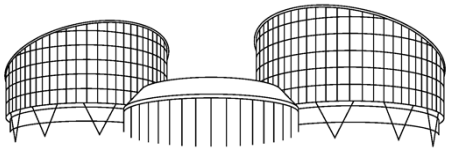

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MEHMET ZEKİ ÇELEBİ v. TURKEY

(Application no. 27582/07)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Use at trial of pre-trial self-incriminatory statements given in absence of a lawyer • Systemic restriction on access to a lawyer during pre-trial stage not counterbalanced by relevant procedural safeguards • Confirmation of impugned statements at trial not discharging domestic courts from duty to remedy the prejudice caused to overall fairness of the proceedings

STRASBOURG

28 January 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mehmet Zeki Çelebi v. Turkey,

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

Robert Spano, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Saadet Yüksel, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 7 January 2020,

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

PROCEDURE

1. The case originated in an application (no. 27582/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Mehmet Zeki Çelebi ("the applicant"), on 21 June 2007.

2. The applicant was represented by Mr M. Erbil, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged that the criminal proceedings against him had been unfair on account of the statutory restriction on his right to a lawyer while in police custody in accordance with Law no. 3842 and the subsequent use by the trial court of his statements taken without a lawyer present to convict him.

4. On 23 January 2018 notice of the above complaints was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1973 and lives in Van.

6. On 23 July 1999 the applicant was arrested on suspicion of membership of a terrorist organisation, namely the PKK (Workers' Party of Kurdistan).

7. On 26 July 1999 the applicant was questioned by the police and gave statements without a lawyer present. The applicant first gave an account of how he had joined the illegal organisation and then provided details about the following three acts: so-called "taxation activities", meaning collection of money on behalf of the illegal organisation through coercion; opening fire on a police armoured vehicle during a demonstration organised in the aftermath of Abdullah Öcalan's arrest; and the killing of M.Y.

8. As to the "taxation activities", the applicant stated that he had threatened a person named M.K., the owner of a furniture store located in the Esenyurt district of Istanbul, with a view to taking 1,000 German marks (DEM) from him. When M.K. had been able to hand over only DEM 25, the applicant had told him that he would come back for the remainder. Subsequently, the applicant had handed that money over to another member of the PKK. The applicant had also gone to a bakery with a gun and asked for money on behalf of the terrorist organisation. The bakery owner's son had given him DEM 2,500, which he had then delivered to another member of the organisation. Likewise, the applicant had also threatened A.K., who had been involved in the construction business, and collected 1,500 United States dollars from him. He had also attempted to collect money from three other people, but they had not given him anything. Together with those, the applicant gave detailed explanations about a total of six incidents of extortion.

9. As regards opening fire on the police vehicle, the applicant stated that he had participated in the demonstration to protest against Abdullah Öcalan's arrest together with R.B. (who was the applicant in *Ruşen Bayar v. Turkey*, no. 25253/08, 19 February 2019) and Ma.Y., who had opened fire on a police armoured vehicle.

10. Lastly, in relation to the murder of M.Y., the applicant maintained that certain other members of the organisation had abducted M.Y. with a view to questioning him after having heard that he had tried to collect money on behalf of the organisation without their permission. Another member, Ma.Y., had told the applicant that they should go to the house where M.Y. was being held to act as lookouts. The applicant had gone to that house but he had later been sent to A.Y.'s shop to wait for R.B., who had not come. The next day at around 11 a.m. the applicant had once again gone to the house where M.Y. was being held, but he had again been sent to A.Y.'s shop to wait for R.B., who had not come. Later on, R.B. had gone to the house with another member of the organisation with the code name "Ezgi-Ayşe" and had continued questioning M.Y. When "Ezgi-Ayşe" had told R.B. that the house had been discovered, they had decided to move M.Y. to another house, in the course of which M.Y. had tried to run away.

As a result, he had been killed by R.B. or Ma.Y. The applicant maintained that this had been told to him by Ma.Y., but that he had not asked them who had killed M.Y. The applicant also stated that after this incident he had become estranged from the organisation and had decided to leave it.

11. On 26 July 1999 the applicant participated in a reconstruction of the events (*yer gösterme*). According to the record drafted by police officers and signed by the applicant, the latter showed the workplace of co-defendant Ma.Y. to the police officers. During a search of Ma.Y.'s workplace, three unlicensed guns of 7.65 mm calibre and corresponding ammunition were found.

12. On 30 July 1999 the applicant took part in an identification parade and three of the four complainants identified him as the person who had asked for money from them on behalf of the terrorist organisation.

13. On the same day M.K. gave statements to the police in his capacity as a complainant, stating that the applicant had come to his workplace together with another person approximately one and a half months before and had asked for money from him on behalf of the terrorist organisation by threatening him.

14. On 31 July 1999 the applicant participated in an identification parade and identified Ş.A., M.H., Ma.Y. and F.A. as people who had carried out activities on behalf of the terrorist organisation. The other suspects, namely Ş.A., M.A., M.H. and A.K. identified the applicant as a member of the organisation.

15. On 1 August 1999 the applicant was brought before the public prosecutor, to whom he made statements without a lawyer present. The applicant told the public prosecutor that most of his statements to the police had not been correct, alleging that the police had made him sign whatever they had written, as he was illiterate. However, the applicant admitted that he had threatened certain individuals in order to collect money on behalf of the terrorist organisation and acknowledged three incidents of extortion. He also denied the allegation that he had been involved in an armed attack. The applicant further stated that he did not know how M.Y. had been killed and denied having taken part as a lookout, arguing that he had learned of the killing from newspapers.

16. On the same day the applicant was questioned by the investigating judge at the Istanbul State Security Court without a lawyer present, when he accepted the content of his statements to the public prosecutor. When asked whether he accepted his statements to the police, the applicant denied them, stating that he was illiterate and that the police had not read out the content of his statements. He also told the court that he had been beaten at the police headquarters. At the end of the questioning, the judge ordered his pre-trial detention.

17. On 10 August 1999 the public prosecutor at the Istanbul State Security Court lodged a bill of indictment with that court against the

applicant and four other persons, charging the applicant with membership of an illegal organisation, attempted extortion (3 counts) and extortion (3 counts) under Articles 61, 495 § 1 and 168 § 2 of the former Criminal Code. The acts attributed to the applicant were, *inter alia*, as follows: collection of money on behalf of the illegal organisation through coercion, opening fire on a police armoured vehicle during a demonstration organised in the aftermath of Abdullah Öcalan's arrest, and the killing of M.Y.

18. At a hearing held on 22 November 1999, the applicant gave evidence in person and without a lawyer present. He denied all the charges against him and pleaded not guilty. He also denied all his previous statements.

19. As of the hearing held on 31 July 2000, the lawyer M.E. represented the applicant. He applied for the applicant's release, stating that he had not committed any other illegal act apart from collecting money on behalf of the terrorist organisation. At the end of the hearing, the trial court rejected the request for release.

20. At a hearing held on 7 May 2001 the applicant's lawyer asked the court to hear evidence from the complainants who had identified the applicant. The trial court subsequently heard them in person at different hearings.

21. At a hearing held on 18 June 2003, the public prosecutor read out his observations on the merits of the case, stating that the applicant should be convicted and sentenced as indicted. At the same hearing, the applicant's lawyer and some of the lawyers of the other co-defendants applied for time to prepare their defence submissions in reply to the public prosecutor's observations on the merits of the case. The trial court adjourned and granted them further time.

22. Another hearing was held on 23 February 2004, which the applicant did not attend. The trial court noted that the applicant had sent a written application dated 28 October 2003 in which he had expressed his wish to benefit from the provisions of the Reintegration of Offenders into Society Act (Law no. 4959).

23. At a hearing held on 6 April 2004, the applicant accepted the content of his "earlier statements". He also asked to be granted a certain period of time with a view to submitting written submissions to provide more information on his activities and those of the other accused persons within the organisation.

24. At a hearing held on 12 May 2004, the applicant submitted a two-page-long document in which he essentially reiterated, *inter alia*, the information he had given to the police concerning the killing of M.Y., stating that the latter had been interrogated as he had collected money on behalf of the organisation without its approval. The applicant also described how other co-accused, namely Ma.Y., F.A. and M.H., had been involved in the killing and stated that he had been to the house where M.Y. was being

held twice and that he had stayed there for fifteen and twenty to thirty minutes respectively. The applicant maintained that he had only been involved in two instances of extortion and denied his involvement in the killing.

25. At the same hearing the court decided to send a letter to the General Security Directorate to seek its opinion on the question of whether the applicant was eligible to benefit from the provisions of the Reintegration of Offenders into Society Act.

26. At a hearing held on 22 November 2004 the trial court received the response of the General Security Directorate, to which the applicant's lawyer responded that he had no comment to make. However, considering the response of the General Security Directorate to be unclear, the trial court decided to ask for its opinion on the same issue for a second time. At the end of the hearing, the trial court ordered the release of the applicant.

27. At a hearing held on 5 June 2006, the trial court received the new response of the General Security Directorate, according to which there was information indicating that the applicant had taken part in violent activities on behalf of the organisation. At the same hearing, the public prosecutor read out his observations on the merits and requested that the applicant be sentenced under Article 125 of the former Criminal Code.

28. At a hearing held on 12 March 2007 the applicant's lawyer submitted a three-page-long defence submission where he stated, *inter alia*, that his client had had nothing to do with M.Y.'s killing and that even if his police statements were regarded as genuine, he had only been a sympathiser of the organisation at that time and he had not known that M.Y. would be killed. Moreover, the victims from whom the applicant had allegedly asked for money on behalf of the organisation had not been able to identify the applicant. Accordingly, his client had to be acquitted and if the trial court considered otherwise, he could only be convicted of membership of an illegal organisation under Article 314 § 2 of the Criminal Code.

29. On 13 February 2009 the Twelfth Chamber of the Istanbul Assize Court requalified the offences and convicted him under Article 125 of the former Criminal Code of breaking up the unity of the State and seeking to remove part of the national territory from the State's control, and sentenced him to life imprisonment. The trial court listed, among other pieces of evidence, "the statements of the accused throughout the proceedings" in the "evidence" part of its judgment. In the part entitled "assessment of evidence and reasons", the trial court noted that the applicant had sent a letter to the court on 12 May 2004 in which he had stated that M.Y. had been abducted and killed by Ma.Y., F.A. and M.H. The trial court concluded that those statements were corroborated by the autopsy report, a crime scene report and a police report establishing that the gun that had been used to kill M.Y. was the same one that had been used at the demonstration. It went on to

hold that the defendants' denial of their guilt during the trial should be dismissed in the light of that evidence.

30. In view of that evidence and the statements of the witnesses and the victims, and the invoices of the illegal organisation that had been found, the trial court also found it established that the applicant had attempted to and had collected money on behalf of the illegal organisation through coercion. It found that the applicant had been involved in six different acts of extortion. It went on to hold that the applicant had taken part in the killing of M.Y. as a lookout with a view to preventing M.Y. from running away. Taking into account the participation of the applicant and Ma.Y. in the demonstration of 20 February 1999, and their positions within the illegal organisation, the trial court considered that the killing of M.Y. and the completed acts of extortion should be accepted as being "serious enough", which was the material element of the offence set out in Article 125 of the former Criminal Code.

31. Lastly, in the "conviction" part of its judgment, the trial court held that the applicant had been a member of the illegal organisation, had collected money on behalf of the illegal organisation through coercion and had participated in the killing of M.Y. It also refused the applicant's application to benefit from the Reintegration of Offenders into Society Act, holding that the applicant did not fulfil the requirements laid down therein. The trial court did not assess any evidence in that part of its judgment.

32. On an unspecified date the applicant lodged an appeal against the trial court's judgment. In the appeal, dated 14 May 2009, the applicant's lawyer argued, *inter alia*, that the use of the applicant's statements to the police, which had been taken under duress and which he had later retracted, had been unlawful.

33. On 27 April 2010 the Court of Cassation upheld the judgment of the first-instance court.

II. RELEVANT DOMESTIC LAW

34. The relevant provisions of the former Code of Criminal Procedure (Law no. 1412), namely Articles 135, 136 and 138, provided that anyone suspected or accused of a criminal offence had a right of access to a lawyer from the moment he or she was taken into police custody. In accordance with section 31 of Law no. 3842 of 18 November 1992, which amended the legislation on criminal procedure, the above-mentioned provisions were not applicable to persons accused of offences falling within the jurisdiction of the State Security Courts. On 15 July 2003, by virtue of Law no. 4928, the restriction on an accused's right of access to a lawyer in proceedings before the State Security Courts was lifted (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 27-29, ECHR 2008).

35. The Reintegration of Offenders into Society Act (Law no. 4959) applies to members of terrorist organisations who surrender to the authorities without armed resistance, either directly, on their own initiative, or through intermediaries, those who can be considered to have left a terrorist organisation, and those who have been arrested. The Law also applies to those who, despite being aware of the aims pursued by the terrorist organisation, provided shelter, food, weapons, ammunition or any other kind of assistance. An important feature of the Act is that it provides the possibility of reducing the sentences of those who wish to take advantage of the Act by providing relevant information and documents on the structure and activities of the terrorist organisation (see *Gül and Others v. Turkey*, no. 4870/02, § 31, 8 June 2010). However, if an individual does not accept before the judge the contents of his or her previous statements, he or she is not able to benefit from the provisions of that Act.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (c) OF THE CONVENTION

36. The applicant complained that he had been deprived of his right to a lawyer while in police custody as a result of the statutory ban provided in Law no. 3842. The applicant referred to Article 6 § 1 of the Convention. The Court will examine this complaint under Article 6 §§ 1 and 3 (c) of the Convention, the relevant parts of which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; "

37. The Government contested the applicant's arguments.

A. Admissibility

38. The Government argued that the applicant had failed to exhaust the domestic remedies in respect of his complaint as he had never raised this complaint before the domestic courts. In particular, his appeal before the Court of Cassation had contained no complaint to the effect that he had been denied the assistance of a lawyer when making statements to the police, the

public prosecutor and the investigating judge. Thus, the complaint had to be rejected.

39. The Court notes that it has already examined the same objection in the case of *Halil Kaya* (*v. Turkey*, no. 22922/03, §§ 13-14, 22 September 2009) and dismissed it, finding that the restriction imposed on the applicant's right of access to a lawyer had been in accordance with section 31 of Law no. 3842, and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts.

40. The Court therefore dismisses the Government's objection regarding domestic remedies.

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

B. Merits

1. The parties' submissions

42. The applicant reiterated his complaints.

43. The Government noted that the applicant had made statements to the police, the public prosecutor and the investigating judge while submitting that he had had the opportunity to sufficiently defend himself during the trial in the course of which he had been represented by his lawyer. In so far as the statements the applicant had made in the absence of a lawyer during the pre-trial stage were concerned, the Government argued that the applicant had accepted the imputed offences in his police statements. In the statements he had made to the public prosecutor and the investigating judge, the applicant had accepted that he had collected money on behalf of the organisation, but denied some of the other accusations. With regard to the statements he had made during the trial stage, the Government stated that at the hearing held on 6 April 2004 the applicant had accepted that his statements to the police, the public prosecutor and the investigating judge had all been accurate despite the fact that he had denied all his previous statements at a hearing held on 22 November 1999. Similarly, in his written submissions dated 12 May 2004, the applicant had admitted that he had collected money through coercion on behalf of the terrorist organisation and had given a detailed account of his relationship with the other co-accused, a fact which he had previously denied. Significantly, the applicant had maintained this position for approximately five years, during which time he was represented by a lawyer, until the trial court's decision to convict him on 13 February 2009. In the Government's view, the applicant's acts were also found to have been established by the applicant's lawyer's defence

submissions dated 12 March 2007, where he stated that a sentence could be imposed on him for membership of an illegal organisation (see paragraph 28).

44. Moreover, the applicant had been convicted on the basis of a body of evidence, such as the records indicating that other complainants had identified him, the statements given by the co-accused and the victims, the weapons and other criminal material found in the workplace of Ma.Y., and the receipts concerning the collection of money. Therefore, in the Government's opinion, there had not been a violation of the applicant's right to a fair trial in the instant case.

2. The Court's assessment

(a) General principles

45. The Court has recently examined in *Beuze v. Belgium* ([GC], no. 71409/10, 9 November 2018) the question of "particularly extensive" restrictions on the right of access to a lawyer stemming from the absence of a provision in Belgian law in force at the material time and has provided further clarifications on how to apply the "overall fairness" test introduced by its judgment in the case of *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, 13 September 2016) in cases of restriction of access to a lawyer, with a view to ascertaining whether a procedural shortcoming of that kind has irretrievably prejudiced the fairness of the proceedings as a whole. Moreover, the Court has already stated in *Beuze* that the statutory restrictions on Mr Beuze's right of access to a lawyer was of the same nature as that complained of in the *Salduz* judgment (see *Beuze*, cited above, § 116). Therefore, as the systematic restriction in the present case also stemmed from the legal provisions analysed by the Court in *Salduz*, the present case should also be examined from the standpoint of the methodology and principles developed in *Ibrahim and Others* (cited above), as refined in *Beuze* (cited above).

46. The Court reiterates that access to a lawyer during the investigation phase may be temporarily restricted where there are "compelling reasons" for doing so. However, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to compelling reasons to restrict access to legal advice for the purposes of Article 6 of the Convention. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2 and 3 and Article 5 § 1 of the Convention in particular. When assessing whether compelling reasons have been demonstrated, it is

important to ascertain whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them (see *Ibrahim and Others*, cited above, §§ 258-59, and *Simeonovi*, cited above, §§ 116-17).

47. Moreover, a finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons (see *Beuze*, cited above, § 142).

48. According to the Court's case-law, the absence of "compelling reasons" for restricting access to a lawyer does not lead in itself to a finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention. In the absence of "compelling reasons", the Court must apply a very strict scrutiny to its fairness assessment: the Government's failure to point to any compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c). The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. Where, on the contrary, compelling reasons for restricting access to a lawyer have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were "fair" for the purposes of Article 6 § 1 (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 118, 12 May 2017, and *Ibrahim and Others*, cited above, §§ 262-65).

49. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see *Ibrahim and Others,* cited above, § 274, and *Simeonovi*, cited above, § 120);

(a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;

(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;

(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;

(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;

(h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;

(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and

(j) other relevant procedural safeguards afforded by domestic law and practice.

50. In that connection, it is also important to reiterate that in the determination of whether the proceedings were fair the Court does not act as a court of fourth instance deciding on whether the evidence was obtained unlawfully in terms of domestic law, its admissibility or the guilt of an applicant (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 149, 18 December 2018). These matters, in line with the principle of subsidiarity, are the province of the domestic courts. It is not the Court's task to rule on whether the available evidence was sufficient for an applicant's conviction and thus to substitute its own assessment of the facts and the evidence for that of the domestic courts.

51. Moreover, the Court considers that where a procedural defect has been identified, it falls to the domestic courts in the first place to carry out the assessment as to whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being *prima facie* incompatible with the requirements of a fair trial according to Article 6 of the Convention. In the absence of any such assessment, the Court must nevertheless make its own determination. In doing so, it is, however, not this Court's task to embark upon an assessment of evidence so as to determine whether a given procedural shortcoming has or has not irretrievably prejudiced the overall fairness of the proceedings, matters that primarily fall within the domain of the national courts.

(b) Application of the general principles to the facts of the case

(i) Whether there was a restriction on the right to a lawyer

52. The Court notes at the outset that the applicant was denied access to a lawyer from 23 July to 1 August 1999 as a result of the statutory ban laid down in section 31 of Law no. 3842. As a result, he did not have access to a lawyer when he made his statements to the police, the public prosecutor and the investigating judge respectively. The Court has already examined the same legal problem and found violations of Article 6 §§1 and 3 (c) of the Convention in cases against Turkey both before and after the above-mentioned *Ibrahim and Others* judgment (for the Court's approach prior to the *Ibrahim and Others* judgment, see *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008; *İrmak v. Turkey*, no. 20564/10, 12 January 2016; *Galip Doğru v. Turkey*, no. 36001/06, 28 April 2015; *Eraslan and Others v. Turkey*, no. 59653/00, 6 October 2009; *Halil Kaya*, cited above; *Ditaban v. Turkey*, no. 69006/01, 14 April 2009; and *İbrahim Öztürk v. Turkey*, no. 16500/04, 17 February 2009; and for the Court's approach following the *Ibrahim and Others* judgment, see *Mehmet Duman v. Turkey*, no. 38740/09, 23 October 2018; *Ömer Güner v. Turkey*, no. 28338/07, 4 September 2018; *Canşad and Others v. Turkey*, no. 7851/05, 13 March 2018; *Girişen v. Turkey*, no. 53567/07, 13 March 2018; *İzzet Çelik v. Turkey*, no. 15185/05, 23 January 2018; and *Bayram Koç v. Turkey*, no. 38907/09, 5 September 2017).

(ii) Whether there were compelling reasons for the restriction

53. The Court reiterates that restrictions on access to a lawyer for "compelling reasons" are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Beuze*, cited above, § 142).

54. Referring to *Ibrahim and Others* (cited above), the Government argued that there was an urgent need to avert serious adverse consequences for life, liberty or physical integrity and to avoid the risk of destruction of evidence and the escape of the other suspects. As such, there were compelling reasons to restrict access to legal assistance during custody for the purposes of Article 6 of the Convention.

55. The Court reiterates that, unlike in *Beuze* where the restriction on the right of access to a lawyer stemmed from the absence of a legal provision in Belgian law, the applicant's access to a lawyer in the present case was restricted by virtue of section 31 of Law no. 3842 and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts, irrespective of the individual assessment of the particular circumstances of each case. Reiterating that the existence of exceptional circumstances which satisfy the substantive requirement of compelling reasons does not automatically provide adequate

justification for limiting suspects' access to legal advice, the Court notes that a statutory restriction of this kind, which excludes any individual assessment, cannot stand up to scrutiny in relation to the procedural requirements of the concept of "compelling reasons" (see *Beuze*, cited above, § 138).

56. Hence, the Court considers that there were no compelling reasons to restrict the applicant's right to a lawyer while in police custody.

(iii) Fairness of the proceedings as a whole

57. As there were no compelling reasons to restrict the applicant's right of access to a lawyer while in police custody, the Court must apply very strict scrutiny to its fairness assessment, especially as there were statutory restrictions of a general and mandatory nature (see *Beuze*, cited above, § 165). The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. The Court also reiterates that it is only in very exceptional circumstances that it can conclude that a given trial has not been prejudiced by the restriction of an applicant's right of access to a lawyer (see *Dimitar Mitev v. Bulgaria*, no. 34779/09, § 71, 8 March 2018).

58. Turning to the circumstances of the case at hand, the Court reiterates that it has already found violations of Article 6 of the Convention in respect of two other individuals who had also been tried and convicted in the same set of criminal proceedings as the applicant in the instant case, on the grounds that the national courts failed to operate the necessary procedural safeguards in respect of the procedural shortcomings complained of by the applicants, namely the denial of access to a lawyer when making statements to the police and the subsequent use of those statements to secure their conviction (see *Ruşen Bayar*, cited above, §§ 100-136, and *Akdağ v. Turkey*, no. 75460/10, §§ 30-71, 17 September 2019).

59. In view of the foregoing, the Court must first of all ascertain whether the prejudice caused by the systemic restriction on the applicant's right of access to a lawyer while in custody rendered the trial unfair in its entirety or was remedied by the operation of the necessary safeguards at the national level, which were moreover subsequently raised by the Government in the examination of the case before the Court (see *Van de Kolk v. the Netherlands* [Committee], no. 23192/15, §§ 33-34, 28 May 2019). In doing so, the Court now turns to the Government's arguments whereby they asserted that they had discharged the burden of proof to demonstrate that the overall fairness of the trial had not been irretrievably prejudiced by the restriction on the applicant's right of access to a lawyer during the pre-trial stage.

60. In that connection, the Court notes that the Government pointed to the applicant's constant changing of position *vis-à-vis* his statements given

at the pre-trial stage as the trial unfolded and argued in essence that the fact that he had accepted during the trial his previous statements made in the absence of a lawyer at the pre-trial stage was sufficient to conclude that the overall proceedings against the applicant had not been prejudiced by the systemic denial of his right of access to a lawyer. In other words, the Government argued that the fact that the applicant had repeated his statements during the trial and had maintained that position in the presence of his lawyer for five years until the trial court's judgment of 13 February 2009 was a factor showing that the applicant's trial had not been seriously prejudiced by the systemic restriction on his right of access to a lawyer during the pre-trial stage.

A further factor corroborating that contention was the use by the trial court of evidence other than the applicant's statements to secure his conviction, that is to say the statements of the co-accused at various stages, the identification reports, the statements of the other co-defendants and the victims, the receipts concerning the collection of money, guns and ammunition found in Ma.Y.'s workplace.

61. The Court observes that the trial court considered that the applicant's acts of extortion and his involvement in the killing of M.Y. had been "serious" enough within the meaning of Article 125 of the then Criminal Code to sentence him to life imprisonment (see paragraph 30). As such, the Court finds it useful to reiterate the applicant's statements in respect of those offences and his position *vis-à-vis* those statements in the course of the criminal proceedings against him. In that respect, the Court notes that according to the applicant's statement form drawn up by the police, the applicant admitted to six incidents of extortion and gave factual information concerning the killing of M.Y. in his police interview, which took place in the absence of a lawyer (see paragraphs 8-10). Before the public prosecutor and again without a lawyer, the applicant accepted the three incidents of extortion, but claimed that he had learned of the killing from newspapers as he had no knowledge of who had killed M.Y. or how he had been killed (see paragraph 15). Before the investigating judge and once again without a lawyer, the applicant accepted the three incidents of extortion but denied any involvement in the killing of M.Y., asserting that he had not acted as a lookout (see paragraph 16). However, the applicant denied the content of all those statements during the trial, specifically at the hearing held on 22 November 1999 (see paragraph 18). Then, in sharp contrast with that stance, the applicant decided to confirm all his previous statements at a hearing held on 6 April 2004 during which he asked to benefit from Law no. 4959, which provided for a reduction in his sentence under certain conditions (see paragraph 23). Subsequently, he sent a letter dated 12 May 2004 wherein he reduced the number of extortion incidents admitted to two and essentially reiterated the factual information he had given to the police regarding the killing of M.Y., while denying any criminal responsibility in it

(see paragraph 24). He maintained this position for five years until the pronouncement of the trial court's judgment on 13 February 2009. In view of the above, the Court cannot but note the applicant's inconsistent stance *vis-à-vis* his statements.

62. The Court takes account of the applicant's assertion that he accepted his previous statements with a view to benefiting from Law no. 4959 which required, *inter alia*, the acceptance before a judge of an individual's previous statements as a precondition to having his sentence discharged or reduced. As such, the applicant cannot be criticised for having made full use of the remedies available under domestic law, specifically Law no. 4959, in the defence of his interests (see *Pishchalnikov v. Russia*, no. 7025/04, § 50, 24 September 2009, and *Yağcı and Sargın v. Turkey*, 8 June 1995, § 66, Series A no. 319-A). However, the applicant, yet again, qualified his police statements in his letter dated 12 May 2004, stating that he had not accepted them in full, meaning that thenceforth he did not fulfil one of the essential conditions to benefit from Law no. 4959 (see para 35 above). Therefore, the present case does not concern the question whether the applicant's acceptance of his previous statements with the hope that he would receive a reduction in his sentence, and maintenance of that position until the end of the trial, was sufficient in itself to remedy the prejudice caused by the statutory restriction of his right to a lawyer to the overall fairness of the criminal proceedings against him (see *Bandaletov v. Ukraine*, no. 23180/06, § 69, 31 October 2013). The Court attaches importance to the fact that the applicant did not complain before it that this situation had been the result of undue pressure, duress or any other type of inappropriate conduct by State agents in respect of which he was able to lay the basis of an arguable claim. Neither did he posit any argument to that effect before the national courts.

63. The Court observes that it is not disputed that the statement form drawn up by the police included self-incriminatory statements allegedly made by the applicant, without a lawyer present, and that they were later used by the trial court to convict him and sentence him to life imprisonment. It is also not disputed between the parties that the applicant subsequently asked to benefit from Law no. 4959 with a view to obtaining a reduction in his sentence, in the course of which he confirmed his previous statements.

64. Furthermore, the Court finds that the applicant's conduct during the police interviews and examinations by an investigating judge was capable of having such consequences for the prospects of his defence that there was no guarantee that either the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the period of police custody (see *Beuze*, cited above, § 171, and *Salduz*, cited above, § 58). Viewed from this angle, although it is not for the Court to speculate, it observes that had the applicant had the assistance of a lawyer during the police interviews, he might possibly have

been advised to remain silent, to be consistent or to give a less self-incriminatory statement.

65. Moreover, the Court has already held in *Beuze* that in cases where the domestic legislation has been found not to have been in conformity with Article 6 § 3 of the Convention – like the Turkish legislation in force at the material time in the present case – the overall fairness of the proceedings could not have been guaranteed merely by legislation providing for certain safeguards in the abstract (*Beuze*, cited above, § 171). This is another factor reinforcing the view that the application of procedural safeguards – and not their mere existence in the form of legislation – is an essential prerequisite for the Court to examine whether a procedural shortcoming is effectively compensated to an extent that renders the proceedings fair as a whole. Importantly, the applicant in *Beuze*, like the applicant in the present case, also changed his statements throughout the criminal proceedings, which was not sufficient to absolve the national authorities from their duty to effectively operate the relevant procedural safeguards.

66. In sum, the prejudice caused to the overall fairness of the proceedings by the restriction of the right to a lawyer cannot be undone merely by an applicant's confirmation of his or her earlier statements given in the absence of a lawyer at a later stage and in the presence of a lawyer, unless that flaw is sufficiently addressed and remedied by the national courts, that is to say by exclusion of statements taken without a lawyer present (see *Beuze*, cited above, § 171; *Chopenko v. Ukraine*, no. 17735/06, § 52, 15 January 2015; and *Titarenko v. Ukraine*, no. 31720/02, § 87 *in fine*, 20 September 2012).

67. In the light of the above, the Court must now examine whether the domestic authorities applied the relevant procedural safeguards in relation to the systemic restriction on the applicant's right to a lawyer. If so, it must ascertain whether their application had a compensatory effect in practical terms, rendering the proceedings fair as a whole (see *Beuze*, cited above, § 171).

68. In that connection, the Court notes that the trial court neither examined the admissibility of the evidence given by the applicant in the absence of a lawyer nor the circumstances in which those statements had been given before using them in securing the applicant's conviction (see *Beuze*, cited above, §§ 171-74 where the Court held that this examination lay at the heart of the second stage of the test set out in the *Salduz* and *Ibrahim and Others* judgments; *Mehmet Duman*, cited above; § 41; *Ömer Güner*, cited above, § 36; *Canşad and Others*, cited above § 44; *Girişen*, cited above, § 60; *İzzet Çelik*, cited above, § 38; and *Bayram Koç*, cited above, § 23).

69. It further notes that contrary to what the Government alleged, the applicant's lawyer contested in his appeal the use of statements taken without a lawyer present. Nevertheless, the Court of Cassation also

remained indifferent *vis-à-vis* this procedural defect as it did not carry out an assessment of the consequences of the absence of a lawyer at crucial points in the proceedings (see *Zhang v. Ukraine*, no. 6970/15, § 73, 13 November 2018, and *Alakhverdyan v. Ukraine* [Committee], no. 12224/09, § 66, 16 April 2019).

70. In view of the above, the Court is not convinced that the mere fact that the applicant confirmed his previous statements taken in the absence of a lawyer is sufficient to absolve the national courts from their crucial duty under Article 6 of the Convention to operate the necessary procedural safeguards in relation to the procedural defects or that such confirmation of itself had a compensatory effect rendering the proceedings fair as a whole.

71. As regards the Government's contention that the applicant's conviction had not only rested on his statements but also on certain other evidence, the Court notes that the statements the applicant made in the course of the criminal proceedings and the identifications made by three victims had significant importance for his conviction. As such, the applicant's statements formed an integral part of the evidence upon which his conviction was based.

72. As a result, the overall fairness of the proceedings against the applicant was tainted due to the fundamental procedural defect resulting from the systemic restriction of his right to a lawyer during the pre-trial stage, the national courts' failure to remedy that shortcoming and the use they made of his statements taken in the absence of a lawyer to sentence him to life imprisonment, which is one of the heaviest penalties of the Turkish criminal justice system (see *Ruşen Bayar*, cited above, §§ 131-33; *Bozkaya v. Turkey*, no. 46661/09, § 50, 5 September 2017; *İrmak*, cited above, §§ 25, 50 and 57, where the applicant also partly accepted in the course of his request to benefit from Law no. 4959 the statements he had made to the police in the absence of a lawyer; and *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 57, 28 October 2010).

73. Accordingly, the Court considers that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

76. The Government submitted that the applicant's claims were unsubstantiated and excessive.

77. As for non-pecuniary damage, the Court considers that the finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention in the instant case constitutes sufficient just satisfaction. Given the possibility under Article 311 of the Code of Criminal Procedure to have the domestic proceedings reopened in the event that the Court finds a violation of the Convention, the Court makes no award under this head (see *Bayram Koç*, cited above § 29).

B. Costs and expenses

78. The applicant's lawyer claimed EUR 1,140 for expenses relating to his assistants' work, postage, translation and stationery which he had incurred. In support of his claims, he submitted a sheet showing the type of expenses and the related costs. However, he neither submitted an invoice nor specified how many hours he or his assistants had worked on this case.

79. The Government invited the Court to dismiss the applicant's claims in respect of costs and expenses due to his failure to submit any documents to support those claims.

80. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (see *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 234, 10 September 2019). In the present case, the applicant's lawyer neither submitted any invoice in support of his claims nor the breakdown of the number of hours of work for which he sought payment. Therefore, the Court decides not to make any award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Robert Spano
Registrar	President