CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 23693/03
by Murad BOJOLYAN
against Armenia

The European Court of Human Rights (Third Section), sitting on 6 October 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs A. GYULUMYAN,
Ms R. JAEGER,
Mr E. MYJER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 17 July 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Murad Bojolyan, is an Armenian national who was born in 1950 and currently serves his sentence in "Kentron" correctional facility in Yerevan. He is represented before the Court by Mr H. Arsenyan and Mr A. Ghazaryan, lawyers practising in Yerevan.

A. The circumstances of the case

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

1. Background to the case

The applicant was born in 1950 in Istanbul, Turkey. He is Armenian by origin.

In 1963 the applicant repatriated with his family to Armenia. In 1972 he graduated from the Yerevan State University, with a degree in history and oriental studies. In 1972-1991 the applicant worked in the Academy of Sciences as a historian and oriental specialist. In 1980-1991 he also worked at the public radio as an announcer and translator into Turkish.

In the same period, in 1970-1991 the applicant served with the intelligence service of the Transcaucasian military circuit under the codename "Zinde". He had the rank of chief radio operator and his functions included carrying out appropriate activities on the territory of Turkey in times of war.

In 1991-1993 the applicant worked as the head of Turkey division in the Ministry of Foreign Affairs. In 1991 he also worked as the chief expert in the Committee for Foreign Affairs of the Supreme Soviet of Armenia.

In 1996 the applicant was appointed as a Turkish interpreter and chief specialist on Turkey at the President's Office where he worked until his dismissal in August 1998 due to a reduction of the staff.

From 1993 the applicant wrote analytical articles for a number of Armenian ("Azg", "Hayastani Hanrapetutyun", "Yerkrapah" and "Hayk") and Turkish ("Radical") newspapers. He also worked on a contractual basis for other Turkish media: from 1998 – for the Anatolian News Agency (*Anadolu Ajansi*), and from 1999 – for the NTV TV station and the MSNBC web-site. The applicant also cooperated with the BBC. Furthermore, he regularly accompanied Turkish journalists on their visits to Armenia in the capacity of an interpreter.

The applicant submits that since summer 2000 he has become involved in trade, making regular trips to Turkey, alone or with his wife, buying and selling clothes.

2. Criminal proceedings against the applicant

a. The applicant's arrest and confession

On 25 January 2002 criminal proceedings were instituted against the applicant who was suspected of collecting information concerning events, organisations and people in Armenia and Nagorno Karabakh, and communicating it to the Turkish intelligence services.

On 26 January 2002, at around 8 p.m., the applicant and his wife, while on their way to Turkey, were arrested at the Armenian-Georgian border and were placed in different rooms in the customs office. Thereafter, they were searched and placed in a police car, where they stayed until early morning.

On 27 January 2002, at around 5 a.m., the police car headed for Yerevan. Upon arrival in Yerevan at around 8-9 a.m., the applicant and his wife were placed in different rooms in the Ministry of National Security (*ՀՀ ազգային անվտանգության նախարարություն*).

On the same date, from 1.15 to 5 p.m., the applicant was questioned as a suspect. According to him, the investigators applied psychological pressure and blackmail, forcing him to confess. In particular, they threatened that, if he refused to confess, his wife and his epileptic son would be detained. He submits that, for this reason, he had no other choice than to testify. Thus, in order to defuse the situation, to have his wife released and to gain some time by fooling the investigators, he decided to make an allegedly false confession by making up a story which included fictitious names, districts and undercover flats which never existed. As a basis for his story he used certain real people and circumstances encountered on his regular trips to Turkey.

No lawyer was present during the questioning. The applicant submits that the national security officers tricked him into dispensing with a lawyer. They convinced him that the presence of a lawyer would not be useful, on the contrary would be detrimental, no lawyer would take up his case or, if he did, he would ask for a big sum of money. Having found out that in the past he had served for the intelligence services, they said that his arrest must have been a misunderstanding and that he would be soon released, so there was no need for a lawyer. In a later submission, the applicant indicated that the investigator invited a State-appointed lawyer but he refused the lawyer's services, since he did not want to have anything to do with either State-appointed or privately hired lawyers until he secured the safety of his family. It appears that the applicant's wife, who was also subjected to a questioning but refused to testify, was released on the same day in the afternoon.

On 28 January 2002 the applicant was formally charged under Article 59 of the then Criminal Code (*ՀՀ քրեական օրենսգիրք, 07.03.1961*) with espionage committed to the detriment of Armenia's sovereignty, territorial integrity, national security and defence. In particular, he was charged with being enrolled in the Turkish National Intelligence Organisation (*Milli Istihbarat Teskilati (the MIT)*) in June 2000 and until January 2002 providing to them information on a paid basis concerning Armenia's and Nagorno Karabakh's military, economic and political spheres, in particular concerning the Russian troops based in Armenia.

On the same date, the applicant was detained on remand by a court order. From 6.15 to 10.40 p.m., the applicant was questioned again in connection

with the above charges. He submitted that he did not wish to have a lawyer. He further admitted his guilt and repented of his actions.

In sum, the applicant's confession statements of 27 and 28 January 2002 contained the following submissions. The applicant established his first contact with various Turkish journalists during his work at the Ministry of Foreign Affairs, as part of his public relations function. Some of these contacts later developed into professional cooperation, such as preparation of journalistic materials for the NTV TV and the Anatolian News Agency. In June 2000 the applicant started to prepare analytical materials concerning Armenia's political and economic spheres for the MIT officers whom he met in May 2000 during his trip to Turkey. Later the communicated materials also included information of a military nature. To collect the materials in question the applicant used the Armenian press and his personal knowledge. The information was communicated in the form of either written reports or the applicant reporting in person and answering questions which interested the MIT officers.

b. Further developments and the applicant's revocation of his confession statements

On 31 January 2002 the applicant's wife hired a defence counsel, B., who was admitted to the case on 1 February 2002.

On 5 and 12 February 2002 the applicant was questioned again, in the presence of B., during which the applicant made further submissions and certain questions related to his previous statements were clarified.

On 21 March 2002 the applicant's wife complained to the investigating authority that B. was not providing effective legal assistance and was cheating them in order to gain more money. She requested that the applicant be informed about this and that B. be not admitted to the case.

In mid-April 2002 the applicant dispensed with the services of B. and hired another defence counsel.

On 4 July 2002 the applicant made a written statement, revoking his confession statements made earlier. In his statement he presented the allegedly true version of events, describing how since 2000 he started to prepare analytical articles for the MSNBC web-site and how little by little he became involved in trade with Turkey thus making more frequent trips to that country. He indicated the names of various people, their relevance and the discussions he had with them during his trips. The applicant contended that he had never cooperated with any foreign organisation except for mass media. As to his confession statements made earlier, these were a tactical move aimed at releasing his wife from detention, securing the safety of his family and preventing any possible violence against himself.

On 16 August 2002 the charges against the applicant were modified and detailed. It was, *inter alia*, stated that he cooperated with various MIT officers since 1998, who mostly operated under the veil of journalistic

activities. At the beginning, various means were used to communicate information, such as letters, faxes and telephone calls, but starting from 2000 the applicant established a direct contact with the officers of the MIT Istanbul office.

c. Court proceedings

On 16 December 2002 the Kentron and Nork-Marash Districts Court of Yerevan (*Երևանի Կենտրոն և Նորք-Մարաշ համայնքների առաջին ատյանի դատարան*) found the applicant guilty of treason under Article 59 of the then Criminal Code and sentenced him to ten years in prison with confiscation of all property. The court found that:

> "After the dissolution of the USSR, [the applicant], by occupying various high posts in Armenia and by being very fluent in Armenian, Russian and Turkish, was spotted by [the MIT]... Within this period, [the applicant] has regularly met and maintained contact with various Turkish journalists, including [O.R.O., N.H., J.B., M.A.B. and S.T.], providing interpretation or information. According to information received from the Russian Federal Security Service [(FSB)] and the Ministry of National Security of Armenia [(MNS)], these individuals were directly linked with the Turkish intelligence services ..."

The court went on to detail the positions held by the above individuals and their alleged involvement with the Turkish intelligence services. The court further found that:

> "Having financial problems and being unable to repay his debts, in the spring of 2000 [the applicant] travelled to Istanbul in search of a well-paid job. There he stayed with his cousin [I.] ... [O]n 2 June 2000 [I.] introduced [the applicant] to two MIT officers, [T. and N.]. They told [the applicant] that they needed information concerning ASALA [(*Armenian Secret Army for the Liberation of Armenia*)], the Kurdish Workers Party, HYD [(*"Armenian Revolutionary Federation" Party*)], Armenia's internal political situation, foreign policy and economic relations, and the Russian troops based in Armenia. [The applicant] told them that he wanted 5,000-7,000 USD for his services. [T. and N.] promised to discuss the issue of remuneration with their superiors. On 6 June 2000 [the applicant], having met again with the above-mentioned MIT officers, asked them to help him first to repay his debts, after which he would cooperate. During their third meeting on 8 June 2000 ... [the applicant] received a down payment of 500 USD from MIT officer [T.] and promised to provide the required information in two months. On 9 June, upon his return to Yerevan, [the applicant] started to single out from media publications the information which interested the Turkish intelligence officers, with the intention of providing it later to them.
>
> On 6 September 2000 [the applicant] travelled to Istanbul and on 11 September 2000 he communicated that information to ... the MIT officers. [He also] answered their questions concerning Armenia's internal political life, the political parties in Armenia, the contacts that he had with members of these parties, and the activities and location of the Kurdish Intelligentsia Association of Armenia, receiving 1,000 USD from the MIT officers as remuneration for the completed assignment ...

[On 10 January 2001 the applicant] ... met in an undercover flat with MIT officers [T. and N.], who were displeased with the fact that he provided only media publications and demanded that he use his contacts and provide unpublished secret information concerning Armenia's political and economic life. [The applicant] explained that, in spite of having many contacts with people who had access to confidential information, they would not allow him – and he was not able – to extort secret information. Thereafter, he told them about recent political events in Armenia, newspapers published in Armenia and their editors ... The next day [the applicant] was presented to another MIT officer who introduced himself as [G.] ... [G.] reproached [the applicant] for providing information with the delay of four months and explained that high remuneration was out of the question without him providing secret or military information ... At the meeting of [10 January 2001 T.] demanded that, from that moment, [the applicant] indicate his sources when providing information. On 12 January 2001 [the applicant] ... met with [T. and N.] and received 1,000 USD from [T.] in return for the information provided. [N.] advised [the applicant] to get engaged in small-scale trade, in such way justifying his frequent trips to Turkey ...

On 16 April 2001, in Istanbul, [the applicant] met with [N. and another officer replacing T.] and told them about the Armenian communities in Georgia and the Krasnodar and Stavropol regions of Russia. Thereafter, [the applicant] presented his notes containing information of a military nature which included information concerning the guarding of the Western and Southern borders of Armenia by the Russian and Armenian border guards, the commander of the Russian border guards, the three check points at the Armenian-Turkish border, the check point at the Armenian-Iranian border, the presence of border guards in "Zvartnots" airport, the length of the Armenian-Turkish and Armenian-Iranian borders, high-ranking officials in the Ministry of Defence of Armenia, the strength of the Armenian army and the conscription quota, the bridges in Yerevan, the troops based in Yerevan and other similar information. During a regular meeting held in an undercover flat [the applicant] was asked questions about Russian weapons and materiel in Armenia. Most of the military related questions had narrow specialization and the names of the materiel were presented in Latin and numerical notes. [The applicant] drew the general layout of Yerevan, indicating the military objectives and bridges in the city, and provided other information. As remuneration [the applicant] received from the MIT officers 2,250 USD and returned to Armenia.

Continuing his cooperation with the Turkish intelligence service and carrying out their assignments, [the applicant] before 26 January 2002 travelled to Istanbul also in July and October 2001, on each occasion providing to the MIT officers information concerning Armenia which interested them and receiving 2,250 USD as remuneration. In July 2001 [the applicant], having received an assignment, wrote down on a blue striped sheet of paper the questions that interested the MIT which included the military cooperation with Greece, the new weapons provided to Armenia by Russia, their location and quantity, the anti-aircraft defence system, the Kurdish Workers Party, Iran and other issues.

On his last trip to Istanbul ... on 26 January 2002 [the applicant] was arrested and various documents and notes prepared by him for the MIT officers were found in his possession, which included the answers to the assignments previously received from the Turkish intelligence officers as indicated above. This information was collected by [the applicant] from various sources and included data concerning the aid provided to Armenia by Iran, the credit extended to the Nagorno Karabakh Republic from the Armenian budget, the unlawful acts taking place in the Armenian army, the location

> of the Armenian border-guarding military units, the ammunition and materiel provided to Armenia by Russia as military aid, the military bases used by Russia, the English delegations that visited the Nagorno Karabakh Republic for purposes of elimination of mines and missiles, the aid provided to Armenia by Greece, the recruitment to the Russian troops based in Armenia, the representatives of the Kurdistan Committee based in Armenia, as well as other information concerning Armenia's military, political and economic spheres. The following items were also found in [the applicant's] possession: a map of Armenia and a tape recording of a conversation between [the applicant] and the Kurds secretly made by him at the Yerevan Office of the Armenian-Kurdish Friendship which [the applicant] was intending to transmit to the MIT officers as proof of an actual contact with members of the Kurdish Workers Party."

The court, as a basis for its findings, first cited in detail the applicant's confession statements made during the investigation. It further cited five witness statements: one of the witnesses – who had worked with the applicant in the intelligence service before 1981 – characterised him as a well-trained intelligence officer, and four others stated that they had met the applicant at the Yerevan Office of the Armenian-Kurdish Friendship and had known him as a translator. As material evidence, the court cited the above tape recording, the map of Armenia, the blue striped sheet of paper and other notes found in the applicant's possession.

As regards the above confession statements, it appears that the applicant unsuccessfully attempted to rebut them in court. He submitted that he had deliberately given self-incriminating statements in order to have his wife released from detention, to gain some time so that the Armenian and Russian intelligence services could intervene and deny the suspicions, and to prevent any possible violence against himself. He further submitted that prior to his questioning he had refused the services of a State-appointed lawyer offered to him, because he did not want his case to attract publicity.

On an unspecified date, the applicant's defence counsel lodged an appeal. In his appeal, he complained, *inter alia*, that the judgment was mainly based on the applicant's self-incriminating statements which the court wrongly considered as "confession statements". In reality, the applicant was an analytical journalist and never cooperated with the Turkish intelligence services. The materials found in his possession were the result of his journalistic activities and were taken from the press. Both the investigating authority and the court had misinterpreted the notion of "other information" contained in Article 60 of the Criminal Code by applying it to the materials in question. Thus, he argued, any material taken from the press could be considered as "other information" posing threat to Armenia's sovereignty and territorial integrity.

On 19 March 2003 the Criminal Court of Appeal (*ՀՀ քրեական և զինվորական գործերով վերաքննիչ դատարան*) dismissed the counsel's appeal. In addition to the findings of the first instance court, the Court of Appeal noted that:

> "[After 1991 the applicant] worked in the National Assembly, the Ministry of Foreign Affairs and the President's Office, he also worked as a reporter and was involved in trade, however, in reality he was an agent connected with intelligence services. Being spotted by the Turkish intelligence services, from 1998 he cooperated with their agents the majority of whom operated under the veil of various journalistic agencies and organisations. Upon their instructions, he collected and communicated information concerning Armenia's and Nagorno Karabakh's economic and internal political spheres.
>
> For a certain period of time [the applicant] cooperated with the Turkish intelligence services through various means of communication, including letters, faxes and telephone calls, but starting from 2000 he changed the mode of cooperation and established a direct contact with the officers of the MIT intelligence office in Istanbul, including [N.,] ... [T. and G.] ... [The applicant] received instructions from them and collected information concerning the type and structure of troops and types of ammunition in [Nagorno Karabakh], the existence and location of troops on the Mrav mountain, the defence system at the Armenian-Turkish border, the existence of radars and military airports, types and number of military aircrafts.
>
> He was also instructed to find out whether Armenia had surface-to-surface missiles and collected information concerning Iranian "Sam-7" type missiles, roads, tunnels and water reservoirs being built in Armenia, the Armenian-Russian joint military bases, their structure, location, anti-aircraft defence units and types of ammunition, the details of the military cooperation between Armenia and Greece, the existence of electronic military bases, the existence of representatives of the Kurdish Workers Party in Armenia and other instructions ...
>
> [The applicant], an employee of the President's Office, from 1998 established contact with [O.R.O.], who was in Armenia at that time, and accompanied him on his trips to various regions in Armenia and received instructions to provide him information. As a paid agent of the Turkish intelligence services, he communicated to the MIT various information concerning the economic and military-political situation. [The applicant] was also in contact with a number of other MIT officers ..."

On 27 March 2003 the applicant's defence counsel lodged a cassation appeal. In his appeal, he argued, *inter alia*, that all the information in question had been collected from mass media and was thus in the public domain. He further complained that the applicant's conviction was based on his self-incriminating statements.

On 25 April 2003 the Court of Cassation (*ՀՀ վճռաբեկ դատարան*) dismissed the counsel's cassation appeal.

B. Relevant domestic law

1. The Constitution

Article 24 guarantees freedom of speech to everyone, including freedom to seek, receive and impart information and ideas through any information medium and regardless of frontiers.

Article 42 provides that no one is obliged to testify against himself.

According to Article 44, the freedoms guaranteed by Article 24 of the Constitution may be subject to such restrictions as are prescribed by law and are necessary for the protection of national security and public safety, of public order, of health and morals, and of rights, freedoms or reputation of others.

2. The Criminal Code of 1961 (no longer in force since 1 August 2003)

According to Article 59, treason is a premeditated act committed by an Armenian national to the detriment of Armenia's sovereignty, territorial integrity or national security and defence, such as joining the enemy, espionage, disclosure of a state or military secret to a foreign country, flight abroad or refusal to return from abroad, assistance to a foreign country in carrying out hostile activities against Armenia, and conspiracy to usurp power. It is punishable by up to fifteen years in prison with confiscation of property.

According to Article 60, communication of a state or military secret, including theft or collection of a state or military secret for communication to a foreign country, a foreign organisation or its branch, as well as communication and collection of other information upon the instructions of a foreign intelligence service to be used to the detriment of Armenia's interests, if committed by a foreign national or a stateless person, is punishable by seven to fifteen years in prison with confiscation of property.

COMPLAINTS

1. The applicant complains under Article 6 §§ 1, 2 and 3 (c) of the Convention that the trial was not fair and his rights not to incriminate himself and to have legal assistance were violated since his self-incriminating statements made on 27 and 28 January 2002 constituted the main evidence against him. These statements were allegedly obtained by the investigators under compulsion and after having tricked him into dispensing with a lawyer. The bulk of the court judgments was based on these statements and all other evidence was circumstantial. Although he revoked these statements at a later stage, both the investigating authority and the courts failed to verify the credibility of the facts contained in these statements.

2. The applicant complains under Article 6 § 3 (c) that his first defence counsel B. did not provide effective legal assistance and on some occasions even sided with the prosecution. He always gave misleading advice, took no actions aimed at defending the applicant's rights and his only intention was to gain more money.

3. The applicant complains under Article 7 of the Convention that it was not proven in court that the Turkish journalists with whom he had cooperated since 1998 were in fact Turkish intelligence officers (O.R.O., N.H., J.B., M.A.B. and S.T.). The court made this conclusion on the basis of a memorandum presented by the MNS, which was prepared on the basis of materials received from the Russian FSB and was never produced in court despite the applicant's numerous petitions.

4. The applicant complains under Article 10 of the Convention that he was convicted under Article 59 of the Criminal Code for preparation of analytical articles and collection of information from the Armenian press. The interference was not prescribed by law, since the phrase "other information" in Article 60 of the Criminal Code was too vague and not foreseeable. Furthermore, the materials and information communicated to the Turkish journalists did not contain any state or military secrets. In any event, they were such that could not pose any threat to Armenia's national security. All the materials were taken from the Armenian press and were thus in the public domain. There was no pressing social need for the interference, since the prosecution failed to prove that the materials and information in question contained any state secret or could damage national security. Finally, the interference was not proportionate, since the authorities gave too wide an interpretation to the notion "in the interests of national security".

THE LAW

1. The applicant complains that his conviction was based mainly on his allegedly compelled confession statements made in the absence of a lawyer and invokes Article 6 §§ 1, 2 and 3 (c) of the Convention which, insofar as relevant, provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself ... through legal assistance of his own choosing..."

The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the

notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 (see, e.g., *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 68).

The Court notes that in the present case the applicant's conviction was primarily based on his confession statements made on 27 and 28 January 2002. The Court considers, however, that the fact that the applicant's confession statements constituted the main evidence against him is in itself not sufficient to raise an issue under Article 6 and this question must be examined in the light of all the circumstances of the case. In particular, first and foremost it must be determined whether the applicant was subjected to any compulsion to give evidence which was later used against him in court.

In this respect, the Court notes that the applicant has failed to submit any evidence of any compulsion allegedly inflicted on him. He never complained to any competent authority about the psychological pressure or blackmail to which he had been allegedly subjected by the investigators during the interrogation. Nor did he raise this issue before the domestic courts. There is nothing in the case file to substantiate the applicant's allegations that he was forced to testify against himself in order to prevent his wife and his epileptic son from being subjected to possible unlawful measures. Furthermore, there is no evidence of any physical violence inflicted on the applicant and his allegations that he could be potentially subjected to such violence, if he refused to testify, are unfounded.

As regards the absence of a lawyer during the interrogations, the Court first notes that the applicant similarly failed to submit any evidence of trickery or pressure allegedly exerted on him by the investigators for him to waive his right to have a lawyer. He similarly never raised this issue before any domestic authority. Moreover, the applicant's submissions in this regard are contradictory. In his application he claimed that the he had been tricked into dispensing with a lawyer, while in a later submission he indicated that he had refused the services of a lawyer offered to him since “he did not want to have anything to do with either State-appointed or privately hired lawyers until he secured the safety of his family”. Before the domestic courts the applicant submitted that prior to the questioning he had refused the services of a lawyer offered to him because “he did not want his case to attract publicity”. In such circumstances, it appears that the applicant

voluntarily refused to be represented by a lawyer and his allegations of trickery are unsubstantiated.

The Court finally notes that the applicant had the right under Article 42 of the Constitution not to testify against himself and, in the light of the above, it appears that nothing prevented him from availing himself of that right. Nevertheless, he chose to break his silence and to make confession statements. Furthermore, the applicant was additionally questioned on 5 and 12 February 2002 in the presence of his defence counsel but, despite this, he made statements in continuation of – and similar to – the ones made earlier. In such circumstances, taking into account all the above factors, the Court concludes that the applicant's allegations that his confession statements of 27 and 28 January 2002 were obtained under compulsion are unconvincing and unsubstantiated.

It remains to be determined whether the subsequent revocation by the applicant of his confession statements should have affected their admissibility as evidence. In this respect, the Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair (see, e.g., *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, § 48).

The Court considers that, in the absence of any evidence of compulsion inflicted on the applicant and of any trickery resulting in him dispensing with a lawyer, the domestic courts were under no obligation to exclude as evidence the applicant's confession statements made on 27 and 28 January 2002. Thus, it cannot be said that the domestic courts overstepped the margin of appreciation by relying on these statements when reaching their judgments.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant complains about his first defence counsel B. and invokes Article 6 § 3 (c), cited above.

The Court recalls that it follows from the independence from the State of the legal profession, that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention (see, e.g., *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2001-XI).

In the present case, defence counsel B., who represented the applicant from 1 February to mid-April 2002, was a private lawyer chosen and hired by the applicant's wife without any State intervention. It is true that the applicant's wife brought B.'s alleged misconduct to the attention of the authorities. However, it was up to the applicant to dispense with B.'s

services, if he was unsatisfied with them, and the State cannot be held responsible for the failure of B. to properly perform his duties.

It follows that this part of the application is incompatible *ratione personae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicant complains that the MNS memorandum was not produced in court and invokes Article 7 of the Convention. The Court considers, however, that this complaint would be more appropriately dealt with under Article 6 § 1 of the Convention, cited above.

In any event, the Court recalls that it may only examine complaints in respect of which domestic remedies have been exhausted (see, e.g., *Valašinas v. Lithuania* (dec.), no. 44558/98, 14 March 2000). In the present case, the applicant failed to raise this complaint in his appeals lodged with the Criminal Court of Appeal and the Court of Cassation.

It follows that the applicant has failed to exhaust domestic remedies, and that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

4. The applicant complains that his conviction unlawfully interfered with his rights guaranteed under Article 10 of the Convention which, insofar as relevant, provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety..."

The Court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this complaint to the respondent Government.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaint under Article 10 of the Convention;

Declares the remainder of the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President