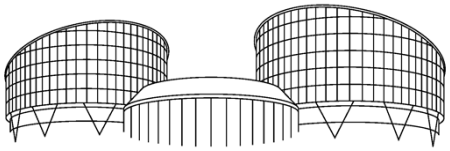

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF SANCAKLI v. TURKEY

(Application no. 1385/07)

JUDGMENT

STRASBOURG

15 May 2018

FINAL

15/08/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sancaklı v. Turkey,

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

Paul Lemmens, *President,*
Ledi Bianku,
Işıl Karakaş,
Nebojša Vučinić,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar*,

Having deliberated in private on 3 April 2018,

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

PROCEDURE

1. The case originated in an application (no. 1385/07) 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 Rıfat Sancaklı ("the applicant"), on 29 December 2006.

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

3. The applicant alleged that he had not had a fair trial in that the domestic courts had not held a hearing during the criminal proceedings against him, which resulted in his being ordered to pay an administrative fine.

4. On 14 October 2009 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Istanbul.

6. On 2 October 2004 the Büyükçekmece Magistrates' Court issued a search warrant allowing the gendarmerie to conduct searches of public places and suspected persons in a designated area.

7. Late at night on the same day, the gendarmerie carried out a search at the Sancak Hotel, which is owned by the applicant. The records drawn up afterwards noted that during the course of the search, a certain M.Ş. had approached the plain-clothes officers outside the hotel and told them that he had a girl inside. It was then established that M.Ş. trafficked women. He and a woman in the hotel were both taken to the gendarmerie headquarters.

8. The search records, which were prepared a few hours after the search and signed by the hotel's manager, showed that five women of foreign nationalities had been staying at the hotel with some men and that they had all been taken to the gendarmerie headquarters.

9. On 3 October 2004 the gendarmerie questioned several men as suspects and five women as victims. They all confirmed that they had been staying at the hotel for prostitution purposes. Some of the women were asked whether they knew of any complicity between the traffickers and the management of Sancak Hotel, to which they responded in the negative.

10. On the same day the applicant was arrested and taken into the custody of the gendarmerie on suspicion of facilitating prostitution.

11. On 4 October 2004 the applicant gave statements to the gendarmerie. He denied having provided premises for prostitution. He argued that he did not allow procurers into his hotel and had never seen M.Ş. before.

12. On the same day, the gendarmerie also questioned the hotel's manager, who stated that both he and the applicant were very strict about keeping procurers out of their hotel.

13. On 30 May 2005 the Büyükçekmece Public Prosecutor issued an indictment against the applicant and three other persons. He accused them of failure to obey an order from an official authority under Article 526 § 1 of the Criminal Code (Law no. 765) in force at the time, on the ground that they had provided premises for prostitution in their hotels.

14. On 1 June 2005 the Misdemeanours Act (Law no. 5326) and the new Code of Criminal Procedure (Law no. 5271) entered into force.

15. On 10 June 2005 the Büyükçekmece Magistrates' Court assessed the case without holding a hearing. Establishing that the accused had provided premises for prostitution in their hotels, it held that the applicant had failed to obey the orders of an official authority as charged and should be punished accordingly. It then sentenced him to an administrative fine of 100 Turkish liras (TRY)[1] pursuant to Section 32 of the Misdemeanours Act (Law no. 5326).

16. The applicant objected to that decision, arguing that his defence rights had been restricted in that the court had sentenced him to the fine solely on the basis of the statements taken previously by the police, and without hearing him in person. He maintained that he accepted clients into his hotel in compliance with the relevant regulation and that he could not be

1. 62 euros at the time of the events.

expected to refuse to offer accommodation to foreign nationals or to question their motives for staying there.

17. On 3 February 2006 after examining the case on the basis of the case file, the Bakırköy Assize Court upheld the decision of the Magistrates' Court. That decision was final.

18. On 24 May 2006 an official letter was sent to the applicant. It was indicated on the envelope that the applicant was invited to a hearing concerning his case, which would be held on 10 July 2006. The envelope did not show any confirmation that the letter had been served on him.

19. The applicant's lawyer stated that he had received a copy of the final decision at the registry of the Büyükçekmece Magistrates' Court on 11 July 2006. In support of his claim, he submitted a copy of the Assize Court's decision, on which a lawyer working at his office had noted that he had been served with the copy in person on that date. That document was later stamped and certified as an authentic copy by the registry of the domestic court.

20. Following communication of the present application, on 21 December 2009 a public prosecutor prepared an assessment report, summarising the events in the case. He concluded that the final decision had been served on the applicant on 26 May 2006.

21. On 2 January 2014 both the applicant and the Government were asked under Rule 54 § 2 (c) of the Rules of Court to provide the Court with a document indicating the notification date of the final decision by 16 January 2014 at the latest. The parties did not respond to that request.

22. On 3 November 2017 the Government were once again asked to provide documents regarding the commencement of the six-month time-limit, in particular the content of the envelope from the Büyükçekmece Magistrates' Court dated 24 May 2006 and the document in support of the public prosecutor's claim that the final decision had been served on the applicant on 26 May 2006. On 30 November 2017 the Government informed the Court that they could not find the requested documents.

II. RELEVANT DOMESTIC LAW

23. Article 526 § 1 of the former Criminal Code (Law no. 765), which regulated failure to obey an order from an official authority, read as follows:

> "A light term of prison sentence between three and six months and a fine ... shall be imposed on those who fail to comply with a legal order or a measure which was issued by an official authority within the context of a judicial act or in order to protect public security, public order or general health, provided that the act in question does not constitute a separate offence."

24. The relevant sections of the Misdemeanours Act (Law no. 5326), which entered into force on 1 June 2005, read:

Section 24

"When the prosecuted offence is found to be a misdemeanour, the relevant court shall deliver a decision imposing an administrative sanction."

Section 29

"1. An objection to a decision issued by a magistrates' court may be lodged before the nearest assize court in accordance with the provisions of the Code of Criminal Procedure. The objection should be lodged within seven days of service of the decision on the parties;

2. The assize court shall examine the objection on the basis of the case file (without holding a hearing);

...

4. The final decision of the assize court shall be served on the parties..."

Section 32

"1. An administrative fine of 100 Turkish liras shall be imposed on those who fail to comply with a legal order which was issued by an official authority in order to protect public security, public order or general health. The imposition of this fine shall be decided by the official authority who issued the legal order.

...

3. The reference made by other laws to Article 526 of the (former) Criminal Code (Law no. 765) shall be understood as a reference to this Section. "

25. The relevant articles of the Code of Criminal Procedure (Law no. 5271), which also entered into force on 1 June 2005, read as follows:

Article 270

"The authority examining the objection may communicate it to the public prosecutor and the other party in order to obtain their written observations. The authority may conduct further investigation into the matter..."

Article 271

"1. Save for the circumstances described by law, the courts shall make decisions about objections without holding a hearing. The public prosecutor as well as the defendant or his/her legal representative may be heard if necessary.

...

4. The decision delivered in respect of the objection shall be final..."

26. Section 5 of the Criminal Records Act (Law no. 5352) provides that decisions concerning administrative fines are not to be registered in the criminal records even if delivered by a court.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

27. The applicant complained that the proceedings had been unfair, in that the domestic court had not held an oral hearing and had imposed an administrative fine without granting him a hearing. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

A. Admissibility

1. Applicability of Article 6 of the Convention

28. The Government argued that the imposition of an administrative fine on the applicant did not constitute determination of a criminal charge against him. In that connection they maintained that, although an administrative fine may be regarded as a deterrent measure, it could not be classified as a criminal sanction.

29. The Court recalls that in the case of *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-XIV), it examined whether tax surcharge proceedings were "criminal" within the autonomous meaning of the Article, and to this end relied on three criteria, commonly known as the "Engel criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22), to be considered in determining whether or not there was a "criminal charge". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. However, this does not exclude a cumulative approach in cases where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 53, ECHR 2009, and *Steininger v. Austria*, no. 21539/07, § 34, 17 April 2012).

30. As regards the first criterion, it is clear that the impugned fine was administrative under section 32 of the Misdemeanours Act. However, this is not decisive. As for the second criterion, the Court notes that the offence at issue, namely failure to obey the orders of an official authority, was a misdemeanour and criminal in nature. In that connection, it points out that the applicant was charged with that offence on account of having provided premises for prostitution, an act which did not constitute a separate criminal offence at the time of the events and was regulated as one by the entry into

force of the new Criminal Code (Law no. 5237) during the course of the proceedings against the applicant. With regard to the third criterion, the Court observes that, although the administrative fine was not a substantial amount, it was punitive, as clearly stated by the Büyükçekmece Magistrates' Court in its decision (see paragraph 15 above). In that respect, it notes that the purpose of the fine was not compensation for damage caused by the applicant but rather a measure to deter the latter from committing the offence again. In the light of the foregoing, the Court finds that Article 6 applies under its criminal head.

31. It follows that the Government's objection of the incompatibility *ratione materiae* of the applicant's complaint with Article 6 of the Convention must be dismissed.

2. Exhaustion of domestic remedies

32. The Government maintained that the applicant had failed to exhaust the domestic remedies in that he had not brought compensation proceedings before the civil or administrative courts in respect of the damage he had allegedly suffered.

33. The Court observes that the applicant's complaint concerns the fairness of the domestic proceedings as a result of which he was sentenced to an administrative fine. According to both the Misdemeanours Act and the Code of Criminal Procedure, the only effective remedy whereby he could have his complaints examined is the filing of an objection with the nearest Assize Court, to which the applicant had recourse in the present case. Accordingly, the Court rejects the Government's argument that the applicant failed to exhaust domestic remedies.

3. Compliance with the six-month time-limit

34. The Government claimed that the applicant had not complied with the six-month time-limit. In that connection they stated that the final decision in the present case had been delivered by the Bakırköy Assize Court on 3 February 2006, whereas the application had been lodged with the Court on 29 December 2006.

35. The Court reiterates first of all that where an applicant is automatically entitled to be served with a written copy of the final domestic decision, the object and purpose of Article 35 § 1 of the Convention are best served by counting the six-month period as running from the date of service of the written judgment. The Government did not mention that date in their observations. The Court observes, however, that the two documents annexed to their observations indicate different dates of notification (see paragraphs 18 and 20 above). The first document was a copy of an envelope bearing a postal stamp dated 24 May 2006 but no confirmation that it had actually been served on the applicant. The second was a report drawn up by

a public prosecutor following the communication of the present case, which simply noted that the applicant had been notified of the final decision on 26 May 2006, without referring to any supporting documents.

36. However, the applicant claimed that he had learnt of the final decision only when his lawyer went to the registry of the Büyükçekmece Magistrates' Court on 11 July 2006. In support of his claim, he submitted a copy of the final decision with a note, which was later stamped and certified as an authentic copy by the registry of that court, stating that his lawyer had received the decision on that date (see paragraph 19 above).

37. As a result of the conflicting submissions made by the parties, in letters dated 2014 and 2017 respectively the Court asked the parties under Rule 54 § 2 (c) of the Rules of Court to provide it with documents indicating the notification date of the final decision. It requested from the Government, in particular, documents which could substantiate the information submitted previously by them. However, the Government informed the Court that they could not find the relevant documents.

38. In view of the foregoing, the Court concludes that the applicant learned of the final decision on 11 July 2006, as supported by the officially recognised document he submitted, and that the six-month period started running on that date. In that connection, it points out that the Government did not challenge the veracity of that document, nor did they claim that the decision had been served on the applicant.

39. Consequently, the Court dismisses the Government's objection under this head as well.

4. Conclusion

40. 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

41. The applicant complained that the domestic court's failure to grant him a hearing during the course of the proceedings violated his right to a fair trial. He argued that although the fine was only a modest one, it carried with it a substantial stigma affecting his reputation since the offence in question, namely, providing premises for prostitution, was a nefarious one. He further argued that such fines were registered in the criminal records, and would have a negative impact on his personal and business life.

42. The Government maintained that if the offence had been committed after 1 June 2005, that is to say, after the entry into force of the

Misdemeanours Act and the recent Code of Criminal Procedure, the fine would have been imposed directly by the relevant official authority, without any court proceedings. They stated that the domestic court had taken the new provisions into account in the applicant's favour and had sentenced him to an administrative fine, which could not be converted into imprisonment and had not been registered in the criminal records. They argued that the outcome of the proceedings could therefore hardly be considered important for the applicant. They further argued that in the present case the relevant law had been clear and the facts undisputed, leaving little room for judicial discretion. The case file included many witness statements and an official report proving that the applicant's hotel was being used for prostitution purposes. Moreover, the applicant had been heard by the authorities during the preliminary investigation stage and had been able to submit his written arguments to the court during the course of the proceedings. The Government concluded that the imposition of an administrative fine without the holding of an oral hearing did not contravene Article 6 of the Convention, in particular taking into account the requirement for efficiency and expediency in the administration of justice.

2. The Court's assessment

43. An oral, and public, hearing constitutes a fundamental principle that is enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be, at first instance, a tribunal which fully meets the requirements of Article 6, and where an applicant has an entitlement to have his case "heard", with the opportunity, *inter alia*, to give evidence in his own defence, to hear the evidence against him, and to examine and cross-examine the witnesses (see *Jussila*, cited above, § 40).

44. That said, the obligation to hold a hearing is not absolute. In *Jussila* (cited above), the Court found that in the light of the broadening of the notion of a "criminal charge" to cases not belonging to the traditional categories of criminal law (such as administrative penalties, customs law and tax surcharges), there were clearly "criminal charges" of differing weights. While the requirements of a fair hearing are strictest concerning the hard core of criminal law, the guarantees of the limb of Article 6 applying to criminal law do not necessarily apply with their full stringency to other categories of cases falling under that head and which do not carry any significant degree of stigma. The Court therefore accepted that an oral hearing might not be required in all cases in the criminal sphere (see *Jussila*, cited above, § 43).

45. Drawing a parallel with its approach in civil cases, the Court considered that the kind of circumstances which may justify dispensing with an oral hearing essentially depends on the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the

case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or the cross-examination of witnesses and where the accused has been given an adequate opportunity to put forward his case in writing and to challenge the evidence against him (see *Jussila*, cited above, §§ 41-42 and 47-48). In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy (*Jussila*, cited above, § 42).

46. Furthermore, when accepting that a hearing was not necessary in the circumstances of a particular case, the Court has previously taken into account the modest sum at stake or the minor character of the offence (*Jussila*, cited above, § 48, and *Suhadolc v. Slovenia* (dec.), no. 57655/08, 17 May 2011).

47. The Court observes in the present case that the domestic proceedings at issue concerned the imposition of an administrative fine on the applicant, which, as such, does not belong to the traditional categories of criminal law (see *Suhadolc*, cited above).

48. Although the proceedings at issue started with an indictment by the public prosecutor in accordance with the former legislation − which prescribed a short-term prison sentence for the offence in question − the Büyükçekmece Magistrates' Court took account of the recent legislation which entered into force only two days after the bill of indictment and sentenced the applicant to a fine of TRY 100 pursuant to section 32 of the Misdemeanours Act. The applicant objected to that judgment, arguing that his defence rights required that he must be heard during an oral hearing before the court. In doing so, he did not challenge the credibility of statements given by or to the gendarmerie or request evidence to be presented and heard by the court, but merely maintained that there had not been sufficient evidence to prove that he had been aware of the prostitution.

49. The Court notes furthermore that the administrative fine imposed on the applicant was a modest one and did not carry a significant degree of stigma. It cannot agree with the applicant's claim that the proceedings were of considerable personal significance to him in that they were concerned with a nefarious crime and had a negative impact on his reputation In that connection, the Court points out that although the domestic court maintained in its reasoning that the applicant was found to have provided premises for prostitution in his hotel, the offence he was eventually found guilty of was failure to obey the orders of an official authority. Moreover, despite the applicant's allegation to the contrary, according to the Criminal Records Act, administrative fines such as the one at issue are not registered in the criminal records (see paragraph 26 above).

50. As regards the domestic regulations concerning the right to an oral hearing, the Court observes that in examining the applicant's objection to the fine, the Assize Court had the discretion to order an oral hearing if it

considered one necessary, pursuant to Article 271 of the Code of Criminal Procedure (Law no. 5271).

51. Taking into account the fact that the applicant did not challenge the credibility of statements given by or to the gendarmerie or request evidence to be presented to and heard by the domestic court, the case did not raise any factual issues (see, *a contrario*, *Hannu Lehtinen v. Finland*, no. 32993/02, § 48, 22 July 2008, and *Flisar v. Slovenia*, no. 3127/09, § 39, 29 September 2011). Moreover, the applicant was able to make his submissions before the domestic court in writing. Accordingly, the Court finds force in the Government's argument that the domestic court was able to adequately resolve the case on the basis of the case file and therefore did not need to hold an oral hearing. It holds therefore that the absence of an oral hearing was justified in the circumstances of the present case.

52. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 15 May 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Paul Lemmens
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

P.L.
H.B.

DISSENTING OPINION OF JUDGE LEMMENS

1. To my regret, I am unable to follow the majority in its conclusion that there has been no violation of Article 6 § 1 of the Convention. That conclusion is based on the view that the fine imposed on the applicant is merely an "administrative" sanction. I respectfully disagree, as I consider that the proceedings brought against the applicant were of a "criminal" nature and that the fine imposed was a "criminal" one.

2. The charges brought against the applicant were based on Article 526 § 1 of the Criminal Code, and the case was sent to the Magistrates' Court, a criminal court.

Two days later the Misdemeanours Act entered into force. The same offence was now the object of section 32 § 1 of that Act. Article 526 of the Criminal Code was abolished.

If charges had been brought after the entry into force of the Misdemeanours Act, an administrative authority could have imposed an administrative sanction (section 22 of the Misdemeanours Act). However, the case was pending before a criminal court. In such a situation, section 24 of the Misdemeanours Act was applicable: when that court (in our case the Magistrates' Court) found that the offence was a misdemeanour, it had to deliver a decision imposing an "administrative sanction".

The term "administrative sanction" referred, in my opinion, to the sanctions classified as such in the Misdemeanours Act. Among these sanctions is listed a fine, called an "administrative fine" (section 16 of the Misdemeanours Act).

3. The majority refer to section 32 of the Misdemeanours Act to conclude that the impugned fine was "administrative" under domestic law.

It is true that section 32 § 1 provides that an "administrative fine" is to be imposed on those who have committed the offence of which the applicant was found guilty. However, this does not turn the fine actually imposed by the Magistrates' Court into an "administrative" one *for the purposes of Article 6 of the Convention*.

The Convention distinguishes between, on the one hand, offences prosecuted before and punished by courts, and on the other, offences, often of a minor nature, which are prosecuted before and punished by administrative authorities. Proceedings before a court are subject to the guarantees of Article 6. Proceedings before an administrative authority are not subject to these guarantees, but if the charge is "criminal" in the (autonomous) sense of Article 6, that provision requires that the person concerned is able to take any decision thus made against him or her before a tribunal that does offer the guarantees of Article 6 (see the principle established in *Öztürk v. Germany*, 21 February 1984, § 56, Series A no. 73).

Had the fine imposed on the applicant been handed down by an administrative authority, it would have been a truly "administrative"

sanction, and the Convention would then have required that the applicant could challenge that fine before a court. The Misdemeanours Act provides for such a possibility (for an example in our case-law, see *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey*, no. 48657/06, 28 November 2017; for other examples involving judicial review of a sanction imposed by an administrative authority (and raising an issue about the right to an oral hearing), see *Hüseyin Turan v. Turkey*, no. 11529/02, 4 March 2008, and *Suhadolc v. Slovenia* (dec.), no. 57655/08, 17 May 2011). Sections 27 and 28 of that Act provide that the person concerned can challenge an "administrative" sanction imposed by an administrative authority before the Magistrates' Court, which can annul the sanction. In such a case, the Magistrates' Court acts as an administrative court: it does not have the power to impose a sanction itself, it can only examine whether the sanction imposed by the administrative authority is a lawful one.

In the applicant's case, the situation was very different. The Magistrates' Court examined the charge brought against the applicant on the merits, found that the offence was a misdemeanour under the Misdemeanours Act, declared the applicant guilty of that offence, and applied the sanction provided by the Misdemeanours Act. The entire proceedings were judicial in nature. The only thing that was "administrative" was the name given to the sanction by domestic law.

That characterisation cannot, in my opinion, change the nature of the charge. Whatever the term used for the sanction ultimately imposed, the charge was, from beginning to end, a "criminal" one.

I therefore believe that the charge was "criminal" already under the first of the *Engel* criteria: the proceedings in question were classified as criminal under domestic law.

4. The majority do not contest that the applicant had, as a matter of principle, the right to an oral, and even a public, hearing before the Magistrates' Court. As is reiterated in the judgment, "this principle is particularly important in the criminal context, where generally there must be, at first instance, a tribunal which fully meets the requirements of Article 6, and where an applicant has an entitlement to have his case 'heard', with the opportunity, *inter alia*, to give evidence in his own defence, to hear the evidence against him, and to examine and cross-examine the witnesses" (see paragraph 43 of the judgment, referring to *Jussila v. Finland* [GC], no. 73053/01, § 40, ECHR 2006-XIV).

I agree with the majority that the obligation to hold a hearing is not absolute (see paragraph 44 of the judgment, referring to *Jussila*, cited above, § 40).

I disagree, however, with the majority's subsequent approach, which is based on the fact that the proceedings against the applicant did not concern the "hard core of criminal law", but rather belonged to a category of cases "which do not carry any significant decree of stigma" and for which "the

guarantees of the limb of Article 6 applying to criminal law do not necessarily apply with their full stringency" (see paragraph 44 of the judgment).

The distinction made by the majority is based on *Jussila* (cited above, § 43). However, in *Jussila* the second of the above-mentioned categories of cases related to cases "not strictly belonging to the traditional categories of the criminal law", but which nevertheless are considered to concern "criminal charges" under the *Engel* criteria. It was noted that the application of these criteria resulted in "a gradual broadening of the criminal head [of Article 6 § 1]" (*ibid.*). I would like to add that the cases belonging to this second category are more akin to administrative-law cases, where an administrative court reviews an administrative act.

By contrast, however, as explained above, the case brought against the applicant was criminal in all its essential aspects. Thus, it did not belong to the category of cases that fell under Article 6 § 1 because of the application of the broad *Engel* criteria. The proceedings before the Magistrates' Court concerned, in my opinion, the "hard core of criminal law", notwithstanding the minor nature of the sanction that could be imposed.

For such cases, an oral hearing at first instance is the general rule and the exceptions to that rule "essentially [come] down to the nature of the issues to be decided by the competent national court" (see *Jussila*, cited above, § 42). An oral hearing is not required, for example, "where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials" (*ibid.*, § 41, referred to in paragraph 45 of the present judgment). The modest character of the fine and the degree of stigma carried by it (see paragraph 49 of the judgment) do not come into play to justify dispensing with an oral hearing in such cases.

5. According to the majority, the applicant "did not challenge the credibility of statements given by or to the gendarmerie or request evidence to be presented and heard by the court, but merely maintained that there had not been sufficient evidence to prove that he had been aware of the prostitution" (see paragraph 48 of the judgment).

I find it hard to draw such a conclusion from the facts of the case. We do not know whether the applicant contested the charge brought against him before the Magistrates' Court, and if so, what were his arguments. But we do know that in his objection to the decision of the Magistrates' Court "he maintained that he accepted clients into his hotel in compliance with the relevant regulation and that he could not be expected to refuse to offer accommodation to foreign nationals or to question their motives for staying there" (see paragraph 16 of the judgment). I assume that the applicant had already raised these arguments before the Magistrates' Court, or could have raised them before that court. If so, it seems to me that these were arguments raising issues of fact, which lent themselves to an oral

development by the applicant and to a direct assessment of his credibility by the Magistrates' Court.

However, the Magistrates' Court declared the applicant guilty solely on the basis of the file, that is, on the basis of statements made by, among others, the applicant and the hotel manager (see paragraphs 11-12 of the judgment). This way of proceeding was, in my opinion, not compatible with Article 6 § 1 of the Convention.

6. Theoretically, the question could arise whether a public hearing before the Assize Court, which examined the applicant's objection to the decision of the Magistrates' Court, would have been capable of correcting the defect before the first-instance court (see *Findlay v. the United Kingdom*, 25 February 1997, § 79, *Reports of Judgments and Decisions* 1997-I). However, in the present case this is a purely hypothetical question, since the Assize Court did not hold a hearing either.

7. Since the applicant did not benefit from an oral hearing before the Magistrates' Court or before the Assize Court, I believe that there has been a violation of Article 6 § 1.