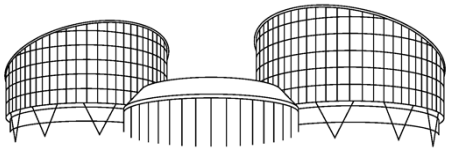

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF FİKRET KARAHAN v. TURKEY

(Application no. 53848/07)

JUDGMENT

Art 6 §§ 1 (criminal) and 3 (d) • Trial leading to conviction for membership of illegal armed organisation unfair, due to applicant's inability to confront witness against him, and despite his lawyer being able to cross-examine the witness • No good reason for failure to obtain statement from witness in applicant's presence, which was essential to challenge reliability of allegations and to dissipate uncertainty surrounding applicant's physical identification • Serious handicap faced by defence not sufficiently compensated by procedural safeguards in the circumstances

STRASBOURG

16 March 2021

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 Fikret Karahan v. Turkey,

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Aleš Pejchal,
Egidijus Kūris,
Carlo Ranzoni,
Pauliine Koskelo,
Saadet Yüksel, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to:

the application (no. 53848/07) 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 Fikret Karahan ("the applicant"), on 26 November 2007;

the decision to give notice to the Turkish Government ("the Government") of the applicant's complaints under Article 6 §§ 1 and 3 of the Convention and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 16 February 2021,

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

INTRODUCTION

1. The case concerns the alleged violation of the applicant's right to a fair trial under Article 6 §§ 1 and 3 of the Convention on account of his inability to examine a witness against him, the failure of the authorities to serve the reasoned judgment of the first-instance court on him and his lawyer, and the lack of an oral hearing before the Court of Cassation.

THE FACTS

2. The applicant was born in 1972. At the time of lodging the present application, he was serving a prison sentence in Tekirdağ F-type prison. The applicant was represented by Mr R. Demir, a lawyer practising in Istanbul.

3. The Government were represented by their Agent.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

A. The applicant's previous convictions

5. On an unspecified date in 1996, criminal charges were brought against the applicant for membership of an illegal armed organisation, namely the PKK (Workers' Party of Kurdistan). At the material time, the applicant was serving a prison sentence in connection with a previous conviction for aiding and abetting the PKK.

6. In December 1998, shortly after his release from prison, the applicant was convicted of membership of the PKK – in connection with the charges brought in 1996 – under Article 168 § 2 of the Turkish Criminal Code in force at the material time (Law no. 765), and was sentenced to twelve years and six months' imprisonment.

B. Criminal proceedings brought against the applicant's brother

7. In August 2000 criminal proceedings were brought against the applicant's brother, G.K., who was a teacher and a member of Eğitim-Sen (the Education and Science Workers' Union), on suspicion of aiding and abetting the PKK. On 13 August 2000 G.K. was questioned at the Anti-Terrorist Branch of the Istanbul Security Directorate, without the assistance of a lawyer. During the questioning, G.K. was asked, *inter alia*, to provide information regarding his nine siblings. G.K. stated, with regard to the applicant, that following his release from prison (in 1998), he had left Turkey illegally and had undertaken activities in Romania under the code name of "Baran", but that he was no longer in Romania. When G.K. was asked to give information on certain phone numbers found in his apartment, he said that one of the numbers starting with the international dialling code "+ 40" was the number used by the applicant in Romania. The applicant had allegedly told him to ask for "Baran" if he tried to reach him on that number. In the same statement, G.K. also said that he did not know where his brother had gone after his release, and that although he had called him three or four times in the meantime, he had never told him where he was. It was his guess that he had escaped from Turkey illegally.

8. It appears from the information in the case file that the criminal proceedings against the applicant's brother were eventually discontinued following the public prosecutor's decision not to bring charges.

C. Criminal proceedings brought against E.A.

9. On 6 August 2003 the Reintegration of Offenders into Society Act (Law no. 4959), which provided for amnesty and mitigation of sentences for members of terrorist organisations in exchange for information, entered into force.

10. On 8 September 2003 a certain E.A., who had previously been a member of the PKK, surrendered himself to the authorities. He stated that he had left the PKK and that he wished to benefit from the Reintegration of Offenders into Society Act.

11. On the same day a statement was taken from E.A. at the Anti-Terrorist Branch of the Istanbul Security Directorate, without a lawyer present. E.A. was asked by the police to provide information on the activities and members of the PKK. He was also shown an album containing photographs of certain PKK members from the Security Directorate's archives, and was asked to identify any members that he knew.

12. E.A. provided the police with information regarding some thirty PKK members. Among those names was an individual with the code name "Mahir", who was allegedly active in the PKK's Kelereş camp in Iran as an armed member. E.A. did not provide any further information regarding "Mahir", such as any specific acts that he might have committed. It appears from a photo identification record drawn up subsequently on 10 September 2003 that upon being shown a black and white mugshot of the applicant – which measured approximately 3.5 cm by 3.5 cm, according to the information in the case file – E.A. had identified him as "Mahir" and had stated that he was certain about the accuracy of his identification. The identification record had been signed by E.A. and the two police officers who had conducted the identification.

II. ARREST AND CONVICTION OF THE APPLICANT

13. On an unspecified date the applicant was arrested while trying to cross illegally from Ukraine to Poland on a forged passport. He was handed over to the Turkish authorities.

14. On 2 February 2005 he was questioned at the Anti-Terrorist Branch of the Istanbul Security Directorate in the presence of a lawyer. During the questioning, the applicant was asked to comment on the statements made by his brother G.K. and E.A. about him and to provide information on the activities that he had carried out on behalf of the PKK. Having established that the applicant had travelled from Istanbul Atatürk Airport to Kazakhstan on a forged passport, the police also asked him where he had obtained that passport, why he had escaped to Kazakhstan and where he had been before Ukraine. The applicant used his right to remain silent and said that he would give his statement before the public prosecutor.

15. On 3 February 2005 the applicant, accompanied by his lawyer, was brought before the Istanbul public prosecutor. He stated that after serving his sentence in connection with a previous conviction for aiding and abetting a terrorist organisation, he had been released from prison in December 1998. However, some three days after his release, he had been convicted again on the basis of other charges (membership of a terrorist

organisation), and had been sentenced to twelve years and six months' imprisonment. He had therefore left Diyarbakır and lived in Istanbul until 2004. He maintained that he had not carried out any activities in the name of an illegal organisation after his release from prison and that he was not a member of any such organisation. He further denied the statements made by G.K. and E.A. about him. He stated that he did not know E.A., and that he also did not know why his brother G.K. had made those claims concerning him. He said that he had never been to Romania, had never used the code name "Baran" and had never been to the above-mentioned PKK camp in Iran. He stated that he had left Turkey in May 2004 on a forged passport because he was being searched, and that he had chosen to go to Kazakhstan because there were no visa requirements for Turkish nationals there. He also explained that he had travelled to Ukraine from Kazakhstan, and that he had been caught while trying to cross over to Poland.

16. Later on the same day the applicant was brought before the Istanbul Assize Court for questioning and largely repeated his previous statement before the public prosecutor. The applicant asserted in addition that he had lived with his elder sister and brother while in Istanbul, and that he had left for Kazakhstan on a forged passport once he had learned that his conviction would become final. He stated that he had not otherwise left Turkey. He further explained that during his time in Istanbul, he had worked on several construction sites or in coffee houses. He also maintained that although he had requested to see a photograph of E.A. at the Security Directorate, his request had not been granted, and that he did not know who E.A. was. He denied, once again, having carried out activities for the PKK under the name "Mahir", or any other code name. When he was shown the mugshot that had been used for his identification by E.A., he confirmed that the photograph was of him and that it had been taken by the police at the time of his arrest in 1996. The applicant's lawyer challenged the reliability of the photo identification procedure, alleging that it was not apparent how E.A. had recognised and identified the applicant. At the close of the questioning, the judge at the Istanbul Assize Court decided to remand the applicant in custody.

17. On 8 February 2005 the Istanbul public prosecutor filed a bill of indictment with the Istanbul Assize Court, accusing the applicant, under Article 68 § 2 of the Turkish Criminal Code in force at the material time, of membership of the PKK/People's Congress of Kurdistan (KONGRA-GEL). The public prosecutor relied in evidence on the statements provided to the police by the applicant's brother G.K. and by E.A.

18. At the first hearing held before the Istanbul Assize Court on 8 June 2005, which was attended by the applicant and his lawyer, the applicant's brother G.K. was heard under oath. G.K. stated that, at the time of his detention in 2000, he had been under pressure by the police and the practice of torture had been quite widespread. He had therefore made certain false

statements about his brother to protect himself and his family. Accordingly, he denied the accuracy of the statements that he had made about the applicant and alleged that his brother had lived in Istanbul at the material time. He explained that during that period, the applicant had worked in various places, but that the family had also supported him financially. He further asserted that the applicant had had no affiliation with a terrorist organisation during that time.

19. At the same hearing, the applicant's lawyer contended that there was no evidence to prove that the applicant had maintained ties with the PKK after his release from prison in 1998, and he requested that E.A. be summoned to be heard in court. That request was accepted by the trial court.

20. Following the failure of E.A. to attend the second hearing, held on 5 October 2005, the applicant and his lawyer – who were both present in court – repeated their request for him to be summoned. They stressed that there was no evidence against the applicant apart from E.A.'s photo identification.

21. E.A., who was at liberty pending his trial, attended the third hearing, held on 21 December 2005. Although the applicant's lawyer was also present, the applicant himself was not brought to the hearing from the prison where he was serving his sentence for his previous conviction.

22. E.A. told the trial court, under oath, that he did not know "Fikret Karahan" (that is, the applicant) by name, nor did he know the real name of the person that he knew under the code name "Mahir". He acknowledged that he had been shown some photographs while being questioned at the Security Directorate, but that he did not remember whether he had actually identified anyone. When he was shown the black and white mugshot of the applicant, he said that the person in the photograph looked like the "Mahir" that he knew, but that he did not know for certain whether it was him. He stated that he had seen "Mahir" at the camp in Iran sometime between 2000 and 2002. In response to a question raised by the applicant's lawyer, E.A. stated that he had not witnessed any specific acts by "Mahir" at the camp, and that there had been ten to fifteen people with the same code name in the camp at the material time. He confirmed the accuracy of the police statement that he had made regarding certain PKK members and activities (see paragraph 12 above), but said that he did not remember in detail owing to the passage of time. E.A. said the following when he was shown a copy of the photo identification record dated 10 September 2003:

> "The person indicated with the code name 'Mahir' ... in the record is the person that I may have seen at the camp. I have stated [before the police] that I may have seen [that person]. I cannot say for certain that it is the person with the code name 'Mahir'."

23. At the next hearing, held on 24 April 2006, where both the applicant and his lawyer were present, neither the defence nor the prosecution requested any further investigation. The public prosecutor then read out his

observations on the merits of the case (*esas hakkında mütalaa*) to the trial court and recommended that the court find the applicant guilty as charged, but under the relevant Articles of the new Criminal Code.

24. At the hearing held on 18 October 2006, where both the applicant and his lawyer were present, the lawyer read out the defence arguments in response to the public prosecutor's opinion (*esas hakkında savunma*). He stated in the first place that there was no offence or act that had been attributed to the applicant by the public prosecutor. The only evidence in the case file was the photo identification conducted by the police, where E.A. had likened the applicant to a certain "Mahir". Although E.A. had been heard by the trial court on 21 December 2005, the applicant had not been able to confront him in person as he had not been brought to the hearing from prison. It was, moreover, evident from E.A.'s testimony before the trial court that he was not able to identify the applicant with any certainty. As for the statements made by the applicant's brother G.K., it was clear from his testimony that he had made those statements under duress. The lawyer further argued that having regard to the applicant's conviction for a second time in December 1998, it was understandable for him to have absconded for a lengthy period. However, in the absence of any credible evidence to show that he had committed the crime of "membership of a terrorist organisation" during that period as alleged by the prosecution, the applicant had to be acquitted.

25. At the same hearing, the Istanbul Assize Court convicted the applicant of membership of the PKK/KONGRA-GEL as charged and sentenced him to six years and three months' imprisonment. The judgment was pronounced in the presence of the applicant and his lawyer. According to the text of the reasoned judgment, the trial court referred as evidence to E.A.'s photo identification and questioning by the police, E.A.'s testimony at the applicant's trial and the "contents of the case file". When it proceeded to assess the available evidence, it discussed exclusively the statement provided by E.A. to the police, which it considered sufficient to conclude that the applicant had been active at the PKK's Kelereş camp in Iran and that, therefore, he had indeed committed the offence of "membership of a terrorist organisation". While the trial court acknowledged the discrepancy between E.A.'s statements to the police and his subsequent court testimony, it considered the police statements to be credible, noting that they were more detailed and closer in time to the events in issue. In the judgment, the Istanbul Assize Court did not in any way refer to the statements of the applicant's brother G.K.

26. On the same day the applicant's representative lodged an appeal with the Court of Cassation and requested the holding of a hearing before the appeal court. The lawyer did not provide any specific arguments in support of the appeal, but only alleged that the first-instance court's judgment was in contravention of the law in both procedural and substantive terms.

27. On 12 December 2006 the public prosecutor submitted his opinion on the applicant's appeal, recommending that the Court of Cassation dismiss the request for the holding of a hearing and uphold the first-instance court's judgment.

28. On 22 January 2007 the applicant's lawyer responded to the public prosecutor's opinion by way of submissions filed with the Court of Cassation. The lawyer indicated at the outset that the reasoned judgment of the Istanbul Assize Court had not been served on the defence, which in turn had prevented them from submitting reasons for the appeal. In his opinion, the failure to serve the reasoned judgment, coupled with the absence of a hearing before the Court of Cassation, would violate the applicant's right to a defence. The lawyer further argued that the only witness against the applicant, who was a "confessor" (*itirafçı*[1]), had been heard by the trial court in the applicant's absence, in contravention of the requirement for the defendant to be able to confront the sole witness against him. He also stressed that at the trial the witness had retracted his earlier statement, and that there was no other evidence to corroborate the allegations against the applicant. He therefore requested the quashing of the first-instance court's judgment.

29. By a decision it delivered on 5 June 2007, the Court of Cassation dismissed the applicant's request for a hearing, as the case did not meet the relevant criteria for the holding of a hearing, and upheld his conviction. The applicant alleged that neither he nor his lawyer had ever been notified of the Court of Cassation's decision.

RELEVANT LEGAL FRAMEWORK

30. Article 210 § 1 of the Code of Criminal Procedure (Law no. 5271 of 4 December 2004) provides as follows:

> "If the evidence for an incident consists [only] of the statements of a witness, that witness must be heard in court. The reading of the record of a previous hearing or of a written statement shall not be a substitute for the hearing [by the trial court]."

31. The Reintegration of Offenders into Society Act (see paragraph 9 above) 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 Act also applies to those who, despite being aware of the aims pursued by the terrorist organisation, have provided shelter, food, weapons, ammunition or any other kind of assistance. An important feature of the Act is that it provides for the possibility of reducing the sentences of those who wish to

1. The term *itirafçı* is used to refer to a member of an illegal organisation who has defected and who provides the authorities with information about that organisation.

take advantage of the Act by supplying 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).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

32. The applicant complained that the witness E.A. had been heard by the trial court in his absence, which had prevented him from putting questions to that witness as required under Article 6 § 3 (d) and had also breached his right to equality of arms and his right to defend himself as guaranteed under Article 6 § 1.

Article 6 §§ 1 and 3 (d) of the Convention 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:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

A. Admissibility

33. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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

34. The applicant maintained his initial allegations. He argued that the sole evidence used to secure his conviction had been the statement made to the police by a certain E.A. on the basis of a black and white photograph of him. According to the applicant, the use of that statement as evidence was problematic for a number of reasons. He submitted firstly that the identification procedure had not been conducted in accordance with the relevant rules. Secondly, he had not been given the opportunity to confront E.A. personally at any stage of the proceedings. He stressed in this connection that there was no evidence in the case file to suggest that the authorities had made any effort to make such a confrontation possible, nor

was there any explanation as to why the applicant had not been brought to the hearing where E.A. had been heard by the trial court. Thirdly, in his testimony before the trial court, E.A. had clearly retracted his earlier statements concerning the applicant by expressing uncertainty regarding the identity of the person on the photograph in issue. Bearing in mind that an eventual confrontation would have served to verify whether the applicant was indeed the person suspected of the offence as presumed on the basis of a photograph, the absence of such a confrontation could not be compensated for simply by granting the applicant's lawyer the opportunity to put questions to the witness.

35. The Government argued that both witnesses who had made statements against the applicant had been heard before the trial court in the presence of the applicant's lawyer, who had been given the opportunity to put questions to them directly. As for the complaint that the applicant had not been able to confront E.A. personally, the Government noted that no such request had been made either at the hearing when E.A. had been heard, or at any other time. Moreover, the applicant had not requested the extension of the scope of the investigation at the hearing held on 24 April 2006. He had, however, had the opportunity to object to E.A.'s statement during the proceedings, which he had done in his defence submissions, as well as in his reply to the public prosecutor's opinion. In these circumstances, and bearing in mind the domestic courts' discretion in the assessment of evidence, there had been no violation of Article 6 under this head.

2. The Court's assessment

(a) Relevant case-law

36. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision; it will therefore consider the applicant's complaint under both provisions taken together (see *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015).

37. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

38. The Court refers in this connection to its case-law under paragraphs 1 and 3 (d) of Article 6 of the Convention, and notes in

particular the principles summarised and refined in *Al-Khawaja and Tahery* (cited above, §§ 119-47) and further clarified in *Schatschaschwili* (cited above, §§ 100-31), regarding the admission of untested incriminating witness evidence in criminal proceedings (for a recapitulation of those principles, see *Boyets v. Ukraine*, no. 20963/08, §§ 74-76, 30 January 2018). While originally developed for scenarios in which a prosecution witness does not appear at the trial, the Court has accepted that the *Al-Khawaja* and *Schatschaschwili* principles can also be applicable where witnesses do appear before the trial court but neither the applicant nor his counsel is able to examine them (see, *mutatis mutandis*, *Ürek and Ürek v. Turkey*, no. 74845/12, § 49, 30 July 2019, and *Chernika v. Ukraine*, no. 53791/11, § 46, 12 March 2020).

39. The Court notes, however, that the case at issue presents a different type of problem in that while the applicant himself was not able to confront the prosecution witness against him, his counsel, unlike in the above-mentioned cases, had the opportunity to cross-examine that witness before the trial court (see paragraph 21 above). The Court has held in some similar cases that the defence counsel's ability to hear the statements of the witness and to put questions to them was sufficient to safeguard the interests of the defence on the facts (see *Šmajgl v. Slovenia*, no. 29187/10, § 64, 4 October 2016, and the cases cited therein). The significance attached by the Court to the presence of a lawyer in such situations is also apparent from its finding in a number of cases that while in exceptional circumstances there may be reasons for hearing evidence from a witness in the absence of the person against whom the statement is to be made, that would be acceptable only on the condition that his lawyer was present (see, for instance, *Hilden v. Finland* (dec.), no. 32523/96, 14 September 1999, and *Šmajgl*, cited above, § 63 *in fine*; see also *X. v. Denmark*, no. 8395/78, Commission decision of 16 December 1981, Decisions and Reports (DR) 27, p. 55).

40. Having said that, the Court has also acknowledged that there may nevertheless be circumstances where the defence counsel's involvement alone may not suffice to uphold the rights of the defence and the absence of a *direct* confrontation between a witness and the accused might entail a real handicap for the latter (see *Šmajgl*, cited above, § 65). Accordingly, it now falls on the Court to determine whether the present case involved such circumstances that called for the applicant's direct confrontation with the witness against him. In making this assessment, it will borrow, as relevant, the approach and principles developed in respect of absent witnesses, and will ask (i) whether there was a good reason to hear evidence from the witness E.A. in the absence of the applicant; (ii) whether the evidence given by that witness was the sole or the decisive basis for the applicant's conviction or carried significant weight; and (iii) whether there were sufficient counterbalancing factors in place to compensate for the difficulties encountered by the defence as a result of the absence of the

applicant's direct confrontation with E.A., focusing in particular on the question whether those difficulties were of a nature that could be effectively offset by the applicant's lawyer's presence at the hearing where E.A. was heard. When responding to these questions, the Court will ultimately seek to establish whether the object and purpose of the protection under Article 6 § 3(d), which is to give an accused an adequate opportunity to challenge and question a witness against him, could be achieved in the present circumstances without ensuring the direct confrontation of the applicant with the witness E.A.

41. Before embarking on the application of these principles to the present case, the Court considers it important to stress that its primary concern under Article 6 § 1 is to evaluate the overall fairness of criminal proceedings (see *Schatschaschwili*, cited above, § 101). That is the ultimate goal of various tests developed to examine different matters relating to specific rights guaranteed by Article 6 § 3 (see, for instance, *Chernika*, cited above, §§ 51 and 52, and the cases cited therein). Compliance with the requirements of a fair trial must therefore be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016).

(b) Application of the above principles to the present case

(i) Whether there was a good reason for not obtaining E.A.'s statements in the presence of the applicant

42. The Court reiterates at the outset that the lack of a good reason for a prosecution witness's absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) (see *Schatschaschwili*, cited above, § 113). The Court considers that the same applies when the witness was not "absent" *per se*, but the accused was denied the opportunity to confront the witness (see *Ürek and Ürek*, cited above, § 66).

43. Turning to the facts before it, the Court notes that the applicant, who was serving a prison sentence at the material time in connection with a previous conviction, was brought to all the hearings held before the Istanbul Assize Court, except for the one where E.A. was heard. No explanation was provided by the trial court during the proceedings, or subsequently by the Government before the Court, as to why the applicant's presence could not be secured at that hearing despite his being under the exclusive control of the State. In fact, the trial court does not seem to have given any consideration to the implications of the applicant's absence in terms of the rights of the defence. The Court further notes that, contrary to the

Government's allegations, the applicant had requested to be confronted with E.A. from the very beginning of the proceedings (see paragraphs 19 and 20 above) and that he had complained about the absence of any such confrontation both in his defence statements before the trial court, and subsequently to the Court of Cassation (see paragraphs 24 and 28 above).

44. In these circumstances, the Court cannot find that there was a good reason for the failure to obtain a statement from E.A. in the applicant's presence, or that the authorities displayed appropriate diligence to ensure the applicant's presence.

(ii) Whether the evidence given by E.A. was the sole or decisive basis for the applicant's conviction or whether it carried significant weight

45. The Court observes that the charges brought against the applicant were initially based on two pieces of evidence, the first being the allegations made by the applicant's brother G.K. when interviewed at the Istanbul Security Directorate, and the second being E.A.'s statements during the questioning and photo identification procedure conducted at the Istanbul Security Directorate (see paragraph 17 above). The Court further observes that during the ensuing trial stage, both G.K. and E.A. were heard by the Istanbul Assize Court as witnesses. However, when delivering its judgment against the applicant, the first-instance court appears to have cited expressly only the evidence provided by E.A. in concluding that the applicant had been active at the PKK's Kelereş camp in Iran and had therefore been a member of that organisation as accused. The Court notes that the first-instance court did not refer in any way to G.K.'s statements, or to any other direct or circumstantial evidence, in establishing the applicant's guilt (see paragraph 25 above).

46. The Court therefore considers, in the light of the domestic court's assessment in its reasoned judgment, that the statements made by E.A. at the Istanbul Security Directorate constituted the decisive, if not the sole, basis for the applicant's conviction, although E.A. expressed doubts regarding the accuracy of those statements when he was later heard by that court (see paragraphs 52 and 53 below for further discussion on this).

(iii) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

47. The Court considers, in the light of the foregoing, that the denial of the applicant's right to confront the witness E.A., for no good reason, had put the defence at a serious disadvantage, having particular regard to the critical role that his statement played in the applicant's conviction. It now remains to be determined whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured,

including measures that permitted a fair and proper assessment of the reliability of the evidence in issue.

48. In this context the Court reiterates that the extent of the counterbalancing factors necessary in order for a trial to be considered fair depends on the weight of the evidence in question. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair (see *Schatschaschwili*, cited above, § 116). Given the centrality of E.A.'s evidence, the Court considers that weighty counterbalancing factors were required to ensure the fairness of proceedings (see *Chernika*, cited above, § 66). The Court has considered the following elements to be relevant in this context: the trial court's approach to the evidence in question; the availability and strength of further incriminating evidence; and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial (see *Schatschaschwili*, § 145, and *Ürek and Ürek*, § 60, both cited above).

(1) Approach of the trial court to the witness evidence and the availability of further incriminating evidence

49. The Court has already established above that the evidence provided by E.A. during his police questioning was, to all intents and purposes, the sole evidence used to convict the applicant. There was certainly no other evidence in the case file submitted to the Court regarding the applicant's alleged presence at the Kelereş camp in Iran. Moreover, while the applicant's brother G.K. had made certain allegations at the time of his police questioning that suggested the applicant's continued involvement with the "organisation" in Romania following his release from prison, he later retracted those statements, which he claimed had been made under duress and in the absence of a lawyer. The Court notes that the trial court's judgment did not contain any discussion of the admissibility or the probative value of G.K.'s statement, nor did it refer in any way to those statements in determining the applicant's guilt. In those circumstances, the Court cannot but hold that there was no other evidence that directly or indirectly corroborated E.A.'s witness statement.

50. As for the trial court's approach to E.A.'s witness statement, the Court considers at the outset that there were a couple of factors that undermined the reliability of that statement. It notes firstly that E.A. had made the relevant statement against the applicant following his surrender to the police under the Reintegration of Offenders into Society Act, in order to benefit from certain advantages in exchange for information on the PKK (see paragraphs 9 and 31 above). In his statement – which had been taken in the absence of a lawyer – at the Anti-Terrorist Branch of the Istanbul Security Directorate, he had accordingly provided information regarding

some thirty alleged members of the PKK, and had identified some of those individuals, including the applicant, on the basis of photographs.

51. The Court reiterates, however, that the use of statements given by witnesses in return for immunity or other advantages may cast doubt on the fairness of the proceedings against the accused and can raise difficult issues, to the extent that, by their very nature, such statements are open to manipulation and may be made purely in order to obtain the advantages offered in exchange, or for personal revenge. The risk that a person might be accused and tried on the basis of unverified allegations that are not necessarily disinterested must not, therefore, be underestimated (see, *mutatis mutandis*, *Habran and Dalem v. Belgium*, nos. 43000/11 and 49380/11, § 100, 17 January 2017, and the cases cited therein, and *Adamčo v. Slovakia*, no. 45084/14, § 59, 12 November 2019).

52. In the Court's opinion, the reliability of E.A.'s statement was further weakened when he stated before the trial court, while under oath, that he was not certain that the person in the photograph shown to him was "Mahir" from the Kelereş camp. The Court observes that the trial court chose to attach more weight to E.A.'s earlier statement to the police in view of its temporal proximity to the alleged events. The trial court's choice is not problematic in itself, given that assessment of evidence is primarily a matter for the jurisdiction of the domestic courts, and that there is no hard and fast rule that requires domestic courts to give precedence under all circumstances to testimony given at the trial hearing (see, for instance, *Makeyan and Others v. Armenia*, no. 46435/09, §§ 40 and 47, 5 December 2019).

53. That said, the particular context in which E.A. had made his initial police statement, coupled with the uncertainty that he displayed at the hearing regarding the accuracy of that prior statement, should have prompted the trial court to treat the evidence given by E.A. with caution, noting in particular the weight of that evidence and the seriousness of the offence with which the applicant was charged. There is, however, no indication in the record of the hearing or the reasoned judgment itself to suggest that the trial court showed the caution called for in the circumstances by engaging in a meaningful assessment of the witness's credibility in the light of the foregoing factors.

(2) Procedural safeguards in place to remedy the applicant's inability to examine E.A. in person before the trial court

54. Pursuant to Article 210 § 1 of the Code of Criminal Procedure, where the evidence against an accused consisted solely of the statements of a witness, that witness had to be heard in court. The Court notes that in accordance with that provision, E.A. was heard by the trial court, which therefore had the opportunity to make observations on his demeanour and credibility as a witness. Furthermore, and as mentioned above (see

paragraph 21), although the applicant was absent, his lawyer was present at the hearing when E.A. was heard and was able to put questions directly to him to challenge his credibility, which, in certain circumstances, may be sufficient to uphold the rights of the defence (see, for instance, *Šmajgl*, cited above, § 63, and the cases cited therein). It is, moreover, not disputed that the applicant had acquainted himself with the contents of the statements given by E.A. both to the police and subsequently at the trial, and that he therefore had the opportunity to challenge their veracity and reliability before the trial court, and to give his version of events.

55. The Court therefore acknowledges that the defence was able to benefit from some important procedural safeguards that were intended to enable a fair and proper assessment of the reliability of E.A.'s statements. That said, having regard to the sheer weight of E.A.'s statements and the special context in which they were obtained, coupled with the seriousness of the punishment which the applicant faced, the Court does not consider that those safeguards may be taken to have sufficiently compensated for the handicap faced by the defence in the present case. This is particularly so given the absence of a good reason to justify the applicant's inability to examine E.A. in person (see paragraphs 42-44 above). In the Court's view, a confrontation between the applicant and E.A. was essential not only to allow the applicant to challenge the reliability of the latter's allegations regarding him – which he could have admittedly done through his lawyer, at least to a certain extent – but above all to dissipate the uncertainty surrounding the physical identification that was at the heart of the case brought against the applicant, which could not sufficiently have been achieved through the lawyer's questioning of the witness. The Court reiterates in this connection that it is normally desirable that witnesses should identify in person someone suspected of serious crimes if there is any doubt about the person's identity (see, *mutatis mutandis*, *Doorson v. the Netherlands*, 26 March 1996, § 75, *Reports of Judgments and Decisions* 1996-II).

(iv) Conclusion

56. The Court considers, in the light of the foregoing, that the applicant's inability to confront the witness E.A. personally rendered the trial as a whole unfair in the special circumstances of the present case.

57. There has, accordingly, been a violation of Article 6 §§ 1 and 3 (d) of the Convention in the present case.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

58. The applicant argued under Article 6 § 1 that the authorities' failure to serve the first-instance court's reasoned judgment on him and his lawyer,

coupled with the refusal of his request for the holding of a hearing before the Court of Cassation, had violated his right to a fair and public hearing.

59. Having regard to its conclusion under Article 6 §§ 1 and 3 (d) of the Convention (see paragraph 57 above), the Court considers that there is no need to examine separately the admissibility and merits of the remaining complaints under Article 6.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

61. The applicant claimed 50,000 euros (EUR) in respect of pecuniary damage for loss of income during the period when he had served the prison sentence in issue in the present case. He also claimed EUR 50,000 in respect of non-pecuniary damage.

62. The Government submitted that the applicant's claims were speculative and excessive.

63. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, ruling on an equitable basis, it awards the applicant EUR 5,000 in respect of non-pecuniary damage (see, for instance, *Ürek and Ürek*, cited above, § 78).

64. Lastly, the Court notes that Article 311 § 1 (f) of the Code of Criminal Procedure provides the applicant with the opportunity to request the reopening of criminal proceedings within one year of a final judgment by the Court finding a violation (ibid., § 79).

B. Costs and expenses

65. The applicant also claimed EUR 3,400 for the lawyers' fees incurred before the Court, which corresponded to a total of thirty-five hours' work undertaken by his lawyers. To support his claim, the applicant submitted a legal-services agreement concluded with his lawyers on an unspecified date. He also claimed EUR 500 in respect of copying, scanning and filing expenses, without, however, submitting any documentary proof, such as invoices, in support of his claims.

66. The Government submitted that the applicant's claims under this head were not substantiated.

67. 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. It reiterates in addition that Rule 60 §§ 2 and 3 of the Rules of Court requires the applicant to submit itemised particulars of all claims, together with any relevant supporting documents, failing which the Court may reject the claims in whole or in part. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,400 covering the lawyers' fees, but rejects the remainder of the costs and expenses which remain undocumented.

C. Default interest

68. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 §§ 1 and 3 (d) concerning the applicant's inability to confront the witness against him admissible;

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

3. *Holds* that there is no need to examine the admissibility and merits of the applicant's remaining complaints under Article 6 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,400 (three thousand four hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 16 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Jon Fridrik Kjølbro
Registrar	President