of the right to an adversarial procedure of which the right to be heard, be it in an oral or written procedure, is one of the basic aspects. This different perspective may also explain the difference between the approaches taken by the original Chamber and the Grand Chamber.

2. In the circumstances of the present case, an oral hearing was not necessary. To that extent, I have joined and contributed to the opinion of the other judges in their partly dissenting opinion.