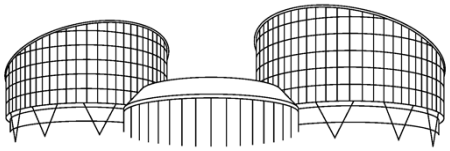

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF RUŞEN BAYAR v. TURKEY

(Application no. 25253/08)

JUDGMENT

STRASBOURG

19 February 2019

FINAL

19/05/2019

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

In the case of Ruşen Bayar v. Turkey,

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

Robert Spano, *President,*
Işıl Karakaş,
Julia Laffranque,
Valeriu Griţco,
Stéphanie Mourou-Vikström,
Arnfinn Bårdsen,
Darian Pavli, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 29 January 2019,

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

PROCEDURE

1. The case originated in an application (no. 25253/08) 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 Ruşen Bayar ("the applicant"), on 24 April 2008.

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

3. The applicant alleged under Article 5 § 3 of the Convention that the length of his detention had been excessive and that the review proceedings of his detention had been in breach of Article 5 § 4 of the Convention as the decisions had been delivered solely on the basis of the case file, without hearing him or his lawyer and without providing them with the public prosecutor's opinion. The applicant also complained under Article 5 § 5 that he had no right to compensation in domestic law for the alleged violations of Article 5 §§ 3 and 4 of the Convention. The applicant further alleged under Article 6 §§ 1 and 3 of the Convention that he had not had a fair trial on account of the denial of legal assistance to him during his police custody. Lastly, the applicant submitted under Articles 6 § 1 and 13 of the Convention that the length of the criminal proceedings against him had been excessive and that there was no effective remedy under Turkish law whereby he could have contested the length of the proceedings brought against him.

4. On 8 October 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972 and is detained in Tekirdağ.

6. On 13 November 2003 the applicant was arrested on suspicion of membership of the PKK/KADEK (Workers' Party of Kurdistan/Kurdistan Freedom and Democracy Congress), an illegal organisation. He was in possession of a fake identity card at the time of his arrest. Subsequently, following the applicant's directions to the police, the latter conducted a house search in the presence of the applicant on the premises where he and another co-accused had been staying. The police found and seized 40 grams of cyanide, a description and diagrams for the construction of a bomb mechanism handwritten by the applicant, and a fake passport bearing the applicant's photograph that had been used by him to go to Iran twice.

7. On 14 November 2003 the applicant was taken for questioning to the Istanbul police headquarters. The applicant's statements to the police were transcribed on pre-printed forms, the first page of which was filled in to indicate, *inter alia*, that the applicant was suspected of the killing of a certain M.Y. in 1999 on behalf of the PKK/KADEK, of undergoing military and political training at the organisation's camps abroad and of carrying out other activities for the organisation. The same page also included a pre-printed message which stated, *inter alia*, that the person being questioned had the right to remain silent and the right to choose a lawyer. It appears from the form that the applicant had refused legal assistance, since the first page of the record includes a pre-printed phrase stating "No lawyer sought" and a box next to it that is marked with a pre-printed "X". Moreover, according to the record, he also stated that he did not want a lawyer or to remain silent. In his statement, which was fifteen pages long, the applicant admitted that he had become a member of the PKK/KADEK in 1996 and gave a detailed account of all the activities he had carried out for that organisation since then, including the killing of M.Y., opening fire on a police armoured vehicle during a demonstration organised in the aftermath of Abdullah Öcalan's arrest, and receiving training at the organisation's camp in Iraq. Moreover, when he was asked whether he wished to benefit from Law no. 3419 on Repentance (*Pişmanlık Yasası*), the applicant turned the offer down, explaining that he found the relevant Law to be "degrading" and "dishonourable". Every page of the statement form was signed by the applicant.

8. According to an undated form explaining arrested people's rights, which the applicant duly signed, he was reminded of his right to remain silent and to have access to a lawyer. According to another document dated 14 November 2003, the applicant had been informed of his rights under Article 135 of the Code of Criminal Procedure as in force at the material

time and stated that he would like to give his statements without a lawyer present. This was also a pre-printed form that bore the applicant's signature and the indication that a copy of a form explaining his rights had been given to him.

9. On 15 November 2003 at 11.10 p.m. two police officers and the applicant signed an incident report according to which the applicant had suddenly moved towards a window while in custody, pushing the officers, and had tried to harm himself by punching the window and hitting his head off it.

10. On 16 November 2003 at midnight the applicant was examined at Haseki Hospital in Istanbul by a doctor who noted the presence of an abrasion on the applicant's third and fifth fingers of his left hand.

11. According to a report drawn up by the police officers and signed by the applicant and his lawyer, T.D., on 16 November 2003, the applicant had seen his lawyer the same day.

12. On 17 November 2003, the applicant underwent a further medical examination at the branch of the Forensic Medicine Institute responsible for the Istanbul State Security Court at 10.30 a.m. The doctor who examined the applicant also observed the same abrasion, adding that the applicant had told him that it had happened when he had hit the window. That report also bore the applicant's handwritten complaints according to which he had been subjected to external stress, deprived of sleep and subjected to psychological pressure and had not been informed of his rights. However, the doctor concluded that there were no signs of ill-treatment on the applicant's body.

13. On the same day the applicant was brought before the public prosecutor at the Istanbul State Security Court, where he was once again informed of his right, *inter alia*, to have access to a lawyer and his right to remain silent. He stated that he did not wish to benefit from the assistance of a lawyer and that he wanted to remain silent. He complained to the prosecutor that he had been subjected to psychological duress at the Istanbul police headquarters, that he had not been informed of his rights and that he had been denied legal assistance. He alleged that when he had asked to see a lawyer, the police had told him that the lawyer had not wished to come to the interview session.

14. On the same day the applicant was questioned by a single judge at the Istanbul State Security Court without a lawyer present, where he expressed his wish to see a lawyer before giving any statement. Thus, the applicant remained silent and refused to make a statement. At the end of the interview, the judge ordered his pre-trial detention.

15. On 4 December 2003 the public prosecutor at the Istanbul State Security Court filed a bill of indictment with that court against the applicant and four other persons, charging the applicant with the offence of breaking up the unity of the State and seeking to remove part of the national territory

from the State's control, under Article 125 of the former Criminal Code. The acts attributed to the applicant were as follows: involvement in opening fire on a police vehicle during a demonstration on 16 February 1999; involvement in a demonstration of 20 February 1999 where six police officers had been wounded by gunfire; membership of a terrorist organisation; killing M.Y. on 1 June 1999; and collecting money on behalf of a terrorist organisation through coercion.

16. On 17 March 2004 the Istanbul State Security Court held its first hearing (case no. 2003/332), where the applicant denied all the charges against him, as well as his police statement. He maintained that at the Istanbul police headquarters he had been forced to sign a self-incriminating statement prepared by the police officers and that his request for legal assistance had been disregarded. The applicant's lawyer also stated that the applicant had not been provided with a lawyer during his pre-trial detention despite his requests, and repeated this allegation throughout the proceedings. He further stated that the witness testimony given by a certain S.N. during a different set of proceedings before the same court (case no. 1999/285), which also concerned the killing of M.Y., included a description of the suspected killer which bore no resemblance to the applicant. The lawyer, therefore, pleaded the applicant's innocence and applied for his release. At the end of the hearing, the court held, *inter alia*, that there was no need to summon S.N. as a witness as he had already testified in case no. 1999/285 and he had not had much information about the killing of M.Y. in any event. It also ordered the applicant's continued detention. It further decided to request the investigation file concerning the torture allegations of the applicant from the Fatih public prosecutor's office.

17. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, the State Security Courts were abolished. The case against the applicant was therefore transferred to the Twelfth Chamber of the Istanbul Assize Court.

18. At a hearing held on 25 August 2004 the applicant's lawyer informed the trial court that the Fatih public prosecutor had delivered a decision not to prosecute the police officers and that he had lodged an objection (*itiraz*) against that decision.

19. At a hearing held on 22 November 2004 case no. 2003/332 was joined with case no. 1999/285, which was also pending before the Twelfth Chamber of the Istanbul Assize Court.

20. At a hearing held on 6 April 2005 the applicant's lawyer informed the trial court that the objection against the decision of the Fatih public prosecutor had been dismissed by the Beyoğlu Assize Court.

21. At a hearing held on 20 July 2005, the applicant's lawyer stated that in accordance with Article 148 § 4 of the new Code of Criminal Procedure, in force as of 1 June 2005, statements taken by the police without a lawyer present should not be used unless confirmed by the individual before a

judge or a court. Thus, he asked the court to exclude the applicant's statements to the police. The trial court did not respond to his application.

22. At a hearing held on 9 November 2005 the trial court received a copy of the Fatih public prosecutor's decision not to prosecute the police officers who had allegedly ill-treated the applicant. At the same hearing, the applicant's lawyer, while referring to his previous defence submissions, stated that the applicant's police statement had no probative value in line with the provisions of the Code of Criminal Procedure. The trial court did not give a ruling on that issue.

23. At a hearing held on 6 March 2006 the applicant's lawyer submitted once again that the evidence had been collected in respect of the applicant had been in breach of the relevant provisions of the Code of Criminal Procedure and that such evidence should not be used in the trial. The trial court did not respond to this application.

24. At a hearing held on 5 June 2006 the public prosecutor read out his observations on the merits of the case, stating that the applicant should be convicted and sentenced under Article 125 of the former Criminal Code. At the same hearing, the applicant's lawyer and some of the lawyers of the other co-defendants applied for time to prepare their defence submissions in reply to the public prosecutor's observations on the merits of the case. The trial court adjourned and granted them further time until the next hearing on 26 July 2006.

25. At a hearing held on 26 July 2006, the trial court noted that two different lawyers of the other co-defendants had informed the court that they would be unable to attend the hearing as one of them had another hearing outside Istanbul and the other one had a hearing in another court in Istanbul. Referring to the absence of those lawyers and the fact that they had not been able to prepare their defence submissions, the applicant's lawyer also asked the trial court to give them a short period of time to prepare their written observations in reply to the public prosecutor's observations on the merits. The trial court accepted the excuses of the two lawyers, adjourned and granted all three lawyers further time to prepare their submissions.

26. At the next hearing, held on 13 November 2006, the public prosecutor read out his observations on the merits and reiterated his previous observations. The applicant's lawyer did not attend that hearing. The lawyer of co-defendant M.A. and the applicant applied for more time to prepare their submissions. The trial court adjourned and granted that application, stating that it would give them time until the next hearing but that it would be for the last time.

27. At the hearing of 12 March 2007 the applicant's lawyer submitted a seven-page-long defence submission where he reiterated, *inter alia*, that the applicant had been subjected to torture while in police custody and had been forced by the police to sign his statements. In that respect, he referred to Article 148 of the Code of Criminal Procedure pursuant to which statements

that had been obtained through such methods could not be used in evidence. Moreover, the applicant's lawyer reiterated that Article 148 § 4 of the Code provided for a specific proscription of the use of police statements taken without a lawyer present unless they had been confirmed by the individual before a judge or a court. Thus, he asked the trial court not to use the applicant's police statements taken without his lawyer present, given that he had never accepted the content of those statements. According to the applicant's lawyer, it would be a breach of Article 6 §§ 1 and 3 (c) of the Convention were the trial court to rely on the applicant's statements to the police to convict him. At the same hearing, M.A.'s lawyer once again applied for additional time to prepare defence submissions, citing his inability to meet his client and the voluminous nature of the case file. The applicant's lawyer stated that in the event of another adjournment of the trial, he would like to make his oral submissions at the next hearing. The trial court noted the reasons put forward by M.A.'s lawyer, adjourned and granted them further time until the next hearing.

28. At the next hearing, held on 2 July 2007, it was noted that M.A.'s lawyer had sent a fax to the trial court in which he had provided an excuse and asked for an adjournment. The applicant's lawyer was present and reiterated his defence submissions that the evidence against the applicant was unlawful and that it could not be used by the trial court. The trial court did not respond to this application. However, the trial court accepted the excuse of M.A.'s lawyer, adjourned and granted further time to that lawyer for the preparation of his defence submissions on the merits.

29. At the next hearing, held on 8 October 2007, the trial court noted the application lodged by M.A.'s lawyer asking for M.A. to be represented by new counsel. The applicant's lawyer was present and reiterated his previous defence submissions. The trial court adjourned the hearing with a view to appointing a new lawyer for M.A. and granting that lawyer time to prepare defence submissions.

30. On 12 December 2007 the applicant's lawyer was present and he once again reiterated his previous submissions. M.A.'s new lawyer applied for additional time to prepare defence submissions and was granted this by the trial court.

31. At a hearing held on 2 June 2008 the applicant's lawyer sent a fax to the trial court in which he provided an excuse for his inability to attend the trial. The trial court heard evidence from a defence witness in respect of M.A. in relation to his ill-treatment allegations. M.A.'s lawyer further raised a plea of unconstitutionality in relation to the maximum permissible period of detention. The trial court decided to examine the plea of unconstitutionality raised by M.A.'s lawyer, accepted the applicant's lawyer's excuse and granted him additional time to prepare his oral submissions.

32. At a hearing held on 19 November 2008 the applicant's lawyer was present and he once again reiterated his previous submissions. M.A.'s lawyer asked the trial court to conduct an additional investigation and hear S.N. as a witness with a view to shedding light on M.Y.'s killing. That lawyer once again asked for additional time to prepare his defence submissions. The trial court dismissed the plea of unconstitutionality, granted M.A.'s lawyer further time to prepare his defence submissions and adjourned.

33. At the hearing held on 19 December 2008 the applicant's lawyer was present and he once again reiterated his previous submissions. However, another lawyer for M.A. was present and she applied for additional time to prepare defence submissions. The trial court adjourned and granted her further time.

34. On 13 February 2009 the Twelfth Chamber of the Istanbul Assize Court found the applicant guilty as charged, convicted him under Article 125 of the former Criminal Code of breaking up the unity of the State and seeking to remove part of the national territory from the State's control, and sentenced him to life imprisonment. The trial court listed, among other pieces of evidence, "the statements of the accused throughout the proceedings" in the "evidence" part of its judgment. In the part entitled "assessment of evidence and reasons", the trial court noted that one of the accused, namely M.Z.Ç., had sent a letter to the court on 12 May 2004 in which he had stated that M.Y. had been abducted and killed by Ma.Y., F.A. and M.H. The trial court concluded that that statement had been corroborated by the autopsy report, a sketch of the scene and a police report establishing that the gun that had been used to kill M.Y. had been the same one that had been used in the demonstration of 20 February 1999. It went on to hold that the defendants' denial during the trial of their guilt should be dismissed in the light of that evidence.

35. The trial court also noted that documents of an organisational nature and documents containing descriptions for the construction of bomb mechanisms handwritten by the applicant as well as the invoices of the illegal organisation had been found. In view of that evidence and the statements of the witnesses and the victims, it found it established that co-defendants M.Z.Ç. and Ma.Y. had both on their own and on the applicant's orders attempted to or collected money on behalf of the illegal organisation through coercion. Taking into account the participation of the applicant, M.Z.Ç. and Ma.Y. in the demonstration of 20 February 1999, and their positions within the illegal organisation, the trial court considered that the killing of M.Y. and the completed acts of extortion should be accepted as being "serious enough", the material element of the offence set out in Article 125 of the former Criminal Code.

36. Lastly, in the "conviction" part of its judgment, the trial court held that the applicant had been a member of an illegal organisation, had taken

military training in its mountain camps, had participated in the demonstration on 16 February 1999 on behalf of that illegal organisation and had opened fire on a police vehicle, had been involved in the injury of five policemen on 20 February 1999, and that the three bullet casings found in the scene of that incident had been fired from the pistol that the applicant had used to kill M.Y. on 1 June 1999. The trial court did not assess any evidence in that part of its judgment.

37. The material submitted by the parties to the Court does not contain a copy of the evidence listed either in the "evidence" or in the "assessment of evidence and reasons" parts of the trial court's judgment. Furthermore, the trial court did not mention any of the defence submissions made by the applicant's lawyer and merely stated that the applicant had denied the accusations in his defence before the court. Similarly, while twelve out of the fifteen accused that had made incriminatory statements to the police had denied those statements before the trial court, the latter did not conduct any assessment in that regard.

38. At the end of each hearing, the Istanbul State Security Court, and subsequently the Twelfth Chamber of the Istanbul Assize Court, considered the applicant's detention either of their own motion or following an application by the applicant. Each time, they ordered the applicant's continued detention pending trial, having regard to the nature and seriousness of the offence with which he was charged, the existence of a strong suspicion that he had committed the offence and the state of the evidence. On two occasions the applicant objected to the assize court's decisions dated 12 March 2007 and 8 October 2007 regarding his continued detention, specifically on 14 March and 15 October 2007. Both of those objections were rejected by the Thirteenth Chamber of the Istanbul Assize Court on 21 March 2007 and 24 October 2007 respectively on stereotypical grounds by way of a non-adversarial procedure. More specifically, the examination was conducted on the basis of the case file alone without hearing the applicant or his lawyer although the public prosecutor was consulted on the matter. Moreover, the opinion obtained from the public prosecutor regarding the applicant's detention was not transmitted to the applicant.

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

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions on the right of access to a lawyer

40. The relevant provisions of the former Code of Criminal Procedure (Law no. 1412), namely Articles 135, 136 and 138, provided that anyone suspected or accused of a criminal offence had a right of access to a lawyer

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

B. Relevant case-law of the Constitutional Court regarding the waiver of the right to legal assistance during police custody

41. In application no. 2013/2319, the Plenary of the Constitutional Court dealt with a situation very similar to the instant case in so far as it concerned the validity of the waiver of the right to legal assistance before giving statements to the police during the pre-trial stage and the use by the trial court of evidence obtained therefrom. On 8 April 2015 it delivered a judgment and found a violation of the right to a fair trial on account of the appellant's inability to have access to a lawyer while in police custody. On 8 and 9 September 2015 the First and the Second Sections of the Constitutional Court found violations of the right to a fair trial in respect of the appellants, who had also been tried and convicted in the same set of criminal proceedings as the appellant in application no. 2013/2319. The reasoning of the above mentioned three judgments were almost identical to each other. However, as application no. 2013/2541 bore more similarities to the present application in that both the appellant in that case and the applicant in the present case had signed a separate document indicating that they had not wished to have a lawyer present when giving statements to the police, the details of that application will be presented below.

42. In that case, the appellant was arrested on 14 May 2004 on suspicion of involvement in the murder of two individuals on behalf of an illegal organisation. The same day, that appellant signed a document according to which he had stated that he had not wished the assistance of a lawyer. The next day the appellant made incriminatory statements to the police without his lawyer present. According to the statement record, the appellant was informed of his rights, including his right to remain silent and to legal assistance, but stated that he neither wished to have the assistance of a lawyer nor to remain silent. Subsequently, the appellant gave statements to the public prosecutor and the investigating judge without a lawyer present and denied any involvement in the murder. He maintained that position and denied his police statements before the trial court. The relevant parts of the Constitutional Court judgment in that application (no. 2013/2541) read as follows:

"...

86. The rules and rights in relation to statements provided in Article 135 of the Code of Criminal Procedure [Law no. 1412] were indicated on the appellant's statement record. The fact that the appellant did not wish to benefit from a lawyer is included as a pre-printed phrase on the [applicant's statement].

87. Nevertheless, after his arrest the appellant submitted in his statements to the public prosecutor on 18 May 2004 that he had had to sign a document according to which he had not wished to benefit from a lawyer and that he had made his statement under physical and psychological pressure and that he denied the content of the statement record and having committed the attributed offences.

88. The descriptions in the bill of indictment dated 14 June 2006 filed by the public prosecutor attached to the Istanbul State Security Court as to how the attributed offences were committed [by the appellant and the other suspects] relied generally on the [police] custody statements. Taking the reasons for the conviction into consideration, it is seen that the [police] custody statements were decisively relied on in the conviction.

89. The examination of the merits of a case and reliance on a confession without examining its admissibility in case it were alleged that it had been obtained under ill-treatment or torture was considered a deficiency by the European Court of Human Rights (see *Hulki Güneş/Türkiye*, B. No: 28490/95, 19 June 2003, § 91).

...

91. In this context, no tangible finding capable of proving the appellant's allegations that he was subjected to ill-treatment during police custody and that as a result he had to sign the statement form, has been submitted. The appellant does not have, on the basis of those allegations, a separate complaint that the prohibition of treatment that is incompatible with human dignity was violated.

92. According to the European Court of Human Rights, the fact that the complaints concerning ill-treatment or torture were not examined because of a decision as to their inadmissibility, does not preclude the Court from taking into consideration the stated circumstances for the right to a fair trial (*Kolu*/ *Türkiye*, B. No: 35811/97, 2 August 2005, § 54).

93. The appellant, together with the other co-accused, was charged with and found guilty of attempting to undermine the constitutional order by force by killing two individuals and was sentenced to aggravated life imprisonment [*ağırlaştırılmış müebbet ağır hapis*] at the end of the trial.

94. It is seen that the appellant, who had been defending the view that he had been innocent and that there had been no proof showing that he had had any connection with the killings, also denied his statements to the police before the public prosecutor and the investigating judge, claiming that he had had to sign them under threat and physical coercion.

95. Those statements [the appellant's police statements] were relied on by the trial court without examining the appellant's defence [submissions], the submissions of the other suspects against whom no case was brought and the other allegations concerning the denial of legal assistance.

96. Within this framework, taking into account the nature of the offence, the severity of the punishment and the appellant's defence submissions following his arrest, it does not appear beyond any reasonable doubt that the appellant knowingly

and intelligently acquiesced to giving statements without asking for [the assistance of] a lawyer during his four-day-long custody. It has not been shown that the appellant was reasonably able to foresee the consequences of such a waiver.

97. It is seen that the statements that were denied by the appellant had been relied on [by the trial court] as a basis for his conviction and that the legal assistance provided afterwards [to the appellant] and the other procedural safeguards could not remedy the prejudice caused to the rights of the defence in the beginning of the investigation.

98. Although Article 148 of the Code of Criminal Procedure, which entered into force while the proceedings were ongoing is of such a character as to secure the efficiency of the defence during the trial, the case was concluded within the framework that had been established by the above-mentioned statements and that situation was not examined in the appeal process.

99. The fact that the appellant was not able to benefit from the assistance of a lawyer and the resulting prejudice caused to the defence prevented the trial from being fair as a whole.

..."

C. Probative value of evidence gathered during the preliminary investigation

43. Under Article 247 of the former Code of Criminal Procedure (in force until 1 June 2005), as interpreted by the Court of Cassation, any confessions made to the police or the public prosecutor's office had to be repeated before a judge if the record of the questioning containing them was to be admissible as evidence for the prosecution. If the confessions were not repeated, the records in question were not allowed to be read out as evidence in court and consequently could not be relied on to support a conviction. Nevertheless, even a confession repeated in court could not on its own be regarded as a decisive piece of evidence but had to be supported by additional evidence (see *Dikme v. Turkey*, no. 20869/92, § 38, ECHR 2000-VIII).

44. Article 148 of the new Code of Criminal Procedure (Law no. 5271) in force as of 1 June 2005 reads as follows:

"The statement of the suspect and the accused should be based on his or her own free will. Physical or psychological interferences capable of undermining [free will] such as ill-treatment, torture, the administration of drugs, induced fatigue, torment and deception, duress, threat, or use of other equipment shall be prohibited.

No benefit that is contrary to law shall be promised.

Statements that were obtained through such methods shall not be used in evidence even if consent has been given [by the accused or the suspect] for their use.

Statements taken by the police without a lawyer present shall not be relied on [for conviction] unless the suspect or the accused confirms them before a judge or a court.

..."

45. Article 213 of the new Code of Criminal Procedure entitled "Reading out of an accused's previous statements" reads as follows:

> "In the event of a contradiction [between an accused's statements], an accused's statements before a judge or a court and his or her statements to the public prosecutor or his or her statements to the police given in the presence of a lawyer may be read out during trial."

46. Article 217 of the new Code of Criminal Procedure entitled "Discretion to evaluate [evidence]" reads as follows:

> "A judge shall base his or her decision only on evidence brought to the hearings [*duruşmaya getirilen*] and assessed in his or her presence. That evidence shall be evaluated freely through the inner conviction of the judge."

D. Relevant provisions on pre-trial detention

47. Pre-trial detention is regulated by Article 100 et seq. of the Code of Criminal Procedure, which entered into force on 1 June 2005 (a description of the relevant domestic law and practice prior to the entry into force of the new Code of Criminal Procedure as regards pre-trial detention can be found in *Çobanoğlu and Budak v. Turkey*, no. 45977/99, §§ 29-31, 30 January 2007).

48. Under Article 100 pre-trial detention of a person may be ordered only if two conditions are met, namely when there exists a strong suspicion that that person has committed an offence and when there are grounds for detention.

49. In accordance with Article 100 § 2 of the Code of Criminal Procedure, grounds for detention may be assumed to exist in cases where the suspect or the accused has absconded or when there are concrete facts showing that the suspect or the accused will abscond or go into hiding, or in a case where the conduct of the suspect or the accused indicates a strong suspicion that he or she will attempt to influence witnesses, victims or other persons or will destroy, manipulate or conceal evidence. However, grounds for detention may be assumed to exist in respect of the particularly grave offences exhaustively listed in Article 100 § 3 of Law no. 5271 in the event that there is a strong suspicion that one of these has been committed.

50. In accordance with Article 101 as in force at the material time, detention may be ordered during the investigation stage by the investigating judge following an application by the public prosecutor. During the investigation stage (*kovuşturma aşaması*), it may be ordered by the trial court either of its own motion or following an application by the public prosecutor. Article 101 § 5 provides that an objection may be lodged against the decisions given in accordance with Articles 100 and 101 of the Code of Criminal Procedure. The suspect or accused may, at any time of the investigation or prosecution stage, apply to be released (Article 104 § 1).

Objections may be lodged against the decisions rejecting such applications (Article 104 § 2 *in fine*).

51. Review of detention is laid out in Article 108 of the Code of Criminal Procedure, which reads as follows:

> "(1) During the investigation phase, a review of whether a suspect's continued detention is necessary or not shall be conducted by an investigating judge upon the public prosecutor's application within time-limits not exceeding thirty days,
>
> (2) Within the time-limit mentioned in the foregoing paragraph, the suspect may also lodge an application for review of the lawfulness of his or her continued detention,
>
> (3) During the trial phase, a judge or a court, on their own motion, shall review an accused person's continued detention at each hearing or, if the conditions require, in between hearings, or within the time-limits foreseen in the first paragraph of this Article."

52. Furthermore, against every decision concerning detention on remand, whether taken at the detainee's request or *proprio motu*, an objection can be lodged under Article 267 of the Code of Criminal Procedure. An objection is initially reviewed by the very same judge or the court who has given the challenged decision. The judge or the court may rectify the decision in the event that they allow an objection (Article 268 § 2). Otherwise, they transmit the case file to the competent court for review.

53. Article 141 of the Code of Criminal Procedure entitled "compensation [for damage sustained] as a result of preventive measures" provides, in so far as relevant, the following:

> "Individuals; ...
>
> d) who were lawfully detained but not brought before a legal authority within a reasonable time and who were not tried within a reasonable time,
>
> during the criminal investigation or prosecution may bring a claim for compensation for all pecuniary and non-pecuniary damage they sustained from the State."

54. Section 1 of Article 142 of the Code of Criminal Procedure further provides:

> "A claim for compensation may be brought [against the State] within three months of the date of service of the final ... judgment and, in any case, within one year following the date on which the ... judgment becomes final."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

55. The applicant complained that the length of his pre-trial detention had been excessive. He relied on Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

56. The Court notes that this complaint 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.

57. The Government argued that the crimes with which the applicant had been charged had been of a serious nature and that his continued detention had been necessary to prevent him from committing any further offences or fleeing. In that connection, they pointed to the concrete and convincing evidence against the applicant such as the fake identity card, the 40 grams of cyanide seized, the description and diagrams for the construction of a bomb mechanism handwritten by him, the fake passport bearing his picture that had been used to go to Iran, the statements of the co-accused and a weapon found in another co-accused's house and used by the applicant in the demonstration of 20 February 1999. Thus, the trial court considered the very high risk of the applicant's escape and aimed at preventing a further offence as the applicant had already been accused of serious crimes. The trial court had also aimed at preserving public order. Accordingly, it had decided to extend the applicant's detention on justified grounds and had displayed special diligence in the conduct of the proceedings.

58. The Court observes that the applicant's detention for the purposes of Article 5 § 3 of the Convention began when he was arrested on 13 November 2003. He was detained for the purposes of Article 5 § 3 of the Convention until his conviction by the Istanbul Assize Court on 13 February 2009. From that date he was detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) of the Convention and therefore that period of his detention falls outside the scope of Article 5 § 3 (see *Solmaz v. Turkey*, no. 27561/02, § 34, 16 January 2007). Thus, the applicant's pre-trial detention lasted for five years and three months.

59. The Court notes that in a number of cases against Turkey, it has already examined similar grievances and repeatedly found violations of Article 5 § 3 of the Convention (see *Ali Hıdır Polat v. Turkey*, no. 61446/00, § 24, 5 April 2005; *Dereci v. Turkey*, no. 77845/01, §§ 38-39, 24 May 2005; and *Murat Özdemir v. Turkey*, no. 60225/11, §§ 38-39, 15 April 2014). It

has examined the present case and finds no particular circumstances which would require it to depart from its findings in the above-mentioned judgments.

60. There has therefore been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

61. The applicant complained that the proceedings reviewing his pre-trial detention had not complied with the requirements of Article 5 § 4 of the Convention, which reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

62. The Government contested that argument.

A. Admissibility

63. The Court reiterates that Article 5 § 4 applies to the proceedings before a court following the lodging of an objection against a decision extending a person's detention (see *Altınok v. Turkey*, no. 31610/08, § 39-40, 29 November 2011).

64. That being the case, Article 5 § 4 is not applicable to the Istanbul Assize Court's decisions given pursuant to Article 108 of Law no. 5271 by which it reviewed the applicant's pre-trial detention every thirty days of its own motion and without holding a hearing (see *Altınok*, cited above § 40).

65. It follows that that part of the complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

66. The Court further notes that the applicant lodged objections against the decisions of the trial court of 12 March and 8 October 2007 extending his detention. Those objections were rejected by the Thirteenth Chamber of the Istanbul Assize Court on 21 March and 24 October 2007 respectively. Given that the present application was lodged on 24 April 2008, the Court finds that the applicant's complaints concerning the decision of 21 March 2007 were not submitted within the six-month time-limit in accordance with Article 35 of the Convention (see *Ali Rıza Kaplan v. Turkey*, no. 24597/08, § 27, 13 November 2014).

67. Thus, the Court concludes that that part of the application should be rejected for being introduced out of time pursuant to Article 35 §§ 1 and 4 of the Convention.

68. As a result, the Court's examination under Article 5 § 4 of the Convention is confined to the decision of 24 October 2007. The Court notes

that this part of the complaint 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

69. The applicant alleged that the proceedings reviewing his pre-trial detention had not been truly adversarial and that they had breached the principle of equality of arms. He averred in particular that the proceedings had been conducted on the basis of the case file and neither he nor his lawyer had been able to attend the proceedings, which had denied him the chance to properly question the lawfulness of his continued detention. Moreover, although the domestic courts had consulted the public prosecutor regarding his continued detention, they had not transmitted the prosecutor's opinion to him for comment.

70. The Government argued that the effectiveness of a remedy does not depend on a favourable outcome. The principle of equality of arms had been ensured given that the applicant had had the opportunity to challenge the lawfulness of his continued detention.

71. As regards the applicant's inability to be present before the appeal court examining the objections to his detention, the Court reiterates that his objection was dismissed on 24 October 2007 by the Thirteenth Chamber of the Istanbul Assize Court, without holding an oral hearing. Nevertheless, the applicant had appeared before the trial court sixteen days before his objections were examined by the appellate court (see *Çatal v. Turkey*, no. 26808/08, § 41, 17 April 2012, and *Öner Aktaş v. Turkey*, no. 59860/10, § 46, 29 October 2013). The Court also observes that the appellate proceedings were conducted in the absence of both the prosecutor and the applicant or his lawyer (see *Rahbar-Pagard v. Bulgaria*, nos. 45466/99 and 29903/02, § 67, 6 April 2006). In these circumstances and bearing in mind the absence of any other element which may have required the applicant's personal presence before the appellate court, the Court does not consider that a further oral hearing before the appeal court was required for the purposes of Article 5 § 4 of the Convention (compare *Naimdzhon Yakubov v. Russia*, no. 40288/06, § 75, 12 November 2015, and *Kolomenskiy v. Russia*, no. 27297/07, § 98, 13 December 2016).

72. In view of the above, the Court concludes that the lack of an oral hearing during those proceedings did not jeopardise their adversarial nature.

73. In so far as the non-transmittance of the public prosecutor's opinion is concerned, the Court notes that the present case raises issues similar to the case of *Altınok* (cited above, §§ 57-61), where it found a violation of Article 5 § 4 of the Convention. In its view, there is no reason to depart from that finding.

74. Accordingly, the Court considers that in the present case there has been a violation of Article 5 § 4 of the Convention on account of the non-transmittance of the public prosecutor's opinion to the applicant or his representative in the context of review proceedings in respect of the lawfulness of the applicant's detention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

75. The applicant also complained of the absence of a compensatory remedy in domestic law for the alleged violations of Article 5 of the Convention. He relied on Article 5 § 5 of the Convention.

> "5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

76. The Government contested that argument.

77. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A, and *Houtman and Meeus v. Belgium*, no. 22945/07, § 43, 17 March 2009). The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, ECHR 2012).

78. Turning to the present case, the Court reiterates that it has found a violation of Article 5 § 3 of the Convention on account of the excessive length of the applicant's pre-trial detention and a violation of Article 5 § 4 of the Convention on account of the non-transmittance of the public prosecutor's opinion.

79. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

80. In so far as the applicant's complaint concerns the alleged violation of Article 5 § 5 of the Convention taken in conjunction with Article 5 § 3, the Court notes that Article 141 § 1 (d) of the Code of Criminal Procedure did not provide the applicant, at the time of lodging the application, with an enforceable right at domestic level to compensation for the excessive duration of his pre-trial detention, since he was not able to use that remedy until 27 April 2010, the date on which his conviction became final.

81. There has therefore been a violation of Article 5 § 5 taken in conjunction with Article 5 § 3 of the Convention.

82. As regards the applicant's complaint concerning the alleged violation of Article 5 § 5 of the Convention taken in conjunction with Article 5 § 4, the Court notes that it has already held that Article 141 of the Code of Criminal Procedure did not provide for the possibility of seeking compensation for damage suffered as a result of procedural deficiencies in the review proceedings, namely the non-transmittance of the public prosecutor's opinion (see *Altınok*, cited above, §§ 66-69, and *Hebat Aslan and Firas Aslan v. Turkey*, no. 15048/09, § 93, 28 October 2014). There is no reason to depart from those findings.

83. Accordingly, the Court concludes that in the present case there has been a violation of Article 5 § 5 taken in conjunction with Article 5 § 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

84. The applicant further complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which, in so far as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

85. The Government contested that argument.

A. Admissibility

86. The Court observes, at the outset, that a new domestic remedy has been established in Turkey since the application of the pilot judgment procedure in the case of *Ümmühan Kaplan v. Turkey* (no. 24240/07, 20 March 2012). The Court observes that in its decision in the case of *Turgut and Others v. Turkey* (no. 4860/09, 26 March 2013), it declared a new application inadmissible on the grounds that the applicants had failed to exhaust the domestic remedies, that is to say the new remedy. In so doing, the Court in particular considered that this new remedy was, *a priori,* accessible and capable of offering a reasonable prospect of redress for complaints concerning the length of proceedings.

87. The Court further points out that, in its judgment in the case of *Ümmühan Kaplan* (cited above, § 77), it stressed that it could nevertheless pursue the examination of such applications under the normal procedure in cases which had already been communicated to the Government prior to the entry into force of the new remedy. It further notes that in the present case the Government did not raise an objection in respect of the new domestic remedy. In view of the above, the Court decides to pursue the examination

of the present application (see *Rifat Demir v. Turkey*, no. 24267/07, §§ 34-36, 4 June 2013).

88. The Court notes that this part of the complaint 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

89. The applicant reiterated that the criminal proceedings against him had not been concluded within a reasonable time.

90. The Government contended that the length of the proceedings could not be considered unreasonable in view of the complexity of the case, the number of accused and the seriousness of the charges against the applicant. In their view, the accused individuals, including the applicant, had intentionally caused delay to the proceedings by requesting additional time to submit their concluding submissions, given that Turkish law as then in force did not allow a trial court to render its judgment without hearing the concluding submissions of the accused. The Government did not cite any domestic provision in support of this claim. In that connection, they pointed out that the trial court had granted the applications of the co-defendants, allowing them time to prepare their defence submissions at the last ten hearings in the proceedings. Since the delay had been caused by the co-accused, who had submitted excuses in order not to present their concluding submissions, the delay could not be attributed to the authorities.

91. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

92. In the present case, the Court observes that the period to be taken into consideration began on 13 November 2003 with the applicant's arrest and ended on 27 April 2010 with the final decision delivered by the Court of Cassation. It thus lasted for nearly six years and six months at two levels of jurisdiction. It further notes that the case before the criminal court was not particularly complex.

93. In the absence of any substantiation by the Government, the Court does not consider it necessary to decide whether at the material time there was a legal obligation for the criminal courts in Turkey to grant an extension each and every time an accused or his or her lawyer asked for additional time to prepare defence submissions. In any event, the Court has serious doubts as to the validity of that interpretation as it would be capable of creating a vicious circle in respect of criminal proceedings according to

which the fate of a trial would be dependent on the applications made by an accused or their lawyer as a result of which courts are obliged to adjourn proceedings *ad infinitum*. For that reason, the Court will examine the impugned proceedings in the light of its well-established case-law as regards the length of proceedings under Article 6 § 1 of the Convention.

94. As to the applicant's conduct, the Court reiterates its well-established case-law to the effect that an applicant cannot be criticised for having made full use of the remedies available under domestic law in the defence of his interests (see *Pishchalnikov v. Russia*, no. 7025/04, § 50, 24 September 2009, and *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 66) unless and in so far as they are solely aimed at the deliberate obstruction of the proceedings. In the present case, the Government argued that the accused had caused the delay by continuously applying for additional time for the preparation of their concluding submissions as, in their view, the trial court had been under a legal obligation to grant such applications under domestic law.

95. In that connection, the Court observes that after the public prosecutor submitted his opinion on the merits of the case, the applicant and his lawyer, together with the other co-accused, applied for additional time to prepare their defence submissions at three hearings – those on 5 June, 26 July and 13 November 2006. These applications were not found by the trial court to have been obstructive to the examination of his case. In fact, all of those applications were granted and the applicant's lawyer submitted his defence submissions at the hearing held on 12 March 2007. More importantly, the applicant was present at all of the last ten hearings before the trial court. However, the Government failed to explain what excuses the applicant had submitted in order not to present his concluding submissions or last words, and ultimately to delay the proceedings. Hence, the Court is unable to conclude that the applicant abused or exercised his procedural rights in such a manner which unjustifiably contributed to prolonging the proceedings (see *Pishchalnikov*, cited above, § 50, and compare *Lazariu v. Romania*, no. 31973/03, §§ 149-50, 13 November 2014).

96. As to the conduct of the authorities, the Court firstly notes that the applicant was in detention throughout the proceedings, a fact which required particular diligence on the part of the courts dealing with the case to administer justice expeditiously (see *Kalashnikov v. Russia*, no. 47095/99, § 132, ECHR 2002-VI). Nevertheless, the trial court scheduled the hearings with significant delays between them ranging from approximately two months to six months. It also took the trial court approximately one year and eight months to obtain the Fatih public prosecutor's investigation file concerning the applicant's ill-treatment allegations while in police custody. Furthermore, the case was before the trial court for almost five years and two months, pending an initial judgment (*Bivolaru v. Romania (no. 2)*, no. 66580/12, § 155, 2 October 2018. Thus, it does not appear from the case

file that the national authorities either acted with special diligence or took any other steps to speed up the proceedings.

97. As for the applications of the other co-accused, the Court observes that they contributed to the prolongation of the instant case. That said, the Court also observes that the trial court granted those applications and adjourned the hearings with significant delays which could have been avoided had it taken a more active approach, particularly in view of the fact that there had been more than one accused in detention throughout the proceedings. At this point, the Court finds it important to reiterate its case-law to the effect that the ultimate responsibility lay with the court dealing with the case to discipline the parties in order to ensure that the proceedings were conducted at an acceptable pace (see *Pishchalnikov*, cited above, § 52). In any event and in the absence of any substantiation by the Government, the Court is unable to conclude that in the particular circumstances of the instant case, the conduct of the other co-accused and the eventual prolongation of the proceedings were in some way imputable to the applicant.

98. Having regard to all the circumstances of the case and its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement (see *Daneshpayeh v. Turkey*, no. 21086/04, § 28, 16 July 2009, and *Gürbüz and Özçelik v. Turkey*, no. 11/05, § 24, 2 February 2016).

99. There has accordingly been a breach of Article 6 § 1.

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

100. The applicant also complained that he had been denied legal assistance when making statements to the police, the public prosecutor and the investigating judge. He further alleged that the trial court had used his statements made to the police when convicting him.

101. The Court decides to examine the complaint under Article 6 §§ 1 and 3 (c) of the Convention, the relevant parts of which provide:

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

102. The Government contested the applicant's claims.

A. Admissibility

103. The Government submitted the police records according to which the applicant had been duly informed of his rights and had stated that he did not wish to benefit from the assistance of a lawyer when giving statements to the police. Those documents had also been signed by the applicant. Significantly, the applicant had not submitted any of those important documents in his application to the Court. Referring to *Al-Nashif v. Bulgaria* (no. 50963/99, 20 June 2002) and *Kerechashvili v. Georgia* ((dec.), no. 5667/02, ECHR 2006-V), the Government argued that such a failure to inform the Court of a fact which is essential for the examination of the present case is manifestly contrary to the purpose of the right of individual application as provided by Article 35 § 3 of the Convention.

104. The applicant argued in reply that the Government's submissions ran counter to the spirit of and the established case-law under Article 6 § 3 of the Convention. Moreover, the fact that he had seen a lawyer two days after he had given statements to the police did not alter the fact that those statements had been taken without a lawyer. More importantly, they were self-incriminatory and had been used by the trial court to convict the applicant. Thus, the Government's arguments were untenable.

105. The Court reiterates that an application may be rejected as an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention if, among other reasons, it was knowingly based on untruths. The submission of incomplete and thus misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information. However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014 with further references therein).

106. Moreover, while an applicant's omission to submit all the documents which the Government, or even the Court, would find relevant for the final examination of a case should not *per se* amount to abuse of the right of petition, in the particular circumstances of the present case the Court needs to evaluate the importance of the facts which were not submitted by the applicant (see *Milosevic v. Serbia* (dec.), no. 20037/07, 5 July 2011)

107. Turning to the circumstances of the present case, the Court notes that together with his application form the applicant provided copies of his statements made to the police, the public prosecutor and the investigating judge. Moreover, the applicant's statement to the police contained the indication that he had been informed of his basic rights and the information that he did not wish to have the assistance of a lawyer when giving those statements. That being the case, at least one document showing that the

applicant did not wish to benefit from a lawyer when giving statements to the police has already been submitted by the applicant for the Court's attention. The fact that the applicant did not submit other documents that concerned the same point cannot be considered to have constituted an abuse of the right of petition within the meaning of Article 35 § 3 of the Convention, which is an exceptional measure and has so far been applied only in a limited number of cases (see *Çölgeçen and Others v. Turkey*, nos. 50124/07 and 7 others, § 42, 12 December 2017). Accordingly, the Government's objection must be dismissed.

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

B. Merits

109. The applicant complained of the absence of a lawyer when giving statements during the pre-trial stage of the criminal proceedings against him and their subsequent admission by the trial court as evidence when convicting him.

110. The Government submitted in the first place that contrary to the applicant's allegations, the police officers had enabled him to see his lawyer on 16 November 2003. To support their contention, they submitted a document dated 16 November 2003 which bore the signatures of the applicant and his lawyer. According to the Government, although the applicant had repeatedly refused the services of a lawyer, the police had enabled him to have his lawyer present of their own motion. Thus, they asked the Court to conclude that there had been no violation of Article 6 § 3 of the Convention in the instant case.

1. General principles

111. The general principles with regard to access to a lawyer, the right to remain silent, the privilege against self-incrimination, the waiver of the right to legal assistance and the relationship of those rights to the overall fairness of the proceedings under the criminal limb of Article 6 of the Convention can be found in the recent judgment in the case of *Simeonovi v. Bulgaria* ([GC], no. 21980/04, §§ 110-20, 12 May 2017) (see also *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 117, 18 December 2018; and Beuze v. Belgium [GC], no. 71409/10, §§ 123-150, 9 November 2018).

2. The Court's assessment

(a) Starting point for the application of Article 6 in the present case

112. The Court notes that the applicant was arrested on 13 November 2003 and considers in the particular circumstances of the present case that that date should be taken as the starting point for the application of Article 6 (see *Beuze*, cited above, § 119, 9 November 2018).

(b) Whether the applicant waived his right to legal assistance

113. The Court observes at the outset that the present case differs from *Salduz* (*v. Turkey* [GC], no. 36391/02, ECHR 2008), where the restriction on the applicant's right of access to a lawyer stemmed from Law no. 3842 and was thus systemic. In other words, there was no blanket restriction on the applicant's right of access to a lawyer during his police custody since at the time of his arrest Law no. 3842, which had provided for a systemic restriction on access to a lawyer in respect of people who had been accused of committing an offence falling within the jurisdiction of the State Security Courts, had already been amended. Thus, from 15 July 2003 onwards it was legally possible for such suspects to have access to a lawyer when giving statements to the police, the public prosecutor and the investigating judge, subject to the condition that they asked for one.

114. Turning back to the circumstances of the instant case, the Court makes the following observations as to the sequence of events. The applicant was arrested on 13 November 2003 and the following day he gave statements to the police without his lawyer present. It is common ground between the parties that the applicant saw his lawyer on 16 November 2003, that is to say after his police statements had been taken and prior to his appearance before the public prosecutor and the investigating judge. The applicant did not allege that his lawyer had failed to inform him of his rights or that she had been ineffective in any other way. However, the parties disagree as to whether the applicant had validly waived his right of access to a lawyer before giving statements to the police. Thus, the Court will confine its examination in the present case to that point.

115. According to the statement record dated 14 November 2003, the applicant was informed of his rights, including his right to legal assistance and his right to remain silent at the time his statements were taken. The first page of the same record includes a pre-printed phrase stating "No lawyer sought" and a box next to it was marked with a pre-printed "X". Since the documents do not contain any information as to their time of issuance, the Court is unable to conclude if they were signed before or after the applicant's statements were taken.

116. Another pre-printed and undated form explaining the rights of accused persons as well as a separate pre-printed form dated 14 November 2003 indicating that the applicant did not wish to have access to a lawyer

were also signed by the applicant. As to the first document, the Court reiterates its case-law to the effect that that document cannot demonstrate with certainty that the applicant was properly informed of his right to a lawyer and his right to remain silent (see *Hakan Duman v. Turkey*, no. 28439/03, § 50, 23 March 2010, and *Płonka v. Poland*, no. 20310/02, § 37, 31 March 2009).

117. As to the second document, the Court takes note of the Constitutional Court's above-mentioned judgment (see paragraph 42 above) in an application raising an almost identical legal issue to the one in the instant case. In that judgment, the Constitutional Court did not attach any decisive importance to the applicant's signature on the same type of document according to which the applicant had not asked to benefit from the assistance of a lawyer before giving statements to the police. Reiterating that the national courts are better placed for interpreting and applying rules of substantive and procedural law, the Court takes note of the conclusions reached by the Constitutional Court. That said, however, the Court considers it important to put that finding in context in the circumstances of the present case.

118. In that connection, the Court attaches decisive importance to the fact that the applicant stated to the public prosecutor that although he had asked the police to provide him with a lawyer, they had rejected that request, asserting that his lawyer had not wished to come (see *Pishchalnikov v. Russia*, no. 7025/04, § 72 *in fine*, 24 September 2009, and compare *Simeonovi*, cited above, § 123). Moreover, the applicant also stated that he had been told by the police that he had no rights and that his statements before the police had been taken without informing him of any of his rights. What is more, the applicant reiterated the same grievance to the doctor who performed his medical examination on 17 November 2003. In the eyes of the Court, these facts undermine the credibility of the above-mentioned documents, on the basis of which the Government alleged that a valid waiver had been established in the present case.

119. In view of the above, the Court is confronted with the question of whether the applicant validly waived his right to legal assistance before giving statements to the police in the light of the documents he signed during his police custody on the one hand, and the statements he made to the public prosecutor that the police had declined his request to see a lawyer before giving statements on the other.

120. At this point, the Court reiterates that the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory (see, among many other authorities, *Dvorski v. Croatia* [GC], no. 25703/11, § 82, ECHR 2015 and the references therein) and that in determining Convention rights one must frequently look beyond appearances and concentrate on the realities of the situation (see, *inter alia*, *Delcourt v. Belgium*, 17 January 1970, § 31, Series A no. 11; *De Jong,*

Baljet and Van den Brink v. the Netherlands, 22 May 1984, § 48, Series A no. 77; *Pavlenko v. Russia*, no. 42371/02, § 116, 1 April 2010; and *Erkapić v. Croatia*, no. 51198/08, §§ 80-82, 25 April 2013).

121. The Court is mindful of the probative value of the documents the applicant signed while in police custody. However, as with many other guarantees under Article 6 of the Convention, those signatures are not an end in themselves and they must be examined by the Court in the light of all the circumstances of the case. Thus, it can be inferred from the foregoing that what constitutes a valid waiver of a right under Article 6 of the Convention cannot be the subject of a single unvarying rule, but must depend on the circumstance of the particular case (see *Simeonovi*, cited above, § 113, and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, §§ 250-1, ECHR 2016; and see for a similar approach *Goran Kovačević v. Croatia*, no. 34804/14, § 75, 12 April 2018).

Turning back to the instant case, the Court considers that two important elements tipped the balance in favour of the applicant. Firstly, the applicant stated to the public prosecutor that he had requested to see a lawyer before giving statements to the police and that that request had been rejected. In other words, the applicant asserted before the domestic courts that he had made an explicit request for legal assistance. On that basis, the present case is distinguishable from *Kaytan (v. Turkey*, no. 27422/05, § 31, 15 September 2015), and *Gür (v. Turkey* (dec.), no. 39182/08, 14 January 2014).

122. Secondly, and equally importantly, the Court notes that the applicant neither admitted his guilt nor accepted his statements to the police after he was given access to a lawyer and consistently repudiated his confession throughout the ensuing proceedings, in which he was represented by a lawyer. The present case is on those grounds distinguishable from *Aksin and Others (v. Turkey*, no. 4447/05, §§ 7, 8 and 19, 1 October 2013), *Diriöz (v. Turkey*, no. 38560/04, § 36, 31 May 2012), and *Yoldaş (v. Turkey*, no. 27503/04, § 19, 23 February 2010) where the applicants maintained their incriminating police statements at least until the first hearing of their trials.

123. In conclusion, the Court considers that it is unable to find that it has been established beyond any reasonable doubt that the applicant had unequivocally, knowingly and intelligently waived his rights under Article 6 of the Convention (compare *Şedal v. Turkey* (dec.), no. 38802/08, § 36, 13 May 2014 where the applicant had seen his lawyer both before and after giving statements to the police).

(c) Whether there were "compelling reasons" to restrict access to a lawyer

124. The Court reiterates that restrictions on access to a lawyer for "compelling reasons" are permitted only in exceptional circumstances, must

be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Simeonovi*, cited above, § 117).

125. The Court notes that the Government have not offered any compelling reasons for the restriction of the applicant's access to a lawyer between 13 and 16 November 2003 during which time he was in police custody. Furthermore, it is not for the Court to undertake of its own motion this task and determine several years on from the events at issue whether there existed any compelling reasons to restrict the applicant's right of access to a lawyer. All the more so, since the domestic legislation in force at the material time did not provide for any reasons for such a restriction for suspects in police custody, let alone a compelling one.

(d) Whether the overall fairness of the proceedings was ensured

126. The Court will now examine whether the overall fairness of the criminal proceedings against the applicant was prejudiced by the absence of a valid waiver of legal assistance when the applicant gave statements to the police and the subsequent admission by the trial court of those statements to secure his conviction. As there were no compelling reasons to restrict the applicant's right of access to a lawyer when he was giving statements to the police, the Court must apply a very strict scrutiny to its fairness assessment (see *Dimitar Mitev v. Bulgaria*, no. 34779/09, § 71, 8 March 2018). More importantly, the onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice (see *Beuze*, cited above, § 145, *Simeonovi*, cited above, § 132, and *Ibrahim and Others*, cited above, § 265).

127. The Court reiterates that in determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence have been respected (see *Beuze*, cited above, § 150, *Simeonovi*, cited above, § 120, and *Ibrahim and Others*, cited above, § 274 for a list of non-exhaustive list of factors when assessing the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings), in particular whether the applicant was given the opportunity of challenging the admissibility and authenticity of the evidence and of opposing its use (see *Panovits v. Cyprus*, no. 4268/04, § 82, 11 December 2008). In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. Indeed, where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (see *Pavlenko*, cited above, § 116).

128. Furthermore, the Court reiterates that it was in the first place the trial court's duty to establish in a convincing manner whether or not the applicant's confessions and waivers of legal assistance had been voluntary (see *Türk v. Turkey*, no. 22744/07, § 53, 5 September 2017). In that

connection, the Court notes that Turkish law sets out a very strong procedural safeguard in Article 148 § 4 of the Code of Criminal Procedure capable of remedying the procedural shortcomings in relation to the use of police statements taken without a lawyer present, irrespective of whether a suspect had waived his right to legal assistance or not. Pursuant to that provision, the police statements taken without a lawyer present should not have been used by the trial court unless they had been confirmed before a court or a judge.

129. In the present case, the applicant made very detailed self-incriminatory statements to the police and confessed to his crimes. According to the documents in the Court's possession, that was the only occasion on which the applicant made self-incriminatory statements. However, the applicant used his right to remain silent before the public prosecutor and the investigating judge (see *Pishchalnikov*, cited above, § 88) after seeing his lawyer on 16 November 2003. Thereafter, the applicant neither admitted his guilt nor accepted his statements to the police and consistently denied his police statements throughout the trial, claiming that he had been threatened and forced to sign them by the police (see *Fefilov v. Russia*, no. 6587/07, § 60, 17 July 2018). However, the trial court listed them as evidence when sentencing the applicant to life imprisonment under Article 125 of the former Code of Criminal Procedure.

130. In that connection, the Court observes that, although the trial court requested the investigation file into the applicant's allegations of ill-treatment while in police custody, it did not make any assessment as regards that question so as to dispel any doubts in relation thereto (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 265 *in fine*, 21 April 2011). Neither the reasoned judgment of the trial court nor the transcript of the trial disclose any indication that the trial court in any way assessed those allegations.

131. Similarly, the Court observes that the applicant's lawyer referred to Article 148 § 4 of the Code of Criminal Procedure and repeatedly asked the trial court not to use the applicant's police statements as he had never confirmed those statements before a judge or a court in the presence of a lawyer. However, the trial court did not carry out an assessment on that point and failed to take any steps to examine the circumstances surrounding the applicant's waiver of legal assistance when giving statements to the police despite the fact that it sentenced the applicant to life imprisonment (see *Bozkaya v. Turkey*, no. 46661/09, §50 *in fine,* 5 September 2017). The Court of Cassation also dealt with the applicant's complaints in respect of the violation of his procedural rights in a formalistic manner. Thus, the domestic courts ignored what appeared to have been the core of the applicant's defence, namely the use of his statements to the police given in the absence of a valid waiver of his right to legal assistance.

132. The Court further observes that despite the fact that the overwhelming majority of the co-defendants – eleven out of fourteen of them – had retracted their incriminating police statements during the trial, the trial court failed to conduct an assessment concerning the admissibility of such evidence despite the fact that it gave evidential weight to them in its reasoned judgment.

133. Thus, the domestic courts failed to fulfil their duties both under Article 6 of the Convention and Article 148 of the Code of Criminal Procedure to remedy the procedural shortcoming that is at the heart of the applicant's case.

134. More importantly, the Government did not bring forward any argument capable of proving that the overall fairness of the criminal proceedings against the applicant had in fact not been prejudiced. The Court reiterates that it can only exceptionally find that the overall fairness of proceedings has not been prejudiced by an initial failure to observe the accused's rights at the early stages of the proceedings. In this regard, the Court recalls that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Ibrahim and others,* cited above, § 255).

135. Against such a background, the Court is unable to conclude that the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. Accordingly, the absence of an appropriate response by the domestic courts on this crucial point, specifically the validity of the applicant's waiver of legal assistance when giving statements to the police and their subsequent admission by the trial court as evidence, undermined the principles of a fair trial in the instant case to an extent that prejudiced the overall fairness of the proceedings against the applicant.

136. There has therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

137. The applicant complained under Article 13 of the Convention that there was no effective remedy under Turkish law whereby he could have contested the length of the proceedings brought against him.

> "Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority..."

138. The Government contested that claim and submitted that Article 141 of the Code of Criminal Procedure provided individuals with the possibility to obtain compensation in respect of pecuniary and non-pecuniary damage in cases where a detained person had not been brought before the legal authorities within a reasonable time and who had not been tried within a reasonable time.

139. The Court notes that Article 141 of the Code of Criminal Procedure is entitled "compensation [for damage sustained] as a result of preventive measures." As such, it relates to detention and not to the complaints concerning the length of proceedings under Article 6 § 1 of the Convention. It therefore dismisses the Government's objection.

140. The Court further notes that this complaint 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.

141. The Court has examined similar issues in previous applications and has found violations of Article 13 of the Convention in respect of the lack of an effective remedy under Turkish law whereby the applicants could have contested the length of the proceedings at issue (see *Daneshpayeh*, cited above, §§ 35-38; *Ümmühan Kaplan*, cited above, §§ 56-58; and *Beşerler Yapı San. ve Tic. A.Ş. v. Turkey* [Committee], no. 14697/07, §§ 12-26, 24 September 2013). It finds no reason to depart from that conclusion in the present case and considers that there was no effective remedy at the material time in respect of the applicant's complaints concerning the length of the proceedings against him.

142. The Court accordingly concludes that there has been a violation of Article 13 of the Convention.

VII. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

143. Lastly, the applicant complained that the Istanbul State Security Court had refused to summon S.N., a person who had testified about the killing of M.Y. in different criminal proceedings before the same court, as a witness and had thus denied him the possibility to confront S.N.

144. The Court notes that although the applicant's lawyer alleged that he had asked the trial court to issue a summons to S.N. as a witness for the hearing held on 17 March 2004, the hearing record reveals that the applicant's lawyer never actually applied to have S.N. summonsed by the court but merely relied on the description of the killer provided by S.N. during the other proceedings to prove the applicant's innocence, as the description apparently had borne no resemblance to the applicant. Be that as it may, even assuming that he had applied to have S.N. give evidence before the trial court, the Court does not have in its possession any document indicating that that point was also raised before the Court of Cassation.

Hence, the Court finds that this complaint is inadmissible for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. 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

146. The applicant did not make any claims under the head of pecuniary damage. Accordingly, the Court makes no award under this head.

147. The applicant claimed a total of 95,000 euros (EUR) in respect of non-pecuniary damage.

148. The Government asserted that the amount was excessive and thus unacceptable.

149. As for the findings of a violation of Articles 5 § 4, 5 § 5, 6 §§ 1 and 3 (c) and 13 of the Convention, the Court considers that the findings of a violation constitutes sufficient just satisfaction in respect of each complaint.

150. As for the violations in respect of the length of the applicant's pre-trial detention and the length of the proceedings against him, the Court finds that he must have suffered pain and distress which cannot be compensated solely by the Court's finding of a violation. It therefore finds it appropriate to award him EUR 5,300 in respect of non-pecuniary damage.

B. Costs and expenses

151. Referring to the scale of fees of the Union of Bar Associations of Turkey, the applicant claimed 3,894 Turkish liras (TRY – approximately EUR 1,738), which constitutes the legal fee inclusive of value-added tax for the proceedings before the Court. In support of his claims, the applicant submitted a copy of an invoice in the amount of TRY 1,180 indicating that the above-mentioned sum had been paid to his lawyer.

152. The applicant further claimed reimbursement of the costs and expenses he had incurred in the proceedings before the Court: postal, translation and stationery expenses amounting to TRY 1,280 (approximately EUR 571). In support of this part of his claims, the applicant submitted an invoice for translation in the amount of TRY 1,180 (approximately EUR 527).

153. The Government contested those claims submitting that they were exaggerated.

154. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the invoices submitted by the applicant and the above criteria, the Court considers it reasonable to award the sum claimed in full covering costs under all heads.

C. Default interest

155. 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 application admissible in so far as it relates to the alleged excessive duration of the applicant's pre-trial detention under Article 5 § 3 of the Convention, the non-transmittance of the public prosecutor's opinion to the applicant or his representative in the examination of his objection dated 8 October 2007 against his detention under Article 5 § 4 of Convention, the alleged lack of an enforceable right to compensation under Article 5 § 5 of the Convention taken in conjunction with paragraphs 3 and 4 of the same article, the length of the criminal proceedings against him and the lack of an effective remedy under Article 13 of the Convention in that respect, and the applicant's right of access to a lawyer under Articles 6 § 1 and 3 (c) of the Convention, and inadmissible in respect of the remainder;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention on account of the length of the applicant's detention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the non-transmittance of public prosecutor's opinion to the applicant or his representative in the context of review proceedings;

4. *Holds* that there has been a violation of Article 5 § 5 of the Convention on account of the lack of an enforceable right to compensation for damage suffered as a result of procedural deficiencies in the review proceedings, namely the non-transmittance of the public prosecutor's opinion;

5. *Holds* that there has been a violation of Article 5 § 5 of the Convention on account of the lack of an enforceable right to compensation for damage suffered as a result of the excessive duration of the applicant's pre-trial detention under Article 5 § 3 of the Convention;

6. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings against the applicant;

7. *Holds* that there been a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the applicant's right to have access to a lawyer when giving statements to the police;

8. *Holds* that there has been a violation of Article 13 of the Convention;

9. *Holds* that the finding of violations constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant, except for the complaints concerning the duration of his pre-trial detention and the length of the criminal proceedings;

10. *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 5,300 (five thousand three hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,309 (two thousand three hundred and nine 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;

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

Done in English, and notified in writing on 19 February 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Robert Spano President