**APPLICATIONS N° 23878/94, 23879/94, 23880/94, 23881/94, 23882/94 and 23883/94 (joined)**

S SAKIK, A TURK, M ALINAK, L ZANA, M H DICLE and O DOĞAN v/TURKEY

**DECISION** of 25 May 1995 on the admissibility of the applications

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**Article 5, paragraphs 1, 3 and 4, and Article 15 of the Convention** *Turkish nationals of Kurdish origin kept in police custody without court review for twelve and fourteen days respectively under the Turkish Anti Terrorism Laws and at a time when a declaration under Article 15 of the Convention had been made (Complaints declared admissible)*

**Articles 5 and 26 of the Convention** *A request for compensation based on Law No 466 relating to the compensation of persons unlawfully arrested or detained is not an effective remedy to complain about the unlawfulness and length of detention in police custody (Turkey) the lawfulness of which has been confirmed by the competent authorities*

**Article 6, paragraph 1 of the Convention** *Inapplicable to proceedings in which the Turkish Constitutional Court examines the lawfulness of a decision to withdraw parliamentary immunity*

**Article 6, paragraphs 1 and 3, and Article 26 of the Convention** *In order to satisfy the exhaustion of domestic remedies requirement Turkish nationals of Kurdish origin convicted by a State Security Court on charges of terrorism who wish to complain of the proceedings before that court must submit their complaints to the Court of Cassation, to which the case was here referred by the prosecution*

**Article 14 in conjunction with Article 10 of the Convention, and Article 26 of the Convention** *In order to comply with the exhaustion of domestic remedies requirement Turkish Members of Parliament of Kurdish origin convicted by a State Security Court on charges of terrorism who complain of a violation of their freedom of expression and discrimination on the ground of language must submit their complaints to the Court of Cassation to which the case was here referred by the prosecution*

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## THE FACTS

The applicants, who are Turkish citizens, are former members of the Turkish National Assembly They used to be members of the DEP (Democracy Party), which has recently been dissolved by the Constitutional Court

In the proceedings before the Commission they were represented by Mr Christian Charrière-Bournazel, a lawyer practising in Paris, Ms Vanna Tsiorva, a lawyer practising in Thessalonica, Mr Hasip Kaplan, a lawyer practising in Istanbul and Professor Kevin Boyle and Ms Françoise Hampson of Essex University, and others

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

1 *Particular circumstances of the case*

The public prosecutor attached to Ankara State Security Court requested on several occasions - on 27 November 1991, 16 December 1992, 25 May 1993 and 2 July 1993 - that the applicants' parliamentary immunity be withdrawn

In these requests, he alleged that the applicants had violated Article 125 of the Turkish Criminal Code

On the basis of the request of 16 December 1992, the application for withdrawal of the applicants' parliamentary immunity was entered in the National Assembly's agenda for debate on 2 March 1994 On that day, the applicants' parliamentary immunity was withdrawn pursuant to Article 83 of the Turkish Constitution

The applicants Dicle and Doğan were taken into police custody on 2 March 1994 by order of the public prosecutor attached to Ankara State Security Court On 4 March 1994 the applicants Sakik, Turk, Alinak and Zana were also taken into police custody

On 7 March 1994 the applicants applied to the Constitutional Court for re-instatement of their parliamentary immunity The Constitutional Court dismissed their applications on 21 March 1994

In the meantime, the public prosecutor attached to Ankara State Security Court had ordered an extension of the applicants' detention in police custody until 16 March 1994 He based his decision on the provisions of Law No 3713 and the Law on State Security Courts' Procedure

The applicants' requests to be brought before a judge, filed on 3 and 9 March 1994, were dismissed by the public prosecutor attached to Ankara State Security Court

The applicants made no statements to the police during their detention in police custody

On 16 March 1994 the applicants were brought before the judge of Ankara State Security Court assigned to rule on matters of detention and were detained on remand

On 21 June 1994 the public prosecutor attached to Ankara State Security Court filed his submissions He accused the applicants of engaging in separatist activities and of undermining national security, crimes punishable by capital punishment under Article 125 of the Criminal Code These charges were based on the tenor of a number of oral and written statements made by the applicants They were also accused of having organisational links with the illegal armed organisation, the PKK (Kurdish Workers' Party) In particular, the applicant Doğan was accused of having harboured and nursed a PKK activist

In a judgment of 8 December 1994 Ankara State Security Court sentenced the applicants Sakık and Alınak to three years and six months' imprisonment for distributing separatist propaganda and sentenced the applicants Turk Zana, Dicle and Doğan to fifteen years' imprisonment for membership of an armed group, offences under Article 8 of Law No 3713 and Article 168 of the Turkish Criminal Code respectively It dismissed the charge based on Article 125 of the Criminal Code, which provides for capital punishment for high treason

The applicants and the public prosecutor attached to Ankara State Security Court appealed on points of law against that judgment The prosecutor submitted that the charges were covered by Article 125 of the Turkish Criminal Code

2 *Relevant domestic law*

Article 83 of the Turkish Constitution

Parliamentary immunity

No proceedings may be brought against any member of the Turkish Grand National Assembly for votes cast or statements made during parliamentary proceedings, nor for ideas or views expressed by him or her on the premises of the Assembly, nor, unless the Assembly decides otherwise on the proposal of the Bureau for the session, the repetition and publicising of such views outside the Assembly

Unless authorised by the Assembly, no member of the Turkish Grand National Assembly may be arrested, detained, interrogated or tried for an offence committed before or after elections This provision shall not apply in cases where a member has been caught in the act of committing an offence punishable by a long term of imprisonment or in those cases listed in Article 14 of the Constitution, provided that an investigation has been initiated before the elections However in such a case the competent authority must notify the Assembly directly and without delay

Article 85 of the Turkish Constitution

Application for judicial review

"Where the Assembly decides to withdraw a member's parliamentary immunity or to strip him or her of office, the member concerned or any other member of the Assembly may, within a week of that decision, apply to the Constitutional Court for such decision to be set aside on the grounds that it is unconstitutional or contrary to the Rules of Procedure governing the Assembly The Constitutional Court shall rule on the application within fifteen days "

Article 125 of the Turkish Criminal Code

"Whosoever shall commit an act such as to submit the State or a part of the State to domination by a foreign State, to lessen its independence or interfere with its unity, or to withdraw part of the territory from the State's administration, shall be liable to capital punishment "

Article 168 of the Turkish Criminal Code

"Whosoever, with a view to committing any of the crimes set forth in Article 125 shall form an armed group or organisation or assume the control and command of or a particular responsibility within such a group or organisation shall be sentenced to a minimum term of imprisonment of fifteen years

The various members of the group or organisation shall be sentenced to a term of between five and fifteen years' imprisonment

Article 8 para 1 of the Anti-Terrorism Law, No 3713

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the indivisible territorial and national unity of the State of the Turkish Republic are prohibited, irrespective of the methods used or the intention and ideas behind them Whosoever carries on such an activity shall be sentenced to a term of between two and five years' imprisonment and to a fine of between fifty and one hundred million Turkish pounds "

## COMPLAINTS

The applicants allege that there has been a violation of Articles 5, 6, and of Article 10 in conjunction with Article 14 of the Convention

The applicants complain firstly of the unlawfulness and excessive length of their detention in police custody They invoke Article 5 paras 1 and 3 of the Convention

They further allege that, contrary to Article 5 para. 4 of the Convention, they had no remedy under Turkish law allowing them to challenge the lawfulness of their detention.

The applicants also complain, invoking Article 5 para 5 of the Convention, that they have no right under Turkish law to compensation for the excessive length of their detention in police custody

They complain further of a violation of their right to defend themselves, on the grounds, *inter alia*, that they did not have legal assistance during their detention in police custody, contrary to Article 6 para. 3 (c) of the Convention

They complain of a breach of the adversarial principle in that the preliminary investigation before Ankara State Security Court is conducted without an investigating judge and under the supervision of the prosecuting authorities. They further submit that there has been a violation of Article 6 para 1 of the Convention as Ankara State Security Court cannot be described as an independent and impartial tribunal

The applicants allege that there has been a further violation of Article 6 para 1 of the Convention in that they were not informed of the grounds of the Constitutional Court's decision to dismiss their application for reinstatement of their parliamentary immunity, as only the operative terms of that decision were served on them.

The applicants complain finally of a violation of their freedom of expression in so far as they were arrested and convicted for expressing, in their capacity as Members of Parliament, the concerns and demands of the Kurdish population in Turkey They submit that they have never incited violence, but have always strongly opposed it, both when the PKK has resorted to violence and when the State has brutally repressed the Kurdish population in all areas inhabited by them. The applicants add that they have been victims of discrimination on the ground of language, in so far as they are being prosecuted for having expressed themselves in Kurdish and for having drafted documents in Kurdish They allege a violation of Article 10 of the Convention in conjunction with Article 14.

... . ....

**THE LAW**

1. Invoking paragraphs 1, 3, 4 and 5 of Article 5 of the Convention, the applicants complain of the unlawfulness and the length of their detention in police custody and of the fact that they had no remedy to challenge the lawfulness of their detention, nor any right to compensation

The respondent Government base their first objection on Article 15 of the Convention: they recall their declaration that "the Republic of Turkey is exposed, in South-East Anatolia, to threats to its national security which have steadily increased in

extent and intensity so that they constitute a threat to the life of the nation within the meaning of Article 15 of the Convention National security is being threatened mainly in the provinces of South East Anatolia and also partly in the neighbouring provinces The Government have had no alternative, given the intensity and diversity of the terrorist activities, but to deploy their security forces in order to suppress them

Referring to the criteria laid down by the Commission in the Greek case (Comm Report 5 11 69, Yearbook 12 pp 71 72, paras 152 154) the Government argue that they are justified in derogating from their obligations under the Convention on the grounds of a 'public emergency threatening the life of the nation within the meaning of Article 15 of the Convention In the light of the Court's case-law (Ireland v United Kingdom judgment of 18 January 1978, Series A no 25, pp 78 79, para 207, Brannigan and McBride judgment of 26 May 1993 Series A no 258 B, p 49, para 43), they argue that it is absolutely essential that they derogate from the procedural guarantees governing the detention of persons belonging to terrorist armed groups and that, on the facts, it is impossible to provide court supervision in accordance with Article 5 of the Convention owing to the difficulties inherent in investigating and suppressing terrorist criminal activities

The Government consider that the measures taken against the applicants are in keeping with the national authorities concern to fight terrorism under the legislation pertaining to states of emergency They observe in this respect that the order for the applicants' arrest was based on the existence of reasonable grounds for suspecting them of having committed an offence and that it was made in accordance with Article 30 of Law No 3842 (Law amending the Code of Criminal Procedure)

As regards the length of their detention in police custody, the Government observe that under Article 30 of Law No 3842, persons arrested for offences triable by the State Security Courts must be brought before a judge within 48 hours at the latest, but that this time period is increased to 15 days for collective offences, as was the case here where the nature of the charges laid against the applicants require that they be detained for longer

The Government thus argue that the custodial measure was ordered by a competent authority and was enforced by that authority in accordance with the requirements laid down by law They conclude that under domestic law the national authorities did not in any way exceed the margin of appreciation accorded to governments under the Convention and that the measures in question were not in any way disproportionate

The Government recall that the decision to detain the applicants on remand was taken by the judge of Ankara State Security Court assigned to rule on matters of detention and was therefore made following judicial proceedings They submit that the supervision required by Article 5 para 4 of the Convention was incorporated into that decision

As regards the complaint that there has been a violation of Article 5 para 5 of the Convention, the Government submit that the applicants have failed to exhaust domestic remedies they argue that a request for compensation based on Law No 466 on the compensation of persons unlawfully arrested or detained provides that applicants have a right to compensation, which they can exercise once their trial is over

The applicants dispute all these arguments As regards Article 15 of the Convention, they argue that the Government construe this provision widely and fail to demonstrate its applicability to their persons or their impugned activities They argue that by describing them as "out-and out terrorists , the Government attempt to eschew all their obligations under the Convention The applicants stress that they were arrested on grounds of their political opinions

As regards the lawfulness of their detention, the applicants recall that in the light of the Court's case-law (Eur Court H R , Fox, Campbell and Hartley judgment of 30 August 1990, Series A no 182, pp 16-17, paras 32 and 34), even in the case of terrorist-type offences, the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 para 1 is impaired They argue that reasonable or "plausible suspicions means reasons based on sufficient evidence

On the subject of the length of their detention in police custody, the applicants refer to the Court's case-law (Eur Court H R , Brogan judgment of 29 November 1988, Series A no 145-B) and submit that the importance attached to the particular factor of terrorism should not result, in practice, in the State being relieved of its obligation to ensure that defendants are rapidly released or brought promptly before a court They observe that the length of their detention in police custody did, in any event, exceed the limits deemed acceptable by the Convention institutions in exceptional circumstances

Regarding the Government's objection under Article 5 para 5 of the Convention that the applicants have failed to exhaust domestic remedies, the Commission observes that, in proceedings before the State Security Courts, the length of detention in police custody can be extended to 15 days by order of the prosecution The length of detention in police custody being challenged by the applicants did not therefore exceed the maximum time-limit provided for in domestic law According to Law No 466, cited by the Government, an action against the authorities can only be for compensation for damage suffered as a result of unjustified deprivation of freedom

In an earlier case, on similar facts, the Commission found that this remedy was ineffective on the grounds, *inter alia*, that, in that case, the Turkish judicial authorities to whom the applicants had complained had already concluded that the detention in question was lawful (see, for example, Nos 14116/88 and 14117/88 (joined), Dec 11 5 87, D R 61 p 250)

The Commission considers, in the light of the foregoing, that the Government's submission that the applicants have failed to exhaust domestic remedies cannot be upheld

The Commission has undertaken a preliminary examination of the applicants' complaints under Article 5 of the Convention in the light of the Government's arguments based on Article 15 of the Convention It considers that this part of the application raises complex questions of law and fact which cannot be resolved at this stage of the examination, but require an examination on the merits These complaints cannot therefore be declared manifestly ill founded pursuant to Article 27 para 2 of the Convention The Commission also notes that no other ground for ruling this part of the application inadmissible has been established

2 The applicants complain further that Ankara State Security Court, which convicted them, was not an independent and impartial tribunal within the meaning of Article 6 para 1 of the Convention They also complain that they did not have a fair hearing before the State Security Court in so far as their right to defend themselves was not respected They invoke Article 6 paras 1 and 3 of the Convention in support of this complaint

The Government argue that the State Security Courts are special courts set up in accordance with Article 143 of the Constitution with jurisdiction to try offences committed against the indivisible integrity of the State and the democratic order They refer to Article 138 of the Constitution which guarantees the independence of the judiciary in the exercise of their functions and argue that it cannot be inferred from the mere fact that these judges are appointed by a decision or recommendation of the Executive that they are not independent They stress that the State Security Courts offer all the usual guarantees of judicial proceedings and that their decisions are subject to review by the Court of Cassation

As regards the complaints relating to the alleged unfairness of the proceedings, the Government argue that the Commission is incompetent *ratione materiae* to examine an application relating to errors of fact and law allegedly committed by a domestic court The Government argue that the assessment of evidence is a matter first and foremost for the domestic courts and cannot be examined by the Commission

The applicants dispute the Government's arguments They stress the fact that judges and prosecutors attached to the State Security Courts are appointed by a committee representing the Executive They observe that the preliminary proceedings before the State Security Court are conducted without an investigating judge and under the supervision of the prosecuting authorities, which are closely linked to the Executive

The applicants submit further that the appeal pending before the Court of Cassation is such an ineffective remedy that they should be exempted from the obligation to exhaust it They allege that the courts make it their general practice to

implement the State's policy of repression and assert that at their trial the State Security Court took no account of any of their allegations of violations of the rights and freedoms guaranteed by the Convention

The applicants also argue that the principle of equality of arms was infringed in the proceedings before the State Security Court They submit that they were unable to defend themselves properly in so far as they were deprived of legal assistance while in police custody and during the preliminary investigation and were not allowed to see the case-file They allege that the State Security Court systematically dismissed their applications for further enquiries to be made and their requests for verification of the authenticity of the documents on the case file and refused to allow evidence to be submitted for the defence or to allow defence witnesses to be called and questioned The applicants stress finally that, in reaching its decision the State Security Court revised the charges in the absence of their lawyers

The Commission notes, however, that the public prosecutor attached to Ankara State Security Court appealed on points of law against the judgment convicting them on 8 December 1994 Criminal proceedings against the applicants are therefore currently pending before the Court of Cassation

The Commission considers it necessary to take into consideration the entire criminal proceedings brought against the applicants in order to express an opinion as to whether they comply with the requirements of Article 6 of the Convention It notes further that, under Turkish law, the applicants can submit to the Court of Cassation the complaints which they now raise before the Commission

The introduction of these complaints therefore appears premature, given the current stage of the proceedings before the domestic courts The applicants cannot therefore complain at this stage of any violation of the Convention They may re submit the case to the Commission if following the outcome of the criminal proceedings against them, they still consider themselves victims of the alleged violations The applications must therefore be rejected on this point as manifestly ill founded pursuant to Article 27 para 2 of the Convention

3 The applicants also complain that they were not informed of the reasons for the Constitutional Court's decision to dismiss their application for reinstatement of their parliamentary immunity They invoke Article 6 para 1 of the Convention

The Commission notes that under Turkish domestic law the Constitutional Court's role is limited to reviewing, at the request of members of the Assembly stripped of their office, whether the decision to withdraw their parliamentary immunity was constitutional or formally complied with the provisions of the Turkish National Assembly's Rules of Procedure These proceedings do not involve either a determination of the applicant's civil rights and obligations or the merits of any criminal charge against them It follows that Article 6 of the Convention is inapplicable in this case

The Commission therefore considers that this part of the application is incompatible *ratione materiae* with the Convention pursuant to Article 27 para 2

4 The applicants complain finally of a violation of Article 10 of the Convention in conjunction with Article 14 They allege that their freedom of expression has been violated in so far as they were prosecuted for expressing their opinions, in their capacity as Members of Parliament, on the Kurdish question in Turkey They maintain, in this respect, that they were victims of discrimination on the ground of language and argue that they were prosecuted for having expressed themselves in Kurdish and for having drafted documents in Kurdish

The Government argue, as a preliminary point, that the facts of the case must be assessed in the light of the terrorist threat hanging over Turkey

In support of their argument that the measures taken against the applicants were justified on the basis of the restrictions provided for in paragraph 2 of Article 10 the Government observe first that the institution of criminal proceedings against the applicants is in accordance with domestic law, the Turkish Constitution and the case-law of the Convention institutions and is consonant with the practices in force in Western democracies and with the Council of Europe's statements of principle condemning racism, ethnic hatred and violence in any form

The Government argue that the measures in question did not in any way attempt to curb the applicants' rights to express political views on the Kurdish question' and that the clear aim which emerged from the applicants' activities and speeches bears no relation to the freedom to hold opinions within the meaning of Article 10 of the Convention The Government consider that despite the applicants' sworn allegiance to the Constitution, they exceeded the acceptable limits in a democratic society on the right to expression by making public statements inciting to the destruction of territorial integrity, separatism, racial hatred and violence

The Government submit, in support of their arguments, that by invoking 'the freedom of the Kurdish people", demanding the recognition of the existence of an independent Kurdish State" and describing the Turkish State's anti-terrorist campaign as a movement for the extermination of the Kurds , the applicants were attempting to create discrimination on the basis of ethnic origin and were inciting racial hatred These tactics, aimed at creating an ethnic minority within the nation, are geared towards the destruction of the State and are therefore incompatible with national integrity The Government submit further that the terms used in the speeches made by the applicants were such as to incite a section of the population to revolt and violence with the aim of founding a separate State on Turkish territory

Regarding the applicants' activities, the Government refer to the submissions made by the public prosecutor attached to the State Security Court and recall that there were reasonable grounds for suspecting the applicants of having an organisational link

with an illegal organisation, the PKK (Kurdistan Workers Party), of receiving orders from that organisation and of being its political spokespersons

The Government conclude that, in the circumstances, the measures taken against the applicants were "necessary in a democratic society" and were in accordance with a pressing social need, that is, the protection of public order and the rights of others They were therefore justified under Article 10 para 2 of the Convention

The Government submit further that Law No 3713, the Anti Terrorism Law, which restricts fundamental freedoms in order to preserve constitutional principles, is justifiable under Article 17 of the Convention

As regards the allegations of discriminatory treatment, the Government refer to the Commission's case-law, arguing that Article 10 of the Convention does not guarantee freedom of language They submit further that no language is prohibited by law in Turkey They recall Article 14 of the Constitution which provides that none of the rights and freedoms enshrined in the Constitution shall be exercised with a view to creating discrimination on the ground of language

The Government observe that there is no discrimination in Turkey between citizens of Kurdish origin and other citizens and that Kurds are fully entitled to all individual rights and freedoms All individuals are free to express their ideas in the language of their choice, on condition that what they say does not violate the integrity of the State and the unity of the nation

The Government emphasise that, in this case, the measures taken against the applicants were based exclusively on the unlawful content of their statements and not on the fact that they had expressed themselves in Kurdish

The applicants dispute this argument They contest in particular the Government's submissions regarding Article 10 para 2 of the Convention They assert that the Turkish judicial authorities applied the restrictions provided for in this provision in violation of democratic principles They recall that pluralism in a democratic society requires the free expression of all views, even those which do not correspond to the opinions expressed by the Government They allege that the Government describe any opinion which runs counter to official policies as an "activity' within the meaning of Article 17 of the Convention and make no distinction between the concepts of activity and opinion"

The applicants observe that they have been referred to as terrorists who threaten the territorial integrity of the State despite the fact that their activities and speeches were strictly political in nature and never disputed Turkey's borders They have consistently condemned violence, while advocating peace and the opening of political negotiations on the Kurdish question The measures taken against them had the

effect of preventing a section of the population from participating in political debate and of violating the democratic legitimacy of Members of Parliament and their freedom of political expression as enshrined in the Constitution

The applicants conclude that the measures taken against them were not justified under Article 10 para 2 of the Convention

It does not fall to the Commission, however, to decide whether the facts alleged by the applicants reveal the appearance of a violation of Article 10 in conjunction with Article 14 of the Convention Under Article 26 of the Convention the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law

The Commission notes that in this case the criminal proceedings against the applicants are currently pending before the Court of Cassation It notes that under Turkish law the applicants can submit to the Court of Cassation the complaints which they now raise before the Commission Should the applicants still consider at the end of those criminal proceedings that they are victims of the alleged violations, they may re submit the case to the Commission

It follows that the applicants have not yet met the condition requiring them to exhaust domestic remedies and that this part of their applications must be rejected pursuant to Article 27 para 3 of the Convention

For these reasons, the Commission, unanimously

DECLARES ADMISSIBLE without prejudging the merits the applicants' com plaints regarding the lawfulness and the length of their detention in police custody, the lack of court supervision and the right to compensation,

DECLARES INADMISSIBLE the remainder of the applications